COMMENTS ON THE DOCUMENT 'ACCESS TO JUSTICE IN INFORMATION CASES'

DRAFT REPORT OF 29 JANUARY 2020 BY JAN DARPÖ, CHAIR OF THE TASK FORCE ACCESS TO JUSTICE

As mentioned in the Introduction, the draft report was communicated to National Focal Points and other stakeholders to the Convention *'in order to secure the quality of the text'*. Moreover, '*the progress will be further reported to the next meeting of the Working Group of the Parties in July 2020. The final text will be discussed and decide upon on the 13th meeting of the Task force on Access to justice … in beginning of 2021'.*

Against this background, as the person responsible for the response given by the European Commission to the questionnaire in 2018, I would like to make the following comments as follows:

I. Section 2 - Questions concerning access to justice in cases on the right to environmental information

1. *Summary of the responses to the Question 3*

On page 11, one reads: '*For example, the respondent from the EU Commission claims that the reconsideration by the Secretary-General of the Commission is independent and impartial and there is no link between the deciding section within the authority and that higher level of administration performing a fresh review of the decision.* ***However, this is contested by ClientEarth, pointing to that body form part of the same institution as the one responding to the information request'***.

I consider that this presentation is not sufficiently accurate, as already pointed out in a letter of 25 June 2019 (Ares (2019)4031937) to Maryna Yanush.

The European Commission presents each year a report on the application of Regulation (EC) n. 1049/2001 relating to access to documents. The last one on the year 2018, i.e. document (COM(2019)356 final of 29.07.19), points out that '***In the European Commission, the treatment of initial access to documents requests is handled on a decentralised basis by the various Commission Directorates-General and services.*** *Each Directorate-General and service appoints at least one legal expert for this task, acting as 'access to documents coordinator'. ….* ***Confirmatory requests are dealt with by the Secretariat-General, so as to ensure an independent administrative review of the reply given at the initial stage****. A specific team within the Secretariat-General's Unit for Transparency, Document Management and Access to Documents is exclusively dedicated to the task of ensuring the coordination and uniform implementation of the detailed rules for application of Regulation (EC) No 1049/2001. It is composed of several case handlers and administrative support staff. …'* [1]. An identical

[1] This explanation is contained in the reports which can be consulted through the link https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/freedom-information/access-documents/information-and-document-management_en

explanation was contained in the report of the year 2017 (COM(2018) 663 final of 3 October 2018, page 4.

The annex to each report contains statistical data: one of the tables relates to the replies given at the confirmatory stage. The last one in the report of the year 2018 mentions statistics, in particular table 9 shows the results of the administrative review performed by the Secretariat-General from 2014 to 2018

9. THE TYPE OF REPLIES GIVEN AT THE CONFIRMATORY STAGE

	2014		2015		2016		2017		2018	
	No	%	No	%	No	%	No	%	No	%
Full revision – Full access granted	51	18.75	22	9.57	11	5.00	14	5.40	19	6.60
Partial revision – Partial access granted	67	24.63	73	31.74	104	47.27	108	41.70	98	34.03
Confirmation of initial reply – Access refused	154	56.62	135	58.70	105	47.73	137	52.90	120	41.67
No documents held	0	0	0	0	0	0	0	0	51	17.70
Total	**272**	**100**	**230**	**100**	**220**	**100**	**259**	**100**	**288**	**100**

It appears that a substantial amount of the initial decisions are totally or partially revised. This constitutes evidence of the independence of the reviewing body. This aspect is even more important in the light of the observation at page 11 of the draft report that '*the requirement for independence and impartiality does not apply to 'administrative reconsideration' under the second sentence of Article 9.1 …'.*

In conclusion, a more balanced presentation of the facts needs to be ensured.

2. Summary of the responses to the Question 5

On pages 12 and 13, one reads: '*In addition to this, however, there are many examples where the court proceedings take more than one year, **sometimes several years (EU**, GE, SK)'.*

The Court of Justice publishes every year a report concerning the EU jurisdictions: the last document, i.e. *'Rapport annuel 2018 activité judiciaire',* is available through the following link: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/ra_2018_fr.pdf

The report contains the statistics of new cases submitted and closed cases, according to the subject of the proceedings. In addition, the average length of cases is indicated. As already pointed out in the reply to the questionnaire, the average length of access to document cases before the General Court is 20 months. If an appeal on a point of law (the only possible one) is submitted to the EU Court of Justice, additional time is required.

Therefore, the reference in the draft report that court proceedings in EU could take several years is imprecise.

First at all, the adjective '*several*' does not seem appropriate: '*some'* years could reflect better the reality. In addition, such a situation could arise only in very complex cases where all remedies are exploited, i.e. an action before the General Court and an appeal to the Court of Justice.

Similarly, the last sentence in the draft report: '*Some of the respondents claim that the whole process from the information request to the execution of the court order* ***may take several years to conclude (EU****, GE, KZ, PT, RS, SK).*

In conclusion, a more balanced presentation of the facts needs to be ensured, pointing out that at least for the EU this could happen in rare, complex and exceptional situations.

3. Summary of the responses to the Question 12

On page 16, one reads: '*For example, the respondent from the European Commission points to the relevance of the findings of the CJEU* ***on costs in C-279/12 Fish Legal (2013)'.***

This indication is not correct. In the reply from the European Commission, this judgment is not mentioned. Moreover, it does not concern the question of costs, but the interpretation of Article 2.2 litterae b) and c) of Directive 2003/4/EC concerning the notion of *'public authority'*. This litterae correspond to Article 2.2 (b) and (c) of the Aarhus Convention and the wording used in the Directive is nearly identical to the wording of the Convention.

There is no judgment concerning expressly the costs at the level of the EU courts. However, as mentioned in the Notice on Access to Justice in Environmental Matters, a judgment of the Court of Justice of 11 April 2013 (*Edwards and Pallikaropulos*, case C-260/11, EU:C:2013:221) gave the interpretation within the EU of the notion of '*not prohibitively expensive'*, contained in Article 9.4 of the Aarhus Convention. You will take note of the fact that after the Notice two other judgments of the Court relate to costs at national level: 17 October 2018, *Klohn* case C-167/17 and 15 March 2018 *North East Pylon*, case C-470/16.

II. Section 3 – Remarks and discussion

1. Barriers and challenges

On page 18, one reads: *'Examples are also given* ***from the EU of cases*** *which have taken* ***more than 4 years from the administrative decision to the final judgment and sometimes even more****. Thus - and this is quite specific for cases concerning environmental information – if the request is made in order to obtain information concerning EIA on a permit application, the permit might already be issued at the time of the court order for a disclosure'.*

This drafting justifies two remarks.

a) As written, this text could be interpreted in the meaning that the second sentence dealing with information on EIA is linked to the previous one and concerns the EU.

In fact, according to Article 4, paragraph 2 (g) of Regulation (EC) 1367/2006 of 6 September 2006, environmental information to be made available and disseminated has to include '*environmental impact studies and risk assessments concerning environmental elements or a reference to the place where such information can be requested or accessed'.* An identical obligation is contained in Article 7, paragraph 2 (g) of Directive 2003/4/EC addressed to EU Member States.

Therefore, it is suggested that a new text eliminating any ambiguity about a possible link between the second sentence and the EU is drafted.

b) The first sentence could give the impression that in the EU environmental information is made accessible after years in a certain number of cases.

It is true that in a very limited number of cases, due to the judicial review, some time elapsed before the administrative decision and the final judgment.

The longest file concerns the request made by Stichting Greenpeace Nederland and PAN Europe:
- the confirmatory decision (total refusal of disclosure) was adopted on 10 August 2011 and attacked by an act of 14 October 2011,
- the judgment of the General Court (case T-545/11) was delivered on 8 October 2013,
- on appeal on a point of law (case C-673/13P), the Court of Justice annulled this judgment by decision of 23 November 2016, remitting the case (T-545/11 RENV) to the General Court for decision,
- the final judgment was delivered on 21 November 2018.
Despite the duration of the procedure, the General Court dismissed the action and confirmed the validity of the refusal of disclosure.

In conclusion, a more balanced wording needs to be ensured, pointing out that in the EU this could happen in complex and exceptional situations, where all remedies are exploited. Moreover, through the development of case-law on the legislation concerned (Regulations 1049/2001 and 1376/2006), cases where a judicial review is made seem to become less frequent, at least for the matters clarified by the EU jurisdictions.

2. Barriers and challenges

On page 18, one reads: *'As such, these cases are indistinguishable from other kinds of environmental cases, although, as already noted, the costs in a number of the studied Parties are at a lower level. On the other hand,* ***the litigation costs in some of the studied Parties can be quite substantial (EU,*** *IE).* ***This can partly be attributed to a mandatory requirement to be represented by a lawyer in court.'***

Some developments on costs are included in page 12 where the author points out that:
court fees seem to be common apart from EU and Sweden;
the Loser Pays Principle is applied in the EU, Germany, Ireland, Switzerland;
the mandatory use representation by a lawyer is a requirement in the EU, Ireland, Portugal and Switzerland with a further comment about the level of costs in one country.

In this section, it is also added: '*Also one respondent from the EU (ClientEarth) claims that the litigation costs on information cases can be significant and unpredictable, partly because the losing party can be ordered to pay the litigation costs of several interveners'.*

It is a general principle that parties who have an interest in a dispute can intervene voluntarily in the action. The court decides whether this intervention is admissible. It could happen that different actors have an interest and are authorised by the court to intervene. Of course, the Loser Pays Principle is applicable according to the results of the judgment. Only if the action is dismissed can the requester be ordered to pay also the costs of the interveners. However, this is a general rule, not typical for an action in information cases.

Therefore, against this background, it is surprising that the EU is mentioned with Ireland with *'quite substantial*' costs.

3. Additional comments on p.19

At page 19 of the report, it is not correct to argue that challenging silence in Court leads to a unpredictable and lengthy procedure; quite the opposite: an annulment action brought against an implicit negative decision can become void afterwards for lack of interest (something that happens procedurally very quickly), and this in case the institution adopts an express negative decision during the judicial proceedings, given that the expiry of the period set out in Article 8(1) and (2) in Regulation 1049/2001 does not have the effect of depriving the institution of the power to adopt a decision (Joined Cases T-355/04 and T-446/04, *Co-Frutta Soc. coop. v Commission*, EU:T:2010:15, paragraph 56). The reason for that is that the interest in the annulment of the contested decision must continue when judicial proceedings are brought and must continue until the final decision. However, this interest is assessed on the basis of the elements for refusal to grant access to documents stemming from this decision (the 'administrative silence'), which then no longer exists. In this case, the Court can then dismiss the application on the basis that no need to adjudicate exists anymore (Case T-250/14, *European Environmental Bureau (EEB) v Commission*, EU:T:2015:274, paragraphs 17-20). Also worthwhile mentioning is that, in case the granted access is only partial, the absence of a need to adjudicate can be limited to this part of the action, whose remaining part will then follow its course (Case T-245/11, *Client Earth aos v ECHA*, EU:T:2015:675, paragraph 121.).