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Comment to
report on EU Member States' measures on access to justice in environmental matters - regarding Denmark

I understand that the Commission has made a call for response to the Summary Report of the inventory of EU Member States' measures on access to justice on environmental matter. The following comments concern only the part of the summary dealing with Denmark and the special country report for Denmark. But if the quality of the other national reports is as poor as the Danish part the summary report neither reflects the access to justice on environmental matters in the Member States nor does the report found a useful tool for further decisions – as it will be explained in the following comments.

1. General observations

1.1 First of all it must be emphasised that the Aarhus-Convention is not directly applicable under Danish Law. Only to the extent the Aarhus Convention has been formally implemented into Danish legislation the convention is applicable at Danish Courts. The same conclusion goes for the EC ratification of the Aarhus Convention. Despite the ruling of the European Court of Justice in case C-213/03 (*Berre lake*), Danish Courts have until now not accepted that EC ratified treaties have status as internal Danish law.

1.2 Second, according to the country report the Danish implementation of article 9 of the Aarhus Convention is almost perfect. The conclusion is reflected in the Summary Report page 18 rating the Danish implementation to +++ - as the only Member State which receive that high rate. The rating is misleading. The mistake could have been discovered by comparing the previous study with the former study on the same matter from 2002. The former report concludes there were a number of problems in the Danish implementation of article 9 of the Aarhus Convention. The substantially difference between the conclusions of the two reports can not be explained by new legislation (because no such legislation has been adopted). Not only is the missing comparative reflexion an analytical error. The analysis as well as the conclusion of the new report is misleading. In fact, case law since 2002 clearly demonstrates even more problems in the Danish implementation than mentioned in the former 2002 report.

1.3 Third, the country report regarding the Danish implementation of article 9 of the Aarhus Convention is according to the preliminary note based on "literature research". However, the report has not any reference to legal literature. This is not because no literature exists on this principle matter – but it might reflect that the author isn't familiar with this literature. As in other Member States, legal standing and legal remedies are important subjects in Danish legal theory and have been addressed by various legal writers. In particular NGO's access to justice and legal remedies

also on environmental matters has been subject to a number of articles. So in this respect, the lack of reference in the report to legal theory can only be explained by ignorance.

2. The principles of the Danish implementation

To analyse and describe the Danish implementation of article 9 of the Aarhus Convention it is important to know the principles for the Danish implementation of the different parts of article 9.

2.1 Regarding article 9(1) on access to justice regarding access to information, the official Danish position is that the Danish Legal Procedural Act requiring "legal interest" as a pre-request for legal action before any Danish Court is sufficient to comply with article 9(1). Thus, following the official Danish interpretation, Denmark didn't need to expand access to justice because of the Aarhus Convention. In this perspective, the access to administrative appeal on access to information to the Environmental Appeal Board and the Nature Appeal Board is something extra – beyond the legal obligations under the Aarhus Convention. – *In contrast the report on Denmark gives the impression that article 9(1) is implemented through the access to administrative appeal to the appeal boards ignoring the fact that the access to administrative appeal is restricted and don't comply with article 9(1).*

2.2 Regarding article 9(2) on access to justice regarding participation in decision making under article 6 of the convention, the official Danish position was and is that the Danish Legal Procedural Act requiring "legal interest" is not sufficient to meet the obligations under article 9(2) to ensure NGOs' access to court. To implement article 9(2) NGOs are under the different environmental legislation granted access to administrative appeal to the Environmental Appeal Board and the Nature Appeal Board. To the extend the scope of access to the Danish appeal boards covers the scope of issues under the Aarhus Convention article 9(2) it seems reasonable to assume that the Danish implementation complies with article 9(2) of the convention. The problem is however that the scope doesn't fully match as explained below. – *In contrast, the report on Denmark gives the impression that the scope of access to administrative Appeal Boards under Danish law fully match the scope of article 9(2).*

2.3 Regarding article 9(3) of the convention Denmark hasn't adopted any legislation to implement this provision. The official Danish perception is that the possibilities for citizens to asking the police, the public authorities or the Ombudsmand to take action in case of offences of Danish Environmental legislation made by private or public parties are sufficient to comply with article 9(3) because article 9(3) does only require "access to administrative or judicial procedures". The official Danish interpretation ignores that such requests from citizens to the police, administrative authorities or the ombudsmand cannot be subject to injunctive relief as required under article 9(4). Regarding the ombudsmand, the interpretation ignores that the Ombudsmand have no discretion to respond to offences made by private parties. It should however be observed that under the Danish Fishing Act, the Anglers Association has a right to legal action in accordance with article 9(3) and under the Planning Act, citizens have also a right to legal action in case of violation of local plans (but not violation of Environmental Impact Assessment obligations) in accordance with article 9(3). With these two exceptions Danish Law doesn't provide any access to justice in accordance with article 9(3). Finally, it must be mentioned that with very few exceptions, the appeal boards have no competence regarding sanctions or other response to offences of Danish environmental legislation. Even complains from a local NGO on the local authority not issuing order to a pig farm on compliance with the Habitat Directive (92/43) article 6(2) has been rejected by the Nature Appeal

Board as beyond its competence. – *In contrast, the report on Denmark gives the impression that the access to administrative appeal is sufficient to implement article 9(3) despite this position is neither taking by the official authorities neither by legal literature. Further more, the few court cases mentioned in the report didn't concern article 9(3) of the convention, but article 9(2) on access to participation in decision making.*

2.4 Regarding article 9(4) of the convention Denmark hasn't adopted any legislation to implement the obligation to ensure that the access to justice under article 9(1)-9(3) provide "*adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*." As mentioned above the Danish authorities don't have an answer to how article 9(4) is implemented regarding article 9(3). Concerning access to information, the official Danish perception is that access to court regarding access to information is not that expensive or time spending. Regarding legal remedies on access to participation in decision making, the official Danish position is that the access to administrative appeal is sufficient to comply with article 9(4). The arguments are that access to the appeal boards is either free or a very small charge, the appeal boards are timely and they have the competence to enact something like injunctive relief (suspension of permits and dispensations). In so far the access to the appeal boards complies with article 9(2) this conclusion is correct. The problem is the scope of appeal which doesn't cover all activities under article 6 of the Convention. For example are decisions on EIA taking by the Minister of Traffic not subject to administrative appeal. This can be illustrated by a Court Case from November 2007 in which the Minister of Traffic authorized a recreational beach resort at the coast without even making a EIA screening arguing that the area also previous was used by bathers why it only was a modification without environmental impact under the EIA-Directive, annex II, point 13. Because no administrative appeal was available, the local landowner association took action before a court but lost the case and was requested to pay 40.000 Euro to the other part besides own costs. Leaving aside that the ruling of the court seems not in compliance with the EIA-Directive, the case illustrates how access to court some times is prohibitively expensive. Moreover, regarding injunctive relief, the Danish Legal Procedural Act prohibit injunctive (temporary prohibitions) towards public authorities, but the Supreme Court has since 1994 formally recognized that legal action against authorities can be gives suspension effect. However, suspension has only been accepted in two cases because this option is interpret extremely narrow. - *In contrast, the report on Denmark gives the impression that the access to administrative appeal as well as the access to courts are in full compliance with article 9(4) supplemented by wrong information about the Danish Court system.*

3. Critics of the Danish implementation of article 9

As indicated above, it seems rather obvious that Danish Law doesn't comply with all part of article 9 of the Aarhus Convention. To document this more in detail a comprehensive report is needed on each of the comprehensive Danish environmental legislation. This goes far beyond the intention of this comment why I will restrain my self to some principle comments.

3.1 It can be argued that the access to court regarding access to environmental information complies with article 9(1) and article 9(4). It should however be emphasised that until now not just one single case on access to environmental information has been reported from Danish courts. In all cases in which access to appeal to the Environmental Appeal Board or the Nature Appeal Board has been

dismissed because of lacking competence, no further action has been taking. Thus, seeing from a practical point of view, it is disputable whether Denmark complies with article 9(1).

3.2 Regarding article 9(2) there are substantially areas of decisions within the scope of article 6 of the convention on which there is no access to administrative appeal boards. Taking into account that the Danish implementation is based on the perception that article 9(2) requires access to administrative appeal boards and the fact that the Convention has no direct effect under Danish Law it seems safe to conclude that Denmark doesn't comply with the scope of article 9(2).

3.3 Regarding article 9(3) the Danish implementation relies on the interpretation that to comply with article 9(3) it is sufficient if people can write to the police, administrative authorities and the Ombudsmand. If this interpretation is correct then article 9(3) requires only a mail system enable people to write to the authorities. If this position is shared by the EC Commission one wonders why the Commission has asked for a comprehensive study on the implementation of article 9(3). In my opinion it is obvious that such narrow interpretation of the obligations under article 9(3) must be rejected and that Denmark is pretty far from having implemented article 9(3) taking into account the obligations under article 9(4).

3.4 Regarding article 9(4) the access to court will not in all cases meet the criteria of not being *prohibitive expensive*. Some of the later court cases has documented that the problem isn't only theoretical. It seems therefore reasonable to conclude that it is only in some cases access to court in Denmark meet the criteria. In contrast access to administrative appeal boards meet the criteria of not being prohibitive expensive. This means that in all cases where the appeal boards don't have competence the Danish implementation doesn't comply with that obligation under article 9(4).

3.5 Regarding the second criteria of article 9(4) on *"timely procedure"* there has been substantially delay at the court system which seems generally not designed to the speedy process intended under article 9(4). Environmental cases pleading before court in 3 or 4 years are not unusual. It is simply not correct when the Danish report informs that the procedure at the high courts last less than one year. As one of the latest example can be mentioned a case regarding insufficient EIA before a permit to a new metro-line was approved by the Capital Region in February 2002. The decision was appealed by a local NGO to the Nature Appeal Board which one year later upheld the decision. The decision by the Nature Appeal Board was brought before the high Court and the NGO asked for suspension of the decision until the case was decided by the Court. In November 2004 the High Court rejected suspensory effect (published in MAD 2004.1360). This year the metro line was finished but the case before the High Court is still pleading.

3.6 Regarding the third criteria on access to *injunctive relief* there is such access in cases between private parties on private contracts, competition law and intellectual property rights. But outside this area of law the access in cases between private parties is either none existing or extremely restricted (no cases have been detected). Regarding cases against authorities there is no access to injunctive relief but a theoretical access to suspension of public permits. However, in court practice access to suspension is interpret so narrow that it is doubtful whether this comply with article 9(4) – at least the Danish practice seems not in accordance with the intention of article 9(4) in this respect. Under the Planning Act, the Nature Appeal Board has the power to order something like injunctive relief regarding constructions in conflict with local plans. In other areas of environmental legislation the Nature Appeal Board and the Environmental Appeal Board has the power to order suspension of

public permits. To the extend the two appeal boards have competence it is reasonable to assume that they meet the criteria "injunctive relief" given this legal remedy a narrow interpretation.

4. Conclusion

The national report regarding the Danish implementation of article 9 of the Aarhus Convention ignores the principle legal issues related to article 9. The explanation of the administrative appeal system and the court system seems based on substantial misunderstanding of Danish administrative and procedural law and contain a number of minor mistakes.[1] In my view it is questionable whether the quality of the report will enable it to pass as a student work. Anyhow, the report is neither capable to give a useful understanding on how Denmark has implemented article 9 of the Aarhus Convention nor is the report capable of enlighten the many problems in the Danish implementation. I don't know whether the same critics can be raised towards the other national reports but will strongly recommend that the Commission enact some sorts of quality control.

Peter Pagh
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[1] According to the Danish report (p. 19), the length of the procedure at the High Court is one year. This is an average length which certainly not covers environmental cases which often takes 3 and 4 years. And according to the Danish report legal actions against decisions by appeal boards is taking place before the High Court – such cases has since 2007 been before the lower court.