

**International Conference on Implementation  
of the Aarhus Convention in Practice.**

Brno, 16.-17. April 2009

**Working groups materials – day 1**

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## **Land use plan**

### **Description of the situation**

In town X, an amendment of local land use plan was being prepared. The proposal of this amendment contained e.g. an increase of the limits (maximum number of heads) for keeping livestock in area A. It also established a route for a new by-pass road.

A landowner, whose parcel with a family house is located directly next to the area A, objected to the proposed increase of the limits for keeping livestock. He argued that his property rights would be infringed by this; the air pollution and smell limits would be probably exceeded and that expertise dealing with these aspects, namely SEA for the land use plan amendment, are lacking.

Several citizens from the town and a local NGO expressed their objections against the proposed route of the new by-pass road. The citizens lived around about hundred meters from the planned route. They claimed that the proposed route is not suitable because it crosses a protected area. The individuals further pointed out that their living conditions would get worse due to growth of noise and air pollution. The opponents suggested an alternative route of the by-pass and asked for comparing the environmental impacts of both routes in the SEA procedure.

The town council approved the amendment of the land use plan as it was proposed. With regard to all the objections, it pointed out in that the planned projects must meet the legal obligations and limits, what will be ensured in the individual permitting procedures. This will also include EIA procedures, if the law requires so.

The landowner affected by the increase of the limits for keeping livestock, as well as the opponents of the proposed route of the by-pass road, asked the court to cancel the amendment of the land use plan. They argued that these planned projects are not in compliance with environmental law requirements (see above) and that the procedure of adopting the amendments was illegal, namely due to missing SEA and insufficient justification of refusing their objections. They further emphasized that in the subsequent permitting procedures (after the approval of the land use plan amendment), the admissibility of the individual investments will not be considered any more, except for their technical details.

#### **The court**

- declared the NGO lawsuit inadmissible for lack of standing, stating that obviously no rights of the NGOs could have been infringed by adoption of the land use plan amendment (whereas proving infringement of subjective rights is a legal condition of the judicial review of the land use plans). The court referred to the possibility of the NGO to take part in the EIA procedure for the new by-pass road.
- refused the lawsuit of the individuals affected by the planned route of the new by-pass road, reasoning that after revision on merit, it came to the conclusion that neither their subjective rights can be directly infringed by the project, considering the distance between their places of living and proposed route (during the court proceedings, an expert study was presented, estimating that the noise level will become approximately 5 dB higher, but the legal maximum limits will not be exceeded).

- revoked, on the base of the lawsuit of the affected landowner, the part of the land use plan amendment, concerning the increase of the limits for keeping livestock in area A, because of lacking assessment of this change impacts on the environment and insufficient evaluation concerning the legal limits of air and smell pollution. At the same time, the court refused this lawsuit, with regard to other parts of the amendment of the land use plan, as these do not concern rights of the plaintiff.

### **Questions and topics for discussion:**

Please assess, in the light of your national legislation and the Aarhus Convention requirements:

- The procedure of the land use plan amendment
- Arguments of the court with regard to the refused lawsuits concerning the by-pass road with regard to both article 9(2) (see namely second subparagraph, *in fine*) and 9(3) of the Convention, also considering art. 9(4) requirements.
- Arguments of the court with regard to the lawsuit of the landowner affected by the increase of the limits for keeping livestock – both the positive and negative parts of the decision

With that regard, please try to define what are the limits of the national legislation and court practice for conditioning access to courts by “infringement of rights” requirement (so that it is in compliance with the Convention).

Next to that, please assess how this case could be affected by adoption of the Directive on Access to Justice in Environmental Matters (namely with regard to it’s subject matter and concerning the standing conditions/ scope of subjects with the right to access to court).

## **Industrial estate**

### **Description of the situation**

The responsible authority carried out screening of a project of a new industrial estate (concretely, the ground shaping works necessary for its preparation) and decided that it is not necessary to carry out an EIA procedure for this projects, as the future objects (operations), located in the estate, will be subject to EIA

A local NGO asked the court to cancel this “screening decision”. It namely argued that already the preparation of the estate (the ground shaping works) seriously damages the environment, by large occupation of agricultural land, changing intrusion to the landscape, threatening the habitats of protected animals as well as pollution the ground waters.

The court refused the lawsuit, reasoning that the screening decision cannot be subject of judicial review, as it is of preliminary nature and does not grant rights nor impose duties to anyone.

The NGO subsequently participated on the procedure of permitting the ground shaping works for the industrial estate. It objected again that EIA should have been carried out for the project.

The permit for the ground shaping works was issued. Concerning the objection of missing EIA, the authority only referred to EIA as redundant, taking into account the previous screening decision.

The NGO filled a lawsuit against the permit for the ground shaping works. Again the main arguments were missing EIA and the above mentioned environmental impacts. It also stated that not all documents, which the permit referred to, were available during the permitting procedure. The NGO also asked the court to issue injunction relief to stop the works, as there was a threat of irreversible damage to the locality.

The court refused to issue the injunction relief, as the plaintiff did not prove that there was a danger of irreversible harm of its personal rights (a legal requirement for granting the injunction).

Finally, when the ground shaping works were already finished, the court canceled the permit for the procedural mistakes. The court refused to deal with the question if EIA should have been carried out, as well as with the other “substantive” arguments of the NGO, reasoning that these do not relate to the procedural rights of the plaintiff.

## **Questions and topics for discussion:**

Please assess, in the light of your national legislation and the Aarhus Convention requirements:

- Arguments of the court for refusing the lawsuit against the screening decision (is it relevant for the evaluation of this court decision, if according to the national law public can participate in preliminary assessment of the project, before issuing the screening decision)?
- The decision of the court not to issue injunction relief and the legislative condition of “irreversible harm” (also in relation to the Preamble and Article 3(1) of the Aarhus Convention)
- The final decision on the lawsuit on the ground shaping works permit, namely with regard to the scope of its review by court
- How would you evaluate the situation, if the court refused the lawsuit against the screening decision, but it would declare in the judgment that the question if EIA should have been carried out must be assessed in the scope judicial review of subsequent decision (permit), and if the court would later really deal with this issue, while reviewing the ground shaping works permit?

Next to that, please assess how this case could be affected by adoption of the Directive on Access to Justice in Environmental Matters (namely with regard to its subject matter, scope of the judicial review of the challenged acts and the requirements of adequate, effective and expeditious proceedings).

## **Traffic noise**

### **Description of the situation**

It was found out by an authorized measurement that traffic noise on a road crossing a residential area exceeds the sanitary limits (with regard to houses located close to the road).

The authority (health office) issued permit on temporary (3 years) exemption for this source of noise, according to which anti-noise screens must be established by that time. According to the relevant law, the only party to the procedure on issuing this exemption was the claimant (the road district).

The affected landowners, distressed by the noise, and a local NGO were claiming the rights to participate on the procedure on issuing the exemption but the health office refused to grant these. It was not possible for them to get the relevant documents and make objections. They were only informed about the final permit.

The landowners and the NGO then filled a lawsuit against the exemption. They argued that the proposed anti-noise measures are insufficient and the 3-year time to impose them is too long. They also asserted that the health office should have granted them rights of parties in the procedure, as issuing the exemption infringes their rights and the local environment.

The landowners and the NGO further filled a civil action against the owner of the road (the state), asking the court to order immediate and effective measures for diminishing the noise burden below the legal limit.

The court declared both lawsuits against the noise exemption to be inadmissible, as the plaintiffs, who according to the law were not parties of the administrative procedure, lacked standing for that reason (neither their rights nor duties were established by the exemption).

The civil court also declared inadmissible the lawsuit of the NGO, as no right of the NGO can be infringed by exceeding the noise limits.

The civil court dealt on merit with the lawsuit of the landowners and declared in the judgment that by exceeding the noise limits, their property rights, as well as rights to privacy and health protection were threatened. However, the court did not grant the plaintiffs what they asked for, stating that there are not any available and faster anti - noise measures, than those included in the health office decision. The court therefore referred the plaintiffs to possible claim for damages compensation.

## **Questions and topics for discussion:**

Please assess, in the light of your national legislation and the Aarhus Convention requirements:

- Refusal of the health office to grant the landowners and NGO rights of parties of the procedure on issuing the exception and the legislation this decision was based on
- Arguments of the courts on the base of which they refused the lawsuits of the landowners as well as the NGO against the noise exemption, and the civil action of the NGO (namely with regard to articles 9(3) and 2(5) and also the Preamble and Article 3(1) of the Aarhus Convention)
- The court decision on the civil action of the landowners (namely with regard to article 9(4) and also the Preamble and Article 3(1) of the Aarhus Convention.

Next to that, please assess how this case could be affected by adoption of the Directive on Access to Justice in Environmental Matters (namely with regard to its subject matter, concerning the standing conditions and the requirements of adequate and effective proceedings).

## **Illegal waste dump**

### **Description of the situation**

Municipality X made a contract with company Y on renting a municipal parcel for operating a waste dump. Company Y later started to store dangerous waste at the parcel, without asking for the relevant permit.

A national NGO learned about this case and asked the responsible authority (Inspection of Environment) to ban the waste dump operation.

The Inspection carried out a local inquiry. The NGO was not invited to participate, nor was it informed about the results.

As the Inspection made no further steps, despite being again asked to do so, the NGO filled a lawsuit to administrative court against its omission to act properly.

The court refused standing of the NGO, reasoning that it is a national NGO, goals of which are very general and by no means related to the affected area (municipality). Next to that, the court stated that even if there was not for that reason, the lawsuit could not be accorded, as courts can only order the authority to issue a decision in the scope of a procedure which at least started formally. This, however, never happened.

Later, underground waters in the municipality were contaminated due to infiltration by chemicals from the dump. A local NGO, established in meantime because of the dump, made criminal complaint on the responsible persons. It asked to be granted a position of the “impaired” in the criminal proceedings, so that it could protect interests of the inhabitants of municipality.”

The prosecutor decided to start criminal proceedings against members of statutory organ of company Y. He however did not grant the position of the “impaired” to the NGO, explaining that only individual inhabitants, able to prove their personal damage due to the infiltration, can be granted it.

The local NGO and one of the inhabitants of the municipality also filled a civil action, asking the court to cancel the operation of the waste dump and to order its removal. They asked the court to issue an injunction relief on canceling the operations.

Court declared the lawsuit of the NGO inadmissible for no infringement of the NGO rights. The lawsuit of the individual was refused, as far as it demanded the court to order removal of the dump. This, the court said, is in the competence of administrative authorities, not courts.

The court issued an injunction relief, by means of which it prohibited company Y any further deposit of waste on the dump. In final judgment, the court stated that by operation of the waste dump, the rights of the plaintiff (as a landowner) were infringed. Court ordered the company Y to refrain from any infringements of the plaintiffs (property) rights.

## **Questions and topics for discussion:**

Please assess, in the light of your national legislation and the Aarhus Convention requirements:

- Behavior of the Inspection (namely with regard to applicability of article 6 of the Aarhus Convention and its importance for the NGOs rights).
- Arguments of the court, on the base of which it refused the lawsuit against omission of the Inspection to take measures against illegal operation of the dump (with regard to articles 2(5) and 9(2) as well as 9(3) of the Convention)
- Behavior of the prosecutor, namely concerning the NGO claim to be granted position of the “impaired” in the criminal procedure (is that aspect, or the position of the public concerned in general, “covered” by the Aarhus Convention?)
- Decision of the civil court on the civil actions of the NGO and an individual and about their request for injunction relief (with regard to articles 9(3) and 9(4) of the Convention).

Next to that, please assess how this case could be affected by adoption of the Directive on Access to Justice in Environmental Matters (namely with regard to its subject matter, concerning the standing conditions and the requirements of adequate and effective proceedings).

# **International Conference on Implementation of the Aarhus Convention in Practice.**

Brno, 16.-17. April 2009

## **Working groups materials – day 2**

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**Compliance Committee - Case 2005/11: Belgium**  
**Access to justice for NGOs with respect to environmental decisions**

**Background facts**

A Belgian NGO, *Bond Beter Leefmilieu Vlaanderen*, filed a complaint to the Compliance Committee (CC) concerning access to justice for environmental NGOs in Belgium. The communicant claimed that Belgian legislation and judiciary (case law) are not in compliance with the access to justice provisions of the Aarhus Convention (article 9). Main specific reason of this situation, according to the communicant, is application of the concept of “direct personal and legitimate interest” and other additional criteria for standing of environmental NGOs before Belgian courts, especially as regards access to the Council of State (Supreme Administrative Court) in relation to town and country planning and building permits.

According to the jurisprudence of the Belgian Council of State, to be able to challenge an “area plan” or “town planning permit”, an environmental NGO must claim a “direct personal and legitimate interest”. It must also prove that, when acting in accordance with its statutory goals, the goals do not coincide with the protection of a general interest or a personal interest of its members. Next to that, a case is not admissible if the objective of the NGO is “so broadly defined that it is not distinct from a general interest”. Further, as to the geographical criterion, an act cannot be challenged by an organization if the act “refers to a well-defined territory and the activities of the organization are not territorially limited or cover a large geographical area, unless the organization also has a specifically defined social objective”. An organization whose objective expands to a large territory, as is the case with “umbrella” – NGO’s, may only challenge an administrative act if the act affects the entire or a great part of the territory envisaged by the organization’s statutes.

The communicant had drawn up a list of cases with concrete examples, illustrating that application of these criteria constituted a serious barrier to access to justice for Belgian environmental NGOs before the Council of State.

**Evaluation and main findings of the Compliance Committee**

CC on the first place noted that none of the cases referred to by the Communicant was initiated after the entry of the Aarhus Convention into force for Belgium. The assessment of these cases therefore could not lead to the conclusion that Belgium is in a state of non-compliance with the Convention. Despite of it, CC considered and evaluated the established practice of the Belgian Council of State, as illustrated on cases presented by the communicant, and revealed its views on Belgian law and court practice from the perspective of the Convention.

CC pointed out the distinction which the Convention makes between conditions for judicial review of, on the one hand, administrative acts and omissions related to permits for specific activities for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by public authorities and private persons which contravene national law relating to the environment (article 9, paragraph 3). With that regard, CC stressed that it is apparent that the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical.

CC found out that the presented decisions concerning “area plans” do not have such legal functions or effects as to qualify as decisions on whether to permit a specific activity. Therefore, article 9(3) of the Convention was the correct provision to review Belgian law with respect to them.

On the contrary, some of the “town planning permits” could be seen as permitting decisions for specific activities (whereas other not). Hence, it was not possible for CC to generally conclude whether Belgian law on access to justice for these cases should be assessed in light of article 9, paragraph 2 or 3. Therefore, CC assessed the case under both provisions.

In the view of CC the criteria applied in the presented cases with respect to the right of NGOs to challenge the town planning permits would not comply with article 9(2) of the Convention. In these cases environmental organizations shall be deemed to have a sufficient interest to be granted access to a review procedure before a court or an independent and impartial body established by law. Although what constitutes a sufficient interest shall be determined in accordance with national law, this must be done “with the objective of giving the public concerned wide access to justice” within the scope of the Convention. As shown by the cases submitted by the Communicant, this was not reflected in the Belgian jurisprudence.

CC further pointed out that to the extent that a town planning permit should not be considered a permit for a specific activity as provided for in article 6 of the Convention, the decision is still an “act by a public authority”, and as such it may contravene provisions of national law relating to the environment. Thus, Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in article 9(3) of the Convention.

CC continued that while referring to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. However, when assessing the criteria for access to justice for environmental NGOs in the light of article 9(3), this provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the Preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”

The Convention therefore allows the Parties a great deal of flexibility in defining which environmental NGOs have access to justice under article 9(3). The Parties are not obliged to establish a system of “actio popularis” in their national laws. On the other hand, the CC stressed, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental NGOs from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should thus be the presumption, not the exception.

CC concluded that the Convention does not prevent a Party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of compliance, the jurisprudence of the Belgian Council of State, as reflected in the cases submitted by the Communicant, implies a too restrictive access to justice for environmental NGOs. The criteria applied by the courts seem to effectively bar most, if not all, environmental organizations from challenging town planning permits and area plans that they consider contravening national law relating to the

environment. Thus, if this approach is not altered, Belgium would fail to comply with article 9, paragraphs 2, 3 and 4, of the Aarhus Convention.

### **Additional remarks**

Next to these main arguments, CC has made two important more general remarks in the report:

Concerning the position of the Convention within the EC law, it referred to the approach taken by ECJ with respect to the status of international agreements concluded by the EC (in cases C-213/03, *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région vs. Electricité de France*, and C-239/03, *Commission of the European Communities vs. French Republic*). In these cases, the ECJ pointed out that under certain circumstances a provision in an international agreement concluded by the EC may be directly applicable in the member State. Thus, the provision of an international agreement can become part of the domestic law of the EU member State. As the CC stated *“it is quite likely that some provisions of the Aarhus Convention... have such properties as to be directly applicable in the EU member States.”*

CC also reminded that according to article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty. In international law, the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement.

### **Questions and topics for discussion**

Please express your opinion on following questions, related to the case and CC findings presented above:

- What is the sense and what are the results of different expression of conditions for access to courts according to articles 9(2) and 9(3) of the Convention? What are the limits, in both cases, for national regulation of standing (for NGOs and other members of public)?
- Under which conditions should be article 9(2) applied on judicial review of land use plans and when article 9(3) (and when none of them)? Please consider separately
  - if (under which conditions) the Convention requires judicial review of the land use plans,
  - if (under which conditions) must the Parties reflect on the Convention with regard to the scope of the persons entitled to challenge approval of land use plans, if the possibility of their judicial review as such is possible in national law?
- How could the CC findings in the Belgium case influence assessment of model case 1 (and others) from day 1 workshops?
- Please evaluate, from the above mentioned aspects, proposed provisions on legal standing of members of the public and of “qualified entities”, and the definition of “environmental law” in the proposal of the Directive on Access to Justice in Environmental Matters (namely articles 2(1g), 3, 4, 5, 8 and 9).
- What do you think about possibility of direct application of the Convention in national legal systems – both immediately and via EC law? What practical effects could direct application

of the Convention have in the presented situation, i.e. with regard to area plans town planning permits according to Belgium law?

**Database of the case:**

<http://www.unece.org/env/pp/compliance/C2005-11/>

**Case documents:**

<http://www.unece.org/env/pp/compliance/Compliance%20Committee/11TableBelgium.htm>

**Findings:**

<http://www.unece.org/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf>

## Compliance Committee – Cases 2006/16: Lithuania and 2006/17 European Community

### Legislation and Implementation Competences of EU and Member States with regard to Aarhus Convention

Thomas ALGE, OEKOBUERO

#### Background facts

A communicant from Lithuania filed two communications based on similar facts addressing Lithuania and the EC. The case is about a landfill in Lithuania that falls both under the EIA and the IPPC-Directives<sup>1</sup> as amended by the Public Participation Directive (Directive 2003/35/EC) of the European Community. The main issues were whether the public was adequately informed about the decision making processes (Art 6 par 2 of the Aarhus Convention), public participation was early and efficient when all options are open (Art 6 par 4) and whether there were effective remedies including injunctive relief (Art 9 par 4). The Committee found Lithuania under non compliance as to quite some aspects of Art 6, but that the EC was found in compliance with the Convention.

The Compliance Committee had, since both the EC and Lithuania are parties to the Convention, to make a decision, what is the competence and responsibility of the EC and what of the Member State with regard to Aarhus related issues: It stated with that regard, that “(...) *the structure of the European Community and its legislation differs from those of all other Parties to the Convention in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member States to implement Community directives*” (para 44). This argument was used when analysing different aspects of the case. The Committee basically assessed whether the public participation provisions of EIA and IPPC directive are sufficient to comply with the Convention.

#### Multiple permits (tiered decision making) – multiple participation

One of the issues was that in the concrete case there were different decisions permitting different aspects at different stages that fall under Article 6 (multiple permits). The Committee stated that the public shall have the right to participate in **any significant environmental permitting procedure** relating to Art 6. For that purpose the parties should make “**significance test**”, whether Art 6 applies for a specific decision or not (the Committee indicated how this can be done). However, it is **the obligation of the Member State** to that and not for the EC.

The Committee ruled as follows: “(...) *Neither the EIA Directive nor the IPPC Directive seem to prevent multiple permit decisions in the Member States.*” (para 45). “*Bearing in mind the above characteristic features of the Community law and the fact that under EIA and IPPC*

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<sup>1</sup> Council Directives 85/337/EEC and 96/61/EC

*directives public participation is mandatory in case of the two main permitting decisions applicable to landfills covered by annex I to the Convention, the Committee is of the opinion that as far as application of article 6 of the Convention in relation to multiple permits applicable to landfills is concerned, the Community legal framework **in principle properly assures achievement of the respective goals of the Convention***” (para 46). This means the EC Directives do not “prevent” Member States from correctly applying the Convention, because there is sufficient room for “correct” interpretation and application on Member State level.

#### **Early and effective participation (Art 6 par 2 and Art 6 par 4)**

A similar statement as above follows with regard to the need of early and effective participation in different Art 6 decision making stages. Furthermore the communicant claimed that European legislation lacks the Convention’s wording that the public has to be informed in an “**adequate, timely and effective manner**” (Art 6/2). The Directives use the term “early and effective” participation. The Committee considers the Directive’s wording sufficient since it has more or less the same objective (para 48). However, the Committee noted that the different wording “*may have some consequences for the implementation of the Convention, as most Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party.*” (para 49). “*Moreover, although a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention, bearing in mind the specificity of European Community directives, the fact that the terms “adequate, timely and effective manner” are not used in the Directives **does not in itself amount to non-compliance with the Convention.***” (para 50)

The communicant further maintained that the EIA Directive and IPPC Directive fail to comply with the Convention because they fail to provide for “**early public participation, when all options are open and effective public participation can take place**” on account of the fact that the participation may take place after the construction has commenced. The Committee argued that since the Directives provide for “early and effective participation” the national system has to guarantee that this is the case in practice“. “*Once an installation has been constructed, **political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure***” (para 54). “*If a legal framework of a Party to the Convention is such that the only opportunity for the public to provide input to decision-making on technological choices which is subject to the public participation requirements of article 6 of the Convention is **at a stage when there is no realistic possibility for certain technological choices to be accepted, then such a legal framework would not be compatible with the Convention.***” (par 55). Again the Committee argued that the Directive’s wording is sufficient, but it is the responsibility of the Member States to apply and implement in the sense of the Convention.

#### **Access to Justice (Art 9 par 2 and par 4)**

The communicant claimed it is meaningless to provide access to justice that takes place after the constructions start. The Committee said that this not necessarily meaningless, but “*if there were no opportunity for access to justice in relation to any permit procedures **until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question.***” (para 56). The Committee was **not convinced** that the Public Participation Directive “*allows a Member State to maintain a*

*system where access to justice in relation to the EIA permit is only provided after the construction has started; nor is it convinced that a Member State having fully implemented the EIA, Public Participation and IPPC Directives would be able to have a system that only provides an opportunity for the public to challenge decisions concerning technological choices at a stage when there is no realistic possibility for considering alternative technologies.” (par 56)*

The Committee further noted that **“indeed both the EIA and the IPPC Directives lack provisions clearly requiring the public concerned to be provided with effective remedies, including injunctive relief. While such remedies are essential for effective access to justice, when considering the structural characteristics of the Party concerned, and the general division of powers between the European Community and its Member States, it is not clear to the Committee whether procedural issues relating to remedies are part of the European Community’s competence. In the absence of further information on this issue, the Committee cannot conclude that the European Community fails to comply with article 9, paragraph 4, of the Convention. The Committee nevertheless stresses the importance of such remedies and the need for the European Community and the EU Member States to determine whether such remedies should be provided only by the laws of the Member States or in addition by Community legislation”** (para 57).

### **General issues of transposition and conclusions**

The EC itself made the point in the proceedings that **“under European Community law, an international agreement concluded by the Community is binding on the Community institutions and the Member States, and takes precedence over legal acts adopted by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement.”** The Committee added that **“notwithstanding the distinctive structure of the European Community, and the nature of the relationship between the Convention and the EC secondary legislation, as outlined in paragraph 35, the Committee notes with concern the following general features of the Community legal framework:**

(a) **Lack of express wording requiring the public to be informed in an “adequate, timely and effective manner” in the provisions regarding public participation in the EIA and IPPC Directives;**

(b) **Lack of a clear obligation to provide the public concerned with effective remedies, including injunctive relief, ...”** (para 59)

Furthermore the Committee noted with concern that the abovementioned features would not lead to non compliance of the EC, but **“they may adversely affect the implementation of article 6 of the Convention.”** (para 59). Finally the Committee concluded (repeated) that the finding about the EC compliance with the Convention is **“based on the assumption that the IPPC Directive is interpreted in a way that allows an IPPC permit in relation to newly established installations to be granted after the construction is completed only if the public had an opportunity to participate at an earlier stage of the procedure when all options were open, in particular the options regarding those features that cannot realistically be altered after the construction is finalized”**(para 61).

### **Questions:**

1. Does your national legislation provide for multiple permitting procedures with the right for the public to participate in any “significant stage” (in particular in stages where the decision

of the technical choice is taken)? Can the public concerned review each of the decisions before the actual constructions start?

2. Does your legal system provide for “early public participation, when all options are open and effective public participation can take place”?

3. Taking in mind the findings of the Committee in the given case, please review following situation: Legislation of some party to the Aarhus Convention (and EU Member State) would make it possible for the public to participate in **two stages** of permitting procedure for the installations which are subject to IPPC. The first stage would be EIA and planning permit. At this stage, anyone have the rights according to Article 6 of the Convention. However, only **directly affected landowners** would have access to judicial review. The second stage would be the IPPC permit. The NGOs meeting some criteria would have right to participate at the IPPC procedure. After the IPPC permit is issued, the investor could start with building the installation. The NGO has right to sue the permit, but cannot obtain injunctive relief. Would this legislation be in compliance with the Convention?

4. The Compliance Committee ruled in the case regarding Armenia (Case 8, para 38.) that it *“acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to **regulate matters subject to articles 6 and 7** of the Convention exclusively through acts enjoying the protection of ouster clauses would be to **effectively prevent the use of access-to-justice provisions.**”*

- a) Is there a possibility in your national system to legally review SEA-related decisions (even though the SEA-Directive (Directive 2001/42/EC does not expressly provide for that)?
- b) Do you think the EU would be under an obligation to enact access to justice related legislation regarding SEA (and other plans and programmes)?

**Case related documents can be found here:**

**European Community (Case 17)**

<http://www.unece.org/env/pp/compliance/Compliance%20Committee/17TableEC.htm>

**Lithuania (Case 16)**

<http://www.unece.org/env/pp/compliance/Compliance%20Committee/16TableLithuania.htm>

**Armenia: (Case 8)**

<http://www.unece.org/env/pp/compliance/Compliance%20Committee/08TableArmenia.htm>

### Standing of private applicants before the ECJ in environmental cases

#### General background

Article 230(4) of the Treaty Establishing the European Community (hereinafter “Treaty”)<sup>2</sup> regulates under which conditions can “private” or “non-privileged” applicants (i.e. other than EU Member States, the European Parliament, the Council and the Commission) institute proceedings before European Court of Justice (hereinafter ECJ or “Court”)<sup>3</sup> against legally binding acts,<sup>4</sup> adopted by the EC bodies. They can do so (only) if

- the act is explicitly addressed to the applicant or
- the act is addressed to another person but is of “direct and individual concern” to the applicant.

According to the ECJ case-law, an act is of *direct concern* if it does not require implementing measures to produce direct legal effects on the situation of the applicant.<sup>5</sup>

The prevailing ECJ interpretation of an *individual concern* dates back to the case known as *Plaumann*.<sup>6</sup> In this decision, the ECJ stated that “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.” In other words, the ECJ said that to satisfy the condition of *individual concern*, it is not sufficient that the act clearly applies to the applicant and influences his/her legal situation. The so called “*Plaumann test*” requires the non-privileged applicant to prove that he/she is in a unique position towards the contested act and no other unidentified person could be affected by it in the same way, included in the future.

#### NGO and other private person’s lawsuits concerning environmental protection

This interpretation of *individual concern* was used by the ECJ also in a number of cases, in which environmental NGOs and other non-privileged applicants tried to challenge acts of the EC bodies which according to them contravened EC environmental law.

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<sup>2</sup> Text of Article 230 of the Treaty is at the end of this text

<sup>3</sup> In this text, we do not distinguish between competences of Court of First Instance and European Court of Justice and use the abbreviation “ECJ” or „Court” for both of them.

<sup>4</sup> The wording of Article 230(4) limits the scope of the acts that can be challenged by private applicants to decisions and decisions in form of regulations. However, according to the ECJ jurisprudence, private applicants can challenge any act that is, in reality, a decision of direct and individual concern to the applicant, including directives and acts *sui generis* such as informal letters from the Commission.

<sup>5</sup> See Case 41-44/70 *NV International Fruit Company v. Commission* [1971], Case 62/70 *Bock v. Commission* [1971], Case 69/69 *Alcan v. Commission* [1971].

<sup>6</sup> Case 25/62, *Plaumann v. Commission*, [1963] ECR 95. *Plaumann* was a German company that imported clementines and sought to challenge the Commission's decision addressed to Germany, refusing a request by the latter to suspend the collection of customs duties on the import of fresh clementines into the EC.

In the *Greenpeace v. Commission* case,<sup>7</sup> the NGO applicants claimed that their special interests in the protection of environment should be deemed as sufficient to satisfy the standing requirements. The ECJ categorically refused this argumentation. It did not acknowledge that the applicants' interests are of public character (in contrast to private economical interests for which the "Plaumann test" was designed). Instead, it has stated that the public interests, such as protection of the environment, are by definition diffuse and therefore "association formed for the protection of the collective interests of a category of persons cannot be considered to be individually concerned for the purposes of the fourth paragraph of Article 173 (now Article 230) of the Treaty by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually".

In the *Danielsson v. Commission* case<sup>8</sup>, ECJ held (with regard to an action filled by three inhabitants of Tahiti against a decision of the Commission not to stop the French nuclear weapon tests in the region), that the standing of the applicants could not be accepted since "the decision concerns the applicants only in their objective capacity as residents of Tahiti, in the same way as any other person residing in Polynesia". According to the Court "even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests... that circumstance alone is not sufficient to distinguish them individually as persons to whom the contested decision is addressed".

In joined cases *EEB and Stichting Natuur en Milieu v Commission*<sup>9</sup> the Court declared inadmissible actions brought by environmental association and foundation against decisions of the Commission, which allowed the Member States to maintain in force authorisations to use plant protection products, containing some chemicals. The Court held that "the applicants, in their objective capacity as entities whose purpose is to protect the environment, are affected by the contested decisions in the same manner as any other person in the same situation." It further confirmed the approach taken in previous case-law, according to which the right to effective judicial protection, despite it represents one of the general principles of law stemming from the constitutional traditions common to the Member States, is not in itself sufficient to justify the admissibility of the NGOs action.

Similarly, the ECJ has refused standing of environmental NGOs in a number of other cases.<sup>10</sup>

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<sup>7</sup> Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995]. Appealed to and upheld by the European Court of Justice; see *Stichting Greenpeace Council (Greenpeace International) v. Commission*, Case C-321/95, [1998] ECR I-1651. The Greenpeace, local environmental organizations and local fishermen, farmers and citizens sought for annulment of a Commission Decision providing funds for the construction of coal-fired power plants at the Canary Islands.

<sup>8</sup> Case T-219/95, *Marie-Thérèse Danielsson, Pierre Largentreau, Edwin Haoa v Commission*, [1995].

<sup>9</sup> Case T-236/04 and T 241/04, *European Environmental Bureau and Stichting Natuur en Milieu v Commission*, T-236/04, [2005].

<sup>10</sup> E.g. case T-91/07, *WWF-UK Ltd v Council*, [2005]. It shall be added that the ECJ has not always applied the "individual concern" criteria so strictly in other branches of law, as trademark or competition and anti-dumping law. In these areas the ECJ seems to examine more flexibly if the particular situation of the plaintiff has some unique characteristics that justify the action to be accepted. For example, the situations in which "the plaintiff 'hold a unique right that is affected by the contested measure'" (Case C-309/89, *Codorniu SA v. Council*, [1994]), "the Commission owns a legislative duty to take account of the specific circumstances of the plaintiff before adopting a measure" Cases T-480 and 483/93, *Antillean Rice Mills NV. v. Commission* [1995]) or "an investigation was initiated by the Commission on the basis of the plaintiff's complaint" Case C-26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977]) were accepted by ECJ as sufficient for granting to private persons standing to challenge the acts of the Commission.

### **The Aarhus Regulation – a way to ECJ for environmental NGOs?**

EC signed the Aarhus Convention in June 1998 and ratified it on February 2005 by Council Decision 2005/370/EC. In September 2006, the European Council and Parliament adopted the Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (so-called “Aarhus Regulation”). The Regulation is applicable from 28 June 2007.

Articles 10 to 12 of the Aarhus Regulation (Title IV – “Internal Review and Access to Justice”) set out special rules for the review of legality of certain acts and omissions of EC institutions in the field of environmental law. These provisions are intended to implement the requirements of Article 9 of the Aarhus Convention with regard to EU bodies and institutions. Article 12(1) of the Aarhus Regulation states that the NGO “*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*”.

The question which has not been clearly solved by ECJ so far is, if the NGOs access to ECJ according to Article 12(1) of the Aarhus Regulation is limited by the conditions of Article 230(4), as they have been interpreted by ECJ so far (the doctrine of direct and individual concern – see above), or if the Aarhus Regulation grants standing before ECJ to all NGOs meeting the criteria of Article 11 of the Aarhus Regulation (to file a request for internal review pursuant to Article 10 of the regulation).

In the *Açores v. Council* case,<sup>11</sup> however, the ECJ has stated that “*Although it is true that the conditions for admissibility laid down in [Article 230 of the Treaty] are strict, the fact remains that the Community legislature adopted, in order to facilitate access to the Community judicature in environmental matters [the Aarhus Regulation]. Title IV (Articles 10 to 12) of that regulation lays down a procedure on completion of which certain non-governmental organizations may bring an action for annulment before the Community judicature under Article 230 EC. Since the conditions laid down in Title IV of that regulation are manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC.*”

This part of the decision can be interpreted in the way that the Court explicitly recognized that the Aarhus Regulation laid down a procedure which makes it possible for “certain environmental NGOs” to bring an action for annulment of certain EC acts before the ECJ. The term “annulment” also indicates that should be possible for the NGOs to challenge act in question in merit (not only procedural failure in dealing with the request for the internal review). The court found the Aarhus Regulation inapplicable to the *Açores* case because the NGO applicants did not follow the internal review procedure of the Aarhus Regulation (which in addition has not been in force yet in the relevant time), and because the contested measure was of legislative and not of administrative character. This again may give the freedom of interpretation that had there been the rules of the Aarhus Regulation complied with, the decision of the Court on the admissibility could have been different.

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<sup>11</sup> Case T-37/04 *Regiao autonoma dos Açores v Council*, [2008]. The government of autonomous region of the Azores, supported by a number of NGOs, asked the Court to review an EC regulation on the fishing management.

With regard to the standing of Azores regional government, the Court did not diverge from previous case-law, stating e.g. that *“the general interest that a region, as the body competent for economic, social or environmental matters in its territory, may have in obtaining an outcome conducive to the prosperity of that territory cannot, of itself, be sufficient for that region to be regarded as concerned within the meaning of the fourth paragraph of Article 230 EC.”*

### **Questions and topics for discussion**

Please express your opinion on following questions, related to the ECJ case law summarized above:

- Did EU, by adopting the 1367/2006 “Aarhus regulation”, fulfilled it’s obligations under Article 9 of the Aarhus Convention, with regard to public access to judicial review of acts and omissions of Community institutions? If not (fully), what are the remaining shortcomings? Is it possible to overcome them without adoption of other legislative acts?
- Do you think that Article 12 of the “Aarhus regulation” and the above quoted part of the ECJ *Açores* case decision, shall be interpreted in a way that since the “Aarhus regulation” entry into force, the NGOs were granted, under some circumstances, right to institute proceedings before ECJ? If yes, in what scope? To what extent is, with that regard, relevant the opinion expressed in some of the ECJ decisions, according to which the EC secondary legislation cannot confer standing on individuals who do not meet the requirements of Article 230(4) of the Treaty?
- Is it possible for the ECJ to apply the Aarhus Convention directly, as a part of EC law? If yes, under what circumstances, in what scope, and how would it change the current case law with regard to standing of “private applicants” at ECJ?
- How would, in your opinion, adoption of the Lisbon Treaty change the current situation? (text of the relevant provision is below)
- Would adoption of the proposal of the Directive on Access to Justice in Environmental Matters in any way influence the conditions and scope of standing of “private applicants” at ECJ?

***Treaty Establishing the European Community***  
**Article 230**

*(1) The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.*

*(2) It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*

*(3) The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.*

***(4) Any natural or legal person 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 direct and individual concern to the former.***

*(5) The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*

***The Lisbon Treaty proposal***  
**Article 263 (ex Article 230)**

*(1) The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*

*(2) It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*

*(3) The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.*

***(4) Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.***

*(5) Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.*

*(6) The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*



**Compliance Committee -Case 2004/06: Kazakhstan  
Enforcement of environmental law, fair and timely court review**

**Background facts**

In September 2004, 3 persons submitted a communication to the Compliance Committee (CC) alleging non-compliance by Kazakhstan with its obligations under article 9, paragraphs 3 and 4, of the Aarhus Convention. The communicants claimed that their right of access to administrative or judicial review procedures, guaranteed under article 9(3) of the Convention, was violated by failing of responsible public authorities and subsequently courts to enforce domestic environmental law with regard to operation of an industrial facility for storage of cement and coal and production of cement-based materials (hereafter “the facility”).

Environmental assessment of the facility established multiple breaches of Kazakh environmental legislation, exceeding by 114 times maximum allowed concentration of cement dust content in the air. The facility did not obtain an environmental permit, it however continued to operate. The communicants therefore filed a lawsuit against omission of the responsible authorities to promote suspension of the facility’s operation (by bringing a court action for suspension of the facility’s operation). The communicants maintained that they were not in a position to directly request injunctive relief for fear of an expensive counter-claim by the facility.

The court rejected the lawsuit, pointing out that the public authorities have right to ask courts to restrict or suspend an industrial activity, but not an obligation to do so. The court considered that imposing an administrative fine on the facility (what the authorities did) provided an alternative course of action for the public authorities in fulfilling their obligations.

**Evaluation and main findings of the Compliance Committee**

CC, on the first place, emphasized that the Convention, as a treaty ratified by Kazakhstan, is part of the Kazakh legal system and is directly applicable, including by the courts. CC also declared that the case falls under article 9(3) of the Convention, triggering also the application of article 9(4).

CC than pointed out that it is not in a position to interpret substantive environmental and administrative legislation of the Party where it falls outside the scope of the Convention, and generally speaking, that it is reluctant to discuss the courts’ interpretations of substantive provisions of environmental or other domestic legislation. There is certainly, in the view of CC, a freedom for the public authorities to choose which enforcement measures are most appropriate as long as they achieve effective results required by the law.

Despite of that, according to CC, “a general failure by public authorities to implement and/or enforce environmental law would constitute an omission in the meaning of article 9, paragraph 3, of the Convention”. Consequently, the CC noted that actions with regard to the facility undertaken by the public authorities in the course of seven years (e.g. imposing fines) consistently failed to ensure effective results.

Therefore, CC found out that even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was not in compliance with article 9(4) in conjunction with article 9(3) of the Convention. Whereas the case taken by the communicants could have provided for more effective enforcement of the laws and regulations relating to the environment, the decisions taken by the judiciary as a whole effectively ensured that this did not happen.

CC acknowledged that the more direct route for the communicants to challenge the contravention of environmental laws in the presented case would have been to take a lawsuit directly against the polluting company. It however also took into account that the communicants were concerned about the financial risk they could face and therefore opted for the second route of taking a lawsuit against the relevant public authorities.

For these main reasons, CC found failure of Kazakhstan to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation in the presented case and therefore also failure to comply with the requirements of article 9(4) in conjunction with article 9(3) of the Convention.

### **Additional remarks**

Next to these main arguments, CC has also pointed out that when a Party takes on obligations under an international agreement, all the three branches of state power are necessarily involved in the implementation. So, for example, bringing about compliance in the field of access to justice might entail analysis and possible additions or amendments to the administrative or civil procedural legislation by bodies usually mandated with such tasks. In the same way judicial bodies might have to carefully analyze its standards and tests in the context of the Party's international obligations and apply them accordingly.

CC also stated that a procedure which allows for a court hearing to commence without proper notification of the parties involved (including a confirmation that notifications have indeed been received), cannot be considered a fair procedure in the meaning of article 9(4) of the Convention.

### **Questions and topics for discussion**

Please express your opinion on following questions, related to the case and CC findings presented above:

- What do you think about the CC finding that despite the communicants could fill a lawsuit against omission of the responsible authorities, their standing was not disputed, and the court could, according to national legislation, order the administrative authority to act, there was still a failure of the Party to comply with the requirements of article 9(4) in conjunction with article 9(3) of the Convention?
- Please suppose that national legislation makes it possible for the affected persons to file a civil action against the operator of the facility, including possibility of injunctive relief, without a danger of expensive counter-claims. Would it be in compliance with the Convention, if the affected persons could not challenge omissions of responsible authorities, taking no measures against the polluter?

- Taking in mind the findings of CC in the given case, please review following situation: Owner of parcel A established a waste-dump on it without permit. Owner of neighbor parcel B, who feels to be harassed by that, asked the responsible authorities to order abolition of the waste-dump. The authorities, however, only imposed fines to owner of the waste-dump and even issued an ex-post permit for it. Owner of parcel B therefore filled an administrative lawsuit. After 3 years, the court canceled the ex-post permit for the waste-dump. After next 2 years, a new ex-post permit was issued, which the owner of parcel B again brought to court. The waste-dump has been now on parcel A for more than 8 years. The court can again only cancel the ex-post permit, but not to order its removal. Is this situation in (non)compliance with articles 9(3) and/or 9(4) of the Convention?
- What do you think about possibility of direct application of the Convention in national legal systems – both immediately and via EC law?

**Database of the case:**

<http://www.unece.org/env/pp/compliance/C2004-06/>

**Case documents:**

<http://www.unece.org/env/pp/compliance/Compliance%20Committee/06TableKazakhstan.htm>

**Draft findings:**

<http://www.unece.org/env/pp/compliance/C2004-06/draftfindingsC06.doc>