

## Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Task Force on Access to Justice

#### Eleventh meeting

Geneva, 27 and 28 February 2018

Item 2 of the provisional agenda

#### Access to justice in cases on the right to environmental information

#### Information paper N4 revised

## QUESTIONNAIRE

### Access to justice in cases on the right to environmental information

At its sixth session<sup>1</sup>, the Meeting of the Parties to the Aarhus Convention set out the mandate of the Task Force on Access to Justice to promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention with special attention to information cases. Available information sources such as Aarhus Convention national implementation reports and e-justice initiatives provide very basic overall description of existing framework but do not go in the details about its elements such as scope of review, time limits, remedies, costs and etc.

To overcome the information gaps, the Aarhus Convention Task Force on Access to Justice will carry out a survey to collect more detailed information, examples of legislation provisions and case law relevant to access to justice in cases on the right to environmental information. The survey could be an important contribution to identifying good practices, addressing key challenges, populating the jurisprudence database and fostering capacity-building efforts to support work in this area. The survey outcomes will lay the ground for advancing the implementation of article 9, para. 1, of the Aarhus Convention and contribute to the monitoring of SDG 16 targets 16.3 and 16.10.

A draft questionnaire was discussed at the eleventh meeting of the Task Force on Access to Justice in Geneva in Geneva on 27-28 February 2018<sup>2</sup> and thereafter revised by the secretariat in consultation with the Chair in the light of the discussion at the meeting and further comments received.

The present questionnaire is distributed to a selection of institutions specialized in information cases in a representative number of Parties from different subregions. In addition, representatives of judiciary, judicial training institutions, other review bodies, non-governmental organizations and stakeholders are welcome to contribute with input on any issue in the questionnaire.

The outcomes of the survey will be synthesized with information from the national implementation reports to a report which will be discussed at the next meeting of the Aarhus Convention Task Force on Access to Justice in Geneva in 2019 and further reported to the subsequent meeting of the Working Group of the Parties to the Aarhus Convention.

<sup>1</sup> See para. 14(a) (i) of decision VI/3 of the Meeting of the Parties adopted at its sixth session (Budva, Montenegro, 11–13 September 2017) available from [http://www.unece.org/env/pp/aarhus/mop6\\_docs.html](http://www.unece.org/env/pp/aarhus/mop6_docs.html)

<sup>2</sup> More information is available from <http://www.unece.org/env/pp/aarhus/tfaj11.html>

Those who want to take part in the survey are kindly invited to complete and return the questionnaire to the following email address: **aarhus.survey@un.org** with the subject line “11TFAJ survey from [name of country, organization]” for processing **before 1 October 2018**. Kindly be informed that the completed questionnaires will be posted on the website of the twelfth meeting of the Task Force.

**CONTACT INFORMATION**

Please provide name and contact data of the person who filled in the questionnaire:

First Name: Duarte

Last Name: Geraldés

Position: Legal Advisor

Organization: Portuguese Ombudsman

Address: Rua do Pau de Bandeira, 9. 1249-088 LISBOA

Telephone: 000351213926600

Fax:

E-mail: [duarte.geraldes@provedor-jus.pt](mailto:duarte.geraldes@provedor-jus.pt)

Website: [www.provedor-jus.pt](http://www.provedor-jus.pt)



## **Access to justice in cases on the right to environmental information**

### **Contribution of the Portuguese Ombudsman**

The Portuguese Ombudsman institution, in its capacity of national human rights institution fully in line with the Paris Principles and accredited with “A” status since 1999, hereby replies to the call for input received from the Task Force on Access to Justice under auspices of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The current mandate holder is Maria Lúcia Amaral.

*(October 2018)*

***Questions concerning access to justice in cases on the right to environmental information:***

- 1. Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information. Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision? How is the applicant *informed* about the possibilities to appeal the decision?**

The Law 26/2016, of 22 August, that regulates access to environmental information, provides, in its article 15 (1), subparagraphs a) to e), the conditions of response to requests for access.

Within a time limit of ten days, the entity to which a request for access to an administrative document has been addressed must:

- a) Communicate the date, place and manner on and in which consultation can be undertaken, if requested;
- b) Issue the reproduction or certificate that has been requested;
- c) Communicate in writing the reasons for wholly or partially refusing access to the document, as well as what guarantees are available to the applicant in terms of the ability to bring an administrative or litigious appeal against that decision, namely by lodging a complaint with Commission for Access to Administrative Documents, (hereinafter referred to as CADA), and by issuing a judicial summons to the entity to which the request was made;
- d) Inform that it does not possess the document, and if it knows which entity does hold it, send the request to the latter and inform the applicant accordingly;
- e) Set out any doubts it has about the decision it is required to take to CADA, in order for the latter entity to issue an opinion.

Article 18 sets the denial regime of requests for access to environmental information, such as, among others, cases when the requested administrative document neither is nor should be in the possession of the organ, ongoing procedure requirements or when a request refers to information that is contained in internal communications between entities.

The possibilities to appeal the decision are determined by Law 26/2016, of 22 August, in Article 16.

- 2. What are the time limits to appeal a decision on access to environmental information? What are the most frequently used grounds for appeal? Are there any issues concerning who has standing in such cases? To what body and in which form is the appeal made; recourse for review within the public authority or to the higher authority; Information Commissioner, Ombudsman or any other independent and impartial body; or directly to court of law? If appeal to the review body other than a court of law is available in any form, does that request suspend the time limits to appeal to the court? Is there a requirement of exhaustion of administrative review procedures prior to bringing the case to court?**

Within a time limit of twenty days, applicants may lodge a complaint with CADA [Law 26/2016, of 22 August, Article 16 (1)]. The common grounds for appeal are provided for by Law 26/2016, concerning the absence of a response by the end of the time limit provided, partial fulfilment of a request or another decision restricting access to administrative documents. Lodging a complaint shall interrupt the time limit for applying for a judicial summons to provide information, consult files or issue certificates.

CADA shall have a time limit of forty days in which to draw up the corresponding report in which the situation is considered, and send it with the due conclusions to all the interested parties. Within a time limit of ten days following receipt of the report referred to in the previous paragraph, the entity to which the request was made shall communicate its final substantiated decision to the applicant [Article 16 (4) (5)].

Interested parties may challenge both decisions, and the absence of any decision by the end of the time limit referred to in the previous paragraph, before the administrative courts, and the rules of the Procedure of the Administrative Courts Code are applicable to the summons process referred above.

The possible involvement of the Ombudsman would not suspend any administrative and judicial time limits, reporting only to the lack of compliance with the expected response times for CADA's actions, and not configuring any kind of review procedure.

In fact, the Ombudsman has not legal competence to cancel or modify the acts of the public powers (article 22 (1), of the Statute), her action being only persuasive and based on proposals or recommendations.

**3. If appeal is made to an independent body mentioned above, how is the independence and impartiality of that body ensured?**

The independence and impartiality of Commission for Access to Administrative Documents is determined by Law 26/2016, of 22 August. CADA is an independent administrative entity that operates under the aegis of the Assembly of the Republic and is responsible for making every effort to ensure compliance with the provisions of the referred Law (Article 28).

**4. What costs (*fees, charges*) are connected to review before the court of law or other review bodies in these cases?**

The intra-administrative procedure with CADA is free of costs. In court, the case has a particularly low cost (see Article 12 (1) subparagraph b) of Decree-Law 34/2008, of 26 February - Regulation of Procedural Costs.

**5. What is the average time needed for the court of law or another independent and impartial body to decide an information case, i.e. from the introduction of the appeal to the notification of the decision? If the national rules of appeal require administrative reconsideration before the appeal is submitted to the court of law or another review body, that time should also be also separately specified.**

As previously said, CADA shall have a time limit of forty days in which to draw up the report after a complaint, and send it with due conclusions to all the interested parties. Within a time limit of ten days following receipt of the report, the entity to which the request was made shall communicate its final substantiated decision to the applicant [Article 16 (4) (5)]. On the other hand, there's not an average time set for the administrative courts to decide.

**6. Are decisions of courts and other review bodies in information cases in writing, publicly available, binding and final? If the appeal is successful, how is the independent body's/court's decision enforced; by ordering the public authority to disclose the information; by disclosing the information**

**directly; by suing the public authority if they persist in refusing to disclose the information or by any other means?**

Although CADA's decisions are not binding, court decisions that are not merely administrative in nature shall set out their grounds in the form laid down by law and they are binding on all public and private entities, prevailing over the decisions of any other authorities (Article 205 (1) (2) of the Portuguese Constitution). Therefore, court's decision enforced by ordering the public authority to disclose the information. Judicial decisions are final after appeal (Article 628 of the Civil Procedure Code).

The principle of disclosure of procedural documents constitutes a means to combat lack of discretion and to ensure the truth and justice of judicial decisions, in particular the possibility of popular control of bodies which, like the courts, exercise sovereign powers (cf. Article 113 (1), of the Portuguese Constitution, and Article 167 (1) and Article 169 (1) of the Civil Procedure Code).

Independently of the reserved nature of the proceedings, concerning its subject-matter and without prejudice to the delimitation of the reservation until a certain procedural stage according to the specific means of action, the law always allows access to the file both to the parties and their agents - Article 168 (1) (2), subparagraph (a) and (b) of the Civil Procedure Code.

**7. Can disciplinary, administrative or criminal sanctions be exercised against the public officials if disclosure of environmental information is refused unlawfully? Would it be possible for the applicant or other members of the public to be a party to such proceedings?**

Public officials are subject to the disciplinary status enshrined in the General Labor Law in Public Functions (LTFP), approved by Law 35/2014, of 20 June. Criminal and civil proceedings (civil liability) can also be exercised against public officials, pursuant to the law, in cases of disclosure of environmental information unlawfully refused. Applicants and private individuals having a legitimate interest can be part to criminal and civil proceedings [vd. Article 20 and 32 (7) of the Portuguese Constitution].

**8. Do you have any experience of situations/cases where individuals or ENGOs asking for environmental information have been penalized, persecuted or harassed in any way for their involvement?**

There is no experience of such cases.

**9. Do you have any experience of misuse or abuse of the right to environmental information and the consequences thereof?**

Given that access to information is thus configured as a popular claim, the popular action, provided for in Articles 20 and 52 (3) of the Constitution, and in Law 83/95 of 31 August, can be summarily defined as a judicial action whose ultimate objective is to protect diffuse interests, consubstantiating a fundamental right of political action, either individually or collectively. The legitimacy (or lack thereof) to defend the diffuse interests in question (South Administrative Central Court decision, of 7 March 2013)<sup>3</sup>, can be seen as an indirect dimension of violation of the right to environmental information at stake.

**10. In your view, what are the main barriers in your legal system concerning access to justice for the members of the public in cases on the right to environmental information**

The main challenges concerning access to justice for the public are not specific in cases on the right to environmental information, focusing on excessive delays and procedural costs.

**11. Does your legal system provide with any innovative approaches concerning administrative and judicial review procedures in cases on the right to environmental information, for example concerning the requirement for the procedure to be expeditious, the use of alternative dispute resolutions**

---

<sup>3</sup><http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/d6e763b2928fca4080257b2e00381cd0?OpenDocument&Highlight=0,04613%20>



**(ADRs), costs, remedies, means for execution of review decisions on disclosure or use of e-justice initiatives?**

It's been considered that Law 26/2016, of 22 August, was a milestone in creating a more open relationship between the state and citizens, as well as promoting transparency in the implementation of political, administrative and legislative measures, including the management of public financial resources. Nevertheless, CADA's decisions should become binding, and its sanctions, including the imposition of fines, should be imposed on entities which repeatedly fail to comply with the duty of cooperation. In court, this procedure is characterized by speed and effectiveness: the procedural deadlines are reduced, the decision period is short (tending to be less than one month: cf. Article 107 of the Procedure of the Administrative Courts Code), and judge may order the imposition of periodic penalty payments for each day of delay, in case of conviction of the entity (Article 108 (2) of the same legislation).

**12. Can you please provide us with a short description of particularly important or innovative information cases, as well as cases which illustrate the main barriers concerning access to justice in these matters.**

*The objective scope of access to environmental information* - The right of access to environmental information concerns the information itself and not just documents, not being dependent on documentary support, which is a possible distinction with regard to the system of access to administrative information (South Administrative Central Court decision, of 11 September 20144).

*Public authority definition* - In its judgment of 7 January 2009, (Process No 0848/08), the Supreme Administrative Court<sup>5</sup> integrates into the concept of public authority any "Investee" as well as any "company concessionaire 'provided that they'

---

4

<http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/1557f7a73992e3bf80257d5600442ee7>

<sup>5</sup><http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/db2117513946c5438025753f00392015?OpenDocument&ExpandSection=1>

deliver services related to the environmentally sensitive or environmentally, whether they belong (or not) to the indirect administration of central power.