

## **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**

#### **Twelfth meeting**

Geneva, 28 February- 1 March 2019

Item 4 of the provisional agenda

#### **Stocktaking of recent and upcoming developments**

#### **Information paper N2**

### **Overview of the implementation of article 9 of the Aarhus Convention regarding encountered challenges**

Prepared by the secretariat on the basis of the 2017 synthesis report and national implementation reports <sup>1</sup>

This information paper directs participants to selected information from the 2017 Synthesis report on the status of implementation of the Aarhus Convention<sup>2</sup> and national implementation reports submitted by 44 Parties to the Convention<sup>3</sup> in the fifth reporting cycle (2014-2016), concerning challenges encountered in the implementation of article 9 of the Aarhus Convention (question XXIX). It also highlights trends and observations and suggests issues that deserve further attention by the Parties to the Convention as appropriate.

Participants are invited to consult this document in advance of the meeting in order to gain an overview of issues to be discussed under agenda item 4, the challenges encountered by the Parties in implementation, and to discuss good practices and further needs to be addressed under the auspices of the Task Force on Access to Justice and potential input to the preparations of the thematic session of the twenty-fourth meeting of the Working Group of the Parties planned for 2020.

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<sup>1</sup> This document was not formally edited.

<sup>2</sup> See Document ECE/MP.PP/2017/6 available in English, French and Russian from [http://www.unece.org/env/pp/aarhus/mop6\\_docs.html/#/](http://www.unece.org/env/pp/aarhus/mop6_docs.html#/) under Category II heading.

<sup>3</sup> Available from <http://apps.unece.org/ehlm/pp/NIR/>. Information from 2017 national implementation reports provided in accordance with their availability to the secretariat by 1 February 2019.

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## I. Excerpts from the 2017 Synthesis Report on the status of implementation of the Convention

176. Reporting Parties from the European Union region, Iceland, Norway, and Switzerland mentioned different obstacles in implementing the access to justice provisions of the Convention: length of court and administrative proceedings; unwillingness of courts to grant injunctive relief; absence or impossibility for environmental NGOs to apply and receive free legal aid, among others. Financial barriers for NGOs and the public are reported by the majority of Parties, namely high costs of experts and lawyers, high court fees and obligation and risk of compensation of the opposite party costs.

177. Standing problems for the public also still persist in Croatia, Iceland, Germany and Slovenia. For instance, Slovenian NGOs and the Ombudsman claimed that there were no effective remedies in the sphere of spatial planning decision-making (including comprehensive environmental impact assessment). The proposal for a new Spatial Management Act addressed these problems of standing of environmental NGOs. Ireland reported that legislation on standing of NGOs in integrated pollution prevention and control and environmental impact assessment proceedings improved recently and broad standing rules exist.

178. In Belgium and Norway, enforcing decisions of authorities performing administrative reviews of decisions or actions relating to the environment, such as the ombudsman or appeal commissions, is reported as an issue. Poland mentioned financial barriers posed by the obligation of the applicant to be represented by an attorney or a legal adviser when submitting the cassation appeal to the Supreme Administrative Court.

179. A few Parties from the Eastern Europe, the Caucasus and Central Asia subregion mentioned that judges are vested with powers to exempt claimants from court fees, but it is unclear how this discretion would be exercised. Lack of clarity of legal norms was reported as an obstacle in determining which jurisdiction should be utilized to consider the case, especially when NGOs are the plaintiffs. The possibility of a court review of the administrative decisions by the President and Government of Kyrgyzstan was not considered sufficient. Belarus stated that injunctions are never granted by courts in environmental cases. Tajikistan mentioned other obstacles, such as low public awareness of their rights, court competence issues, fear of courts and high court fees.

180. As for the South-Eastern Europe subregion, Serbia and Albania mentioned the issue of costs, which is regarded as an obstacle for NGOs and the public in access to justice. Montenegro outlined the difficulties of enforcing criminal penalties in cases related to environmental crimes.

*(See paragraphs 176 to 179 of document ECE/MP.PP/2017/6).*

## II. Overview of 2017 National Implementation Reports

### Albania

Costs is one of the concerns on matters related to environment:

- To initiate a judicial process;
- For expertise (mainly in the case of EIA and Environmental Permit, when it is necessary a detailed expertise to object it);
- For legal representative in the process (if used/needed);

Also one of the main problematic, especially noticed during different sessions on environmental matters, is lack of environmental legal framework knowledge from the judiciary side in its entirety, both for the prosecution party and judging side.

## Austria

103. On the first implementation report certain members of the general public as well as a political party represented in the Austrian Parliament have criticized the existing implementation of Article 9, Paragraph 3, for being not comprehensive enough. Public consultation on the updates of the implementation report has shown similar results. For the present update, NGOs as well as the Federal Chamber of Labour articulated critique on the slow pace of development on full implementation of Art. 9 (3). In an environmental liability case, an NGO complained that they had to bear the costs for an officially appointed expert because they were applicant in the said procedure.

## Azerbaijan

No obstacles were encountered in the implementation of article 9

## Belarus

143. Instances of claims being filed before the courts in regard to protection of the right to a favourable environment, access to information and the right to participate in the environmental decision-making process have become more frequent in Belarus.

144. Citizens often do not use appeals procedures because they do not have information on possible access to justice in environmental matters. The Aarhus Centre does provide advice to citizens, but this problem requires at the very least a network of regional Aarhus Centres to be set up. In the past, there was a significant problem determining jurisdiction over a case – in other words, whether it should be heard by the ordinary courts or by a special (economic) court. Review on the merits of a dispute connected with the Aarhus Convention is subject to the jurisdiction of the ordinary courts; however, when the applicant was an NGO (and almost all NGOs in Belarus are legal entities), the ordinary courts refused to instigate proceedings and instead directed the parties to the economic court, without regard to the non-economic essence and purpose of the dispute. This approach can lead to protracted proceedings and higher fees (because fees are higher in the economic courts) and does not accord with the principles of procedural legislation, since relations regulated by the Aarhus Convention fall within the remit of public interests, not commercial or economic activities. The public association ‘Ecohome’ applied to the Supreme Court in 2015 for this legal uncertainty to be resolved. However, a Resolution of the Presidium of the Supreme Court of the Republic of Belarus of 30 November 2016 on certain issues in Determining Jurisdiction over Civil and Economic Cases within the System of Ordinary Courts has not entirely solved the problem: procedural legislation on jurisdiction over matters where the claimant/applicant is an NGO and the defendant is another type of organization requires further improvement. Another obstacle to access to justice is that those who put the law into effect – not only judges but also lawyers and members of the public – are not sufficiently proficient in reviewing this type of case. Therefore it is essential to improve the awareness and capabilities of judges, Public Prosecution Service staff, lawyers and ordinary citizens in relation to environmental protection legislation and the provisions of the Aarhus Convention (through continuing professional development, training materials, round tables, seminars, etc.). There is no system of administrative courts as such. The courts have practically never adopted interim remedies – for example, preventing activities being put into effect before final review of the case.

## Belgium

In a number of annual reports the appeal body on open government (and reuse of public information) identified the following obstacles:

- not all applications for public access to documents are registered, so statistical data are incomplete; an attempt to remedy this is being undertaken by making a model register available online; however, during the past years the appeal body noticed that frequent use is made of the provided model register.
- a lot of appeals are submitted for the stand still of the authority because the maximum term in which an application must be answered, is often not respected. The term is a formal time-limit that is only sanctioned by giving the applicant the possibility to lodge an administrative appeal;

- in many cases, the decisions do not mention the possibilities of appeal, although it is obligatory. Not complying to this obligation will be penalized, because the deadline for an administrative appeal is extended with 3 months.

### Bosnia and Herzegovina

In most cases, the relevant institutions have not issued the guidelines specified by Article 20 of FoIA. NGO sector regards that the present procedure is too complex and complicated, and find the costs of retaining lawyers to work on these cases too high to afford, which is evident in the replies submitted by the NGOs showing that very few of them use legal services (by lawyers not necessarily specialized for this area of expertise). Currently, there are no judges or prosecutors in BiH specialised in the environmental law. However, in the past two years considerable efforts have been invested in their training, with further activities planned for the future.

BHAS notes that statistics on environmental law has not yet been initiated as a statistical activity. Also, one has to take into account that the BHAS Department of Environment, Energy and Regional Statistics started working in 2008 and that it is at a stage of intense development and efforts to fulfil requirements of international environmental statistics. In a very short period of time, this Department has established and developed key environmental statistics according to international and EU standards, and it is still intensely working towards the development of the existing statistics, as well as on the establishment of new environmental statistics. There is a problem of a lack of human resources at Entity-level statistical institutions (RSSI, FSI), who have major difficulties in keeping abreast with activities of BiH Agency for Statistics Department of Environment, Energy and Regional Statistics.

### Bulgaria

1. Necessity to increase the capacity of legal professionals on issues related to environmental law.
2. Need of serious research and publications on environmental law.
3. Still insufficient case law - relatively few judicial decisions and rulings on issues related to the environment.

### Croatia

CSOs deem that the EPA, which sets the principle of access to justice, is not aligned with the provisions under the Convention, EU legislation (Directive 2003/35/EC) and the Croatian Constitution. Namely, Article 19, paragraph 2 of the EPA contains the condition that the right to contest the procedural and substantive legality of decisions, acts or oversights of public authorities before the competent body and/or competent court exists only if it can be proven that rights have been permanently violated. There are no similar examples in Croatian legislation, it suffices that the claimant deems his/her right to be violated, and the violation does not have to be permanent. Thus, the right of access to courts is disproportionately restricted, and therefore it is necessary to align the principle of access to justice with the AAD in order to ensure the consistency of the Croatian legal system.

The rules for filing complaints are too strict since they stipulate participation in the procedures (Article 167, paragraph 1 of the EPA). It is proposed that paragraph 1 of Article 168 of the EPA is amended in such a way that the requirement of participation in the procedures regulated under the EPA as public concerned is removed for other persons as well. Such requirement is not in accordance with the AAD pursuant to which for filing a complaint it is enough that the claimant deems that his/her rights or legal interests were breached by a specific act. The Act does not stipulate any other additional requirements for the claimant to have had to participate in the administrative procedure, only that he/she used the right to appeal in the administrative procedure if appeal was permitted.

In Croatia the right to free legal aid can be exercised only by natural persons and thus CSOs are denied it, which is in contravention to the Aarhus Convention (Art. 9, para. 4 and 5, which require fair and equitable legal remedies and the duty to consider establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice). According to the Act on Free Legal Aid, legal persons cannot be users of free legal aid, and therefore also CSOs. Organisations engaged in environmental protection should be able to participate equally in court and other proceedings and the legislator should recognise that.

Article 172 of the EPA prescribes that court proceedings on all legal actions instigated in the field of environmental protection are deemed urgent, however the practice has shown that court proceedings initiated by CSOs can last for 2 or more years. Also, the delaying effects of complaints are very rarely applied.

Another obstacle in the implementation of the Aarhus Convention is that the parties in the procedure for issuing a location permit are very restricted by the Physical Planning Act and include only the applicant, the owner of the property for which the location permit is being issued and a holder of other real rights on that property, an owner or holder of other real rights on the property which directly borders the property for which the location permit is being issued. Consequently, the CSOs do not have the right to participate in the procedure for issuing a location permit. Together with the inability to contest the alignment of the project with the spatial planning documents one of the important elements of control over negative environmental impacts in the administrative procedure of assessing the impact of the project on the environment remains out of reach of the public and interested public.

### Cyprus

*Has not provided information*

### Czechia

*Has not provided information*

### Denmark

*Has not provided information*

### Estonia

NGOs have pointed out the following problems in the implementation of article 9:

- A possible ruling of the court regarding payment of the legal costs of the other party or a third party involved in the proceeding may prove to be an obstacle to filing the claim;
- It is suggested that establishment of specific provisions in the proceedings of environmental cases regarding coverage of legal costs should be considered;
- Complainants need legal counselling, because in complicated environmental matters, it is difficult without legal counselling to have recourse to court and participate equally in court proceedings with other parties to proceeding, but the relevant mechanisms for help have not been determined.

### European Union

Pending compliance cases against the EU in the ambit of Article 9 are published on the UNECE website.

As regards the implementation of Article 9(2) and (4) from the perspective of transposition and implementation of EU law, the Commission examined Member States' systems, in particular on standing, costs and scope of review. As a result, the Commission brought infringement actions, based on Article 258 TFEU, against some Member States. Assessment of implementation of Article 9(3) by Member States is ongoing.

### Finland

*Has not provided information*

### France

163. - According to some organizations, access to justice remains expensive for certain people who cannot benefit from legal aid for court proceedings, notably in cases involving appeal on a point of law before the Council of State.

The organizations consulted expressed dissatisfaction at the large number of decisions taken by prosecuting authorities not to pursue cases involving minor environmental offences because they have insufficient human resources.

Finally, some organizations take the view that recent reforms have reduced opportunities to seek remedies in matters concerning urban planning and commercial development consents.

## Georgia

As of today cases of violation of deadlines for consideration of claims, filed to the court in regard to violation of the right of access to environmental information have not been registered.

According to the article 7 of the Organic law of Georgia on Common Courts (2009), a judge is independent in the process of exercising of his/her duties on assessing factual circumstances and making decisions, and he/she obeys only the Constitution of Georgia, universally acknowledged principles and norms of international law, according to other laws and his/her preconceived opinion. Consequently, the Civil Procedural Code of Georgia and Administrative Procedural Code of Georgia define the circle of persons, who shall be exempted from the obligation of payment of costs of court proceedings, as well as deferral of such costs or reduction of their amount. Consequently, a judge defines the amount of charges on case by case basis according to the legislation.

## Germany

The amendment to German law as a result of Decision V/9h of the 5<sup>th</sup> Meeting of the Parties to the Aarhus Convention, set out above, leads to substantial changes in the German system of judicial remedy. The amendment has thus generated some debate in Germany, both in expert circles and among many stakeholders. During the hearing on the amendment to the UmwRG, many industry federations voiced their fear that the significant expansion of the scope of the Act and the abolishment of provisions precluding challenges in court could cause procedural delays and would thus impair planning certainty and legal certainty for infrastructure projects. Furthermore, the industry federations fear that the abolishment of provisions precluding challenges in court may lead to a reduction in the participation of environmental associations in administrative procedures and that this may cause inquiries into facts being shifted increasingly to court proceedings. The environmental associations do not share these fears; on the contrary, they have demanded even more far-reaching options to take legal action.

## Greece

Currently there is no specific committee for review of refusals of access to environmental information. Initially, Greek law provided for review of these decisions by a specific committee- the Special Committee of article 5(13) of law 1943/1991. Later this committee was abolished (article 8(2) of law 2266/1994) reinstated again (article 2(2) of law 2690/1999) and abolished yet again in 2013 (article 25(5) of the law 210/2013). Its responsibilities were not transferred to an existing body. However, it is still possible, under the general provision of the Greek Code of Administrative Procedure, to request reconsideration either by the body that refuses access (remedy's request) or by its superior body but these forms of review undertaken by administrative hierarchy and not an independent body.

## Hungary

Problems reported by environmental- and nature protection civilian organizations:

Suspensions are very rare in practice. In most cases courts overrate economic losses arising from the lack of implementation and underrate environmental damages arising from the implementation. This has the adverse effect, that a legal debate about the permission of an activity that has already been partially implemented is still on-going.

The most common environmental use arises from construction. Earlier, in permission processes the environmental authority was present as a professional authority. However, today, the green authority only submits a professional opinion that creates efficiency and participation problems. A review of the decision of legal unity is required.

In practice, the use of *actio popularis* initiated pursuant to Section 9, Paragraph (3) is hindered by many factors. Such as high procedural fees. The review of the legal institution is required along with the strengthening of its implementation.

Many professional authority fees have administrative service fees on first- and second instance as well, that must be paid in full in the case of an appeal, so the 1% rule does not apply here.

In recent time, the court practice shifted and now, in administrative proceedings authority opinions formulated as a decree may only be refuted with a professional opinion of a judicial expert. This places significant and unacceptable financial burdens on civil organizations.

The longevity of proceedings is a well-known fact. This hinders the effectiveness of the right to legal remedy as environmental damage is realized until the end of the proceedings.

In the case of winning the proceeding, the transfer of procedural fees is delayed in many cases.

## Iceland

Several comments were received during the writing of Iceland's 1st implementation report regarding the implementation of article 9. NGOs pointed out that the backlog of the Environment and Natural Resources Board of Appeal was too long for the board to serve its function. The Confederation of Icelandic Employers also complained over the backlog and pointed out that the legal uncertainty when a ruling is awaited was not in the interest of the developers.

The Ministry for the Environment and Natural Resources would like to point out that the Environmental and Natural Resources Board of Appeal has received more appeals than was foreseen when the board was established. This has led to a backlog of cases which means that processing of cases often goes beyond the deadline given by law. As pointed out in chapter XXVII (d) the Government is working on strengthening the work of the Board of Appeal.

Environmental NGOs point out that the cases that can be appealed to the Environment and Natural Resources Board of Appeal only cover decisions and therefore do not cover omissions as is required by the Convention. Regarding this point the Ministry would like to mention that omissions can be appealed to the Board of Appeal in connection with an appeal of the development consent in question. In addition, and following an opinion by the EFTA Surveillance Authority on the same subject, work is now on-going so that challenging omissions can also be a subject of an independent challenge to the same extent as decisions. Because of this Act No. 130/2011 on the Environment and Natural Resources Board of Appeal and Act No. 106/2000 on EIA will have to be amended. This work is already underway and the amendment will be reviewed by the working group mentioned in chapter XV, point (a).

Environmental NGOs are of the opinion that the implementation of the Aarhus Convention is not functioning well enough as they are not granted standing in all environmental cases. The NGOs are of the opinion that they should, as a main rule, be given standing in all environmental cases and that the current legislation defines too narrowly which cases NGOs can have standing in.

Comments were made regarding a particular case where an environmental NGO tried to get an injunction on road construction which was expected to go through a previously unspoiled lava field in Iceland. It was stated in the comments that the NGO was denied a standing in the case as it was not considered to have legal interests. In the comments received it was stated that this constituted an insufficient implementation of Article 9, paragraph 4.

As explained above the third pillar of the Aarhus Convention was legally implemented in Iceland by Act No. 130/2011 establishing the Environmental and Natural Resources Board of Appeal. The Act states that environmental NGOs shall be considered to always have legal interests, that is the right to stand, in cases regarding

- a. The National Planning Authority's decisions on whether projects shall be subject to an environmental impact assessment, on whether interrelated projects shall be subject to a joint environmental impact assessment and on reviewing of the assessment report according to Act No. 106/2000 on Environmental Impact Assessment.

- b. Decisions on permits for projects that are subject to environmental impact assessment.
- c. Decisions on permits according to Act No. 18/1996 on genetically modified organisms.

It is the opinion of the Ministry for the Environment and Natural Resources that this satisfies the requirements of Article 9 of the Aarhus Convention. This understanding has been confirmed by The Supreme Court of Iceland in rulings in cases No. 119/2014 and 677/2013 where it was stated that the Aarhus Convention is correctly implemented in Iceland since the Government has chosen to implement an administrative procedure to ensure the public access to justice in environmental matters. The Ministry points in particular to the fact that Article 9 of the Convention must be read in conformity with Article 6, which refers to the activities that are covered by Annex I (which are the activities mentioned in Directive 2011/92/EU and in Act No. 106/2000).

The Ministry for the Environment and Natural Resource would like to mention a recent case where the Aarhus Convention was widely discussed. The Icelandic Grid Operator, Landsnet, has been working on preparing the installation of transmission lines from the power plant Krafla to the industrial site in Bakki, Húsavík. Environmental NGOs appealed the development consents issued by the three municipalities, which the case concerned, to the Environment and Natural Resources Board of Appeal in the summer of 2016. The Board of Appeal gave interim verdicts in June and August whereby the installations were stopped in part pending the final verdict of the Board. In September 2016, the Minister of Industry and Commerce put forward a legislative proposal to the Parliament allowing Landsnet to install and run transmission lines from Krafla to Bakki in Húsavík. During the parliamentary procedures several objections and comments were made stating that the bill was not in conformity with Iceland's constitution and various international agreements, among them the Aarhus Convention. The Board of Appeal expedited its work on the appeals made by the environmental NGOs and in its decision issued in October one of the development consents in question was repealed. After that the Minister of Industry and Commerce retracted its bill in 2016. Following final verdicts of the Board of Appeal the municipalities revised three out of four development consents according to the recommendation in the Board of Appeal's verdicts. Later, new development consents were issued on the installation of the transmission lines in the area. Environmental NGOs have appealed those decisions to the Board of Appeal. To conclude the Ministry would like to point out that the bill in question was not passed by the Parliament and therefore did not have any legal effect on the appealed cases before the Board of Appeal and its ruling in these cases.

### Ireland

The body of case law examining the above laws has continued to grow since the submission of the previous NIR in 2013. This has increased the understanding of the application of the cost rules.

The issue of standing for eNGOs was raised in the public consultation. Ireland introduced legislation to provide explicit recognition for environmental NGOs in certain litigations relating to the IPPC and EIA Directives. The statutory instrument in question, S.I. No 352 of 2014, was signed into law on 23rd July 2014. This legislation was enacted to fulfil the requirements of the EIA and IPPC Directives and by use of powers under these Directives. It does not therefore cover other environmental litigation. However, DCCAE is not aware of any case in which standing for eNGOs has been denied. Ireland has broad standing rules. This is set out in response to questions XXVIII (b) and (c).

### Italy

In Italy, access to justice is granted according to the criteria indicated by legislators and jurisprudence. As for actions/omissions by private entities, violating environmental legislation, the inspection mechanism is complex since it requires the involvement of different public Authorities.

### Kazakhstan

The obstacles to the implementation of any of the paragraphs of article 9 of the Aarhus Convention are not detected.

It should be noted that according to paragraph 1 of Article 9 of the Aarhus Convention, consideration shall be carried out by a court or other "independent and impartial body established by law." The concept of "an independent and impartial body" is well-established under the Convention for the Protection of Human Rights

and Fundamental Freedoms. "Independent and impartial" bodies do not necessarily have to be the courts, but they have to perform quasi-judicial functions, have to ensure required process, be unreachable for the influence of authority and not to be associated with any private entity.

In Kazakhstan, all disputes relating to environmental protection are considered mainly in the courts. However, this does not exclude out-of-court dispute settlement, as stipulated in Article 323 of the Environmental Code. For example, according to the rules established by Article 126 of this Code, to appeal to the court against the decisions, actions (inaction) of a person authorized to carry out environmental monitoring, it is necessary to pre-appeal to the official or to a higher state body.

In the end of November 2016, the Supreme Court of the Republic of Kazakhstan plans to adopt normative regulations on some issues on courts' application of the ecological legislation of the Republic of Kazakhstan for civil cases instead of the obsolete normative regulation of the Supreme Court of the Republic of Kazakhstan dated December 22, 2000 № 16 "On the practical application of the legislation on environmental protection by the courts", which was modified only once, on 25 June, 2010. Since then environmental legislation has abruptly changed, many features of the previous normative regulation have lagged behind and therefore interfere with judges in the administration of justice.

In a discussed project of the normative regulation it was explained how the courts apply the norms of environmental legislation related to implementation and protection of the rights of citizens and public organizations for information concerning environment, for access to justice with respect to the requirements of the Aarhus Convention, the restriction, suspension and (or) the termination of business and other activities that are harmful to the environment, life and health of the population.

## Kyrgyzstan

292. There may be delays in hearing cases involving contraventions of environmental law. The Code of Civil Procedure provides for the possibility of exemption from court fees for people who are defending public interests, but the courts do not always recognize a contravention of environmental law as a matter of public interest.

293. It is still difficult to revoke administrative decisions taken by the Government and the President. The introduction of a new judicial institution, the interdistrict court, has led to some difficulties in determining jurisdiction in environmental cases.

294. Under the Code of Civil Procedure, the district court (or city district court or municipal court, as appropriate) hears all civil cases except those under the jurisdiction of a garrison military tribunal or an interdistrict court. If it is alleged that a decision has been taken without authority or that a decision impairs environmental rights or freedoms, the interdistrict court has jurisdiction. However, when damages are claimed for an environmental offence, the case is heard as a civil case in a district court. When a decision that leads to environmental harm is challenged, the case comes under the jurisdiction of the interdistrict court, even if damages are also claimed.

295. The absence of guidance on how to apply the rules of civil procedure makes it difficult to choose the right court and leads to delays in restoring impaired rights.

296. Furthermore, not only are court fees for the interdistrict courts significantly higher, but the schedule of fees approved by the Government does not list every type of case, which further complicates the process of filing a claim. For example, there is no information on the fee to be charged for a claim seeking the invalidation of regulations adopted by public and local authorities. Moreover, courts are not in the habit of applying the provisions of the Aarhus Convention.

297. The abolition of the Constitutional Court as a separate entity within the court system in favour of the creation of a Constitutional Chamber of the Supreme Court casts doubt on the latter's independence and objectivity in making decisions. A conflict of interest may arise in cases where the Chamber has to determine the constitutionality of a law or regulation that has already formed the basis of a Supreme Court judgment.

298. The introduction of provisions into the Code of Civil Procedure to prevent any appeal against dismissal of an application to disqualify a judge creates a situation in which a judge who is not trusted by one of the parties may make wrongful decisions.

## Latvia

One of the obstacles to the timely hearing of cases is that of overloaded courts. If the process is relatively fast before the public authority (depending on the nature of case, two weeks to one month), the court process can be considerably longer. Various projects are being developed and implemented to increase capacity of the courts. For example, on 4 July 2013 the law “Amendments to the Law “On Judicial Power”” was promulgated, providing for management of deadlines for case adjudications. This responsibility rests on the Chief Judge of the court. Amendments to the Law also provide for broader responsibility of the Chief Judges of district (city) courts and regional courts by requiring, inter alia, to ensure transparency of the court work, to check the observance of procedural terms in cases handled by judges, to issue orders to judges relating to organization of their work. The Chief Judge may instruct a judge to set an appropriate term for making a procedural activity, considering circumstances of the case, as well as may redistribute cases among judges in accordance with the division of cases plan.

Sometimes a private person and an institution have different views on whether a particular decision can be challenged. Namely, whether the relevant decision is only an interim decision before adoption of the final decision and does not create direct legal consequences for the addressee, or it is an administrative act that might be challenged.

## Lithuania

208. NEW! Representatives of the public have noted that NGOs have no right to contest the lawfulness of provisions of a normative legal act before a court. NGOs note that there is a lack of clarity about which legal acts may be contested before a court and which ones may not.

## Luxembourg

*Has not provided information*

## Malta

Although appeal fees were capped at 3,500 Euros in 2016, ENGOs reported that appeal fees with respect to development permissions are too expensive.

## Montenegro

In the implementation of efficient penal policy in the field of environment, Montenegro shares problems faced by countries in the region, and similar problems occur, in a lower extent, in a lot less developed countries. The reasons for having only a few legally binding decisions in the field of environment are mostly due to the fact that certain norms pertaining to these criminal acts have not been precisely defined, and therefore the following norms are interpreted differently:

- “pollution to a large extent and in a broad area”;
- “hazard for the life and health of people”;
- “extensive destruction of plant and animal life”.

In this sense, the provisions in this area were harmonized with the European Union - 2008/99/EC Directive on the protection of the environment through criminal law by Amendments to the Criminal Code of 2013. The most important novelties include the introduction of new offenses (environmental pollution by waste and ozone depletion - Article 303a and 303b), and for the purpose of this study it is particularly important that the legal standard "on a large scale or a more extensive, i.e. wider area" is maintained only for two offenses (Article 307 and 308), while the corresponding norms are now clearer and more precise (using the legal standard, "substantial damage", and a number of standards were significantly amended). Also, qualified forms of the most serious crimes were threatened by long-term legal penalties. An illustrative example is the new Article 303 which now in paragraph 1 regulates in a different manner the basic form of criminal act of environmental pollution specifying

that any person shall be punished with imprisonment up to three years, "who violates the regulations on the protection, preservation and enhancement of the environment by dropping, placing or disposing of certain amount of substances or ionizing radiation in air, water or land which endangers the life, body or health of human beings, or causes the risk of occurrence of significant damage in relation to the quality of air, water or soil, or animal or plant life." The qualified forms of the offense are also prescribed, if serious bodily injury or serious damage is caused to the health of one or more persons, and if the death of one or more persons is caused, which is threatened with imprisonment for a term of two to ten, or three to twelve years.

It is expected that the standardization of offenses under Chapter XXV in a way that is not abstract, and the precise specification of the nature of criminal offenses and significantly stricter sanctions will contribute to the growing number of criminal charges, as well as a greater number of convictions for these crimes.

The hope remains that, in the long run, these amendments to the criminal legislation will be in addition reflected on the reduction of environmental crime using the principle of prevention.

Having this in mind, a several recommendations may be given, which would contribute to higher efficiency in minor criminal and criminal proceedings for environmental protection in relation to:

- closer cooperation between competent inspection authorities, State Prosecution, Police Directorate and the court, based on a signed Memorandum of Cooperation;
- organizing of seminars and round tables to provide training to both inspection authorities and prosecutors and judiciary in the field of environment and for their better awareness of material regulations in this field, with inclusion of experts from the region;
- preventive actions of inspection authorities and raising awareness of citizens about importance of environmental protection in order to prevent criminal offences and minor criminal offences;
- developing manuals on legal protection of the environment, which would contain comparative legal and court practice as well;
- establishing databases on criminal offences in the field of environmental protection.

## Netherlands

In the Netherlands there is a tendency to make more use of general rules than of permits. Consequently, de facto less appealable decisions are taken. However, general rules generally concern less environmentally harmful activities for which a level playing field can be promoted and, compared with the situation of a license, less burden for companies and public authorities are caused and enforcement and monitoring of compliance with environmental regulations are simplified.

An environmental organization indicates that an accumulation of measures makes access to justice more difficult, and that a trend in the Netherlands shows that requirements for appeal are still further increased. Furthermore, it is noticed that the involvement of experts and lawyers is complicated because of the height of the costs.

Comment: These measures are to a large extent related to legislation that has been drawn up with a view to a more effective administrative procedural law. The Netherlands continues to fulfill the obligations arising from the Aarhus Convention.

Another remark is that the introduction of the relativity requirement constitutes a legal restriction for access to justice .

Comment: The relativity requirement implies that the administrative judge can only annul a decision if the rule on which the plaintiff relies, seeks to protect the plaintiff's interests. This rule has been in the GALA with the Adjustment of Administrative Procedure Law Act (Dutch: Wet aanpassing bestuursprocesrecht). This change can indeed be regarded as a restriction in relation to the previously existing situation, but there is no threshold for citizens to appeal. However, it may be that the court does not annul the contested decision (part), because he believes that the standard invoked by the plaintiff does not aim to protect the interest which he claims to have been affected.

Moreover, the introduction of the relativity requirement contributes to the streamlining of decision-making processes and is consistent with the Convention.

A civil society organization indicates that the Crisis and Recovery Act has limited the possibilities of appeal to the courts, in some cases significantly.

Comment: The Crisis and Recovery Act has introduced a number of changes; however, the system that is in place in the Netherlands provides indeed for adequate access to justice in accordance with the Aarhus Convention. For example, the Administrative Jurisdiction Division of the Council of State confirms in its statements (e.g. ABRvS 17 November 2010, no. 201004771/1 / M2) that it can not be held that Article 1.6, second paragraph and Article 1.6a of the Crisis and Recovery Act should not apply because of conflict with Article 9, paragraphs 2 and 3 of the Aarhus Convention.

### North Macedonia

The need of capacity building for the competent authorities for the implementation of the right to access to justice especially the authorities from the executive and judicial governance. A separate decision is necessary exclusively for the third pillar in order to be able to perform a regular implementation of the same.

### Norway

Three of the comments received from organisations within media, environment and outdoor recreation to the draft implementation report point out that access to justice is hampered by legal expenses and lack of binding effect of the opinions of the Parliamentary Ombudsman. They claim that this is contrary to the obligations of the Convention. One of the comments points out that most cases within the environmental field are finally decided within the organs of public administration, claiming that the administrative appeals system is not sufficiently independent. It is pointed out that only 0,5 % of the cases brought before the courts during the period between 1996-2005 concerned environmental issues. It is suggested that an expert committee is established to consider the introduction and organisation of a nature and environment appeals board as broadly described in the comment, or other similar solutions. One of the other comments argues that the Regulations on environmental information of 2003 nr. 1572 § 10 should be changed to avoid that legal expenses hampers justice. It is proposed to make the Appeals Board for environmental information the legal counterpart in cases where an undertaking contests a decision finding for the claimant's right of access to information. It is argued that in some cases where the Board have found in favour of those requesting information, the undertaking has refused to provide access and the claimant has not been able to enforce his claim due to legal expenses.

A similar proposal to consider a nature and environment appeals board was introduced in connection with consideration by the parliament of the whitepaper 14 (2015-2016) on a Norwegian action plan for nature diversity, but did not receive sufficient support.

The parliament received a report from the Ombudsman recently concerning a case where a ministry did not follow its opinion (Dokument 4:2 (2015-2016)).

### Poland

196. Non-governmental organizations point out that Polish regulations lack temporary measures in proceedings requiring public participation. Because of that, in their opinion, access to justice is in practice often illusory. It results from the fact that if a non-governmental organization is not admitted to participate in the proceedings, even if it appeals to such negative decision, the concerned proceeding will continue and can be finished with a final decision. Even if a non-governmental organization receives favourable sentence of administrative court on the participation in the proceeding and then challenges the decision in the primary proceeding and administrative court finds in its favour, then the court will be able to issue sentence in which decision with the violation of the law will be stated. In the opinion of non-governmental organizations this situation makes the access to justice ineffective.

197. Non-governmental organizations pay attention to limited number of parties in proceedings for issuing the so-called integrated permits. Non-governmental organizations acknowledge such permits as decisions having significant influence on the environment and claim that they should be approved to participate in such proceedings.

198. Non-governmental organizations claim that the Polish law limits the possibility to challenge the plans and programs concerning environmental protection. It mainly originates from the need of the complainant to demonstrate that such plans infringe their legal interest. Environmental organizations usually are not willing to demonstrate that. What is more, the provisions of the Building Law stipulate that in the case of a complaint submitted to the administrative court against the decision on the construction permit, the suspension of such decision's execution, as requested by the complainant, is conditional upon the applicant's submitting a security deposit for the investor's claims relating to the suspension of the decision's execution. This constitutes, in the opinion of non-governmental organizations, an important restriction in access to justice.

198'. According to non-governmental organizations, sometimes the costs of court-administrative proceeding are an obstacle in access to the system of justice. In their opinion costs of appeal proceedings concerning cases related to the Building Law or spatial planning (PLN 500) are too high. Another limitation for them is also the attorney and counsellor obligation when submitting the cassation appeal to the Supreme Administrative Court. They claim that numerous non-governmental organizations cannot afford the remuneration for the counsellor or an attorney, and only a few have relevant specialists. At the same time, the courts rarely grant financial assistance to them, though there is such a legal possibility.

### Portugal

Nothing to report on this item. Portugal identifies itself with the objectives of the Aarhus Convention. The Portuguese Constitution, which has enshrined this right since 1976, pioneered the treatment of the environment as a fundamental right, and even inspired other framework laws in European and Portuguese-speaking countries. Therefore, Portugal has sought to implement legislation that supplements and fosters access to justice in environmental matters and practices that make this effective.

### Romania

Insufficient legally trained personnel in the environmental authorities.

### Serbia

There are differences in the understanding of the essence of judicial procedures between the general public and members of the legal profession, which results in complaints about the functioning of courts. Moreover, there is a false perception that the Ministry of Justice is responsible for the state of affairs in all the bodies that make up the legal system. Many people do not understand fully the functioning of the judiciary in a democratic society. This leads to a situation where citizens do not use courts as much as they should to achieve legal protection in the cases of violation of fundamental rights and freedoms.

- The Ministry of Justice has developed the National Judicial Reform Strategy which revealed that access to case records is restricted to litigants, counsel, and a small number of other interested individuals. As part of the National Judicial Reform Strategy, the Ministry of Justice began implementing the project of introducing new business software, i.e. automated case management programme for courts in Serbia. The project has been carried out in commercial courts and in all courts throughout Serbia it was implemented so that all 60 basic and high courts in Serbia are connected in software system for the automatic management of data. After the introduction of the system, citizens will have free access to case data, while preserving litigant privacy. Thus, open access will result in an objective perspective of courts, judges and court proceedings. The possibility of misinforming the public will be reduced and public understanding and trust in the judiciary will be improved.

- Recognizing that the strength and vitality of the judiciary depend on citizens who understand and support its role, the judicial system aims to promote equal access to judiciary for all, including disadvantaged citizens, by passing a new law that would establish a comprehensive and efficient system of free legal assistance through legal aid programmes, accessible to all requiring such assistance. The new law will allow setting up a comprehensive system of legal assistance that will, in turn, provide defendants in civil and criminal cases with more efficient assistance and enable the creation of standardized criteria for granting legal aid. - Associations in RS believe there is a clear lack of trained staff in RS in the field of access to justice in environmental issues.

- Associations in RS states that the costs of the proceedings for access to justice in environmental matters are high and a deterrent to organisations and individuals in trying to protect their rights.

- Associations Young Researchers of Serbia is with support of MAEP held the Conference “Aarhus Mirror”, in Belgrade 2016. The Conference was attended by the representatives of the competent state and provincial authorities, local self-governments, CSOs, commercial sector, academic community. The objective of the national conference was to give incentive to a constructive dialogue on all three pillars of the Aarhus Convention in order to identify the obstacles in the implementation of the Aarhus Convention and to propose measures for overcoming those obstacles. Some of the outcomes of the Conference are as follows:

-EU accession implies harmonisation of numerous domestic laws with the EU acquis. This is frequently used as an excuse for unreasonably high number of regulations whereof adoption is subject to the so called urgent procedure. This means lack of public participation in the preparation process, which, in part, affects the quality of the regulation, difficulties in thereof proper implementation, frequent amendments etc;

-Initiate, in cooperation with the Ministry of Justice, the collaboration of organisations of judges, prosecutors and civil society organisations, in order to ensure attendance, at meetings covering the issue of Aarhus Convention, of the representatives of court and prosecutor’s office, which would, through experience sharing, significantly improve the work of the civil sector in the field of access to justice in environmental matters.

- In the judiciary field, initiate forming, within some future judiciary reorganisation, of a special judiciary department to deal with environmental protection.

-Amend penal policy and make it stricter in respect of infringement of rights in the field of environmental protection.

## Slovakia

Judges do not specialize in environmental cases; at regional courts and the Supreme Court of the Slovak Republic there are administrative boards the competence of which includes such cases, too.

Lawyer offices do not specialize in cases of environmental law violations. There are just few lawyers who would address such cases (also with regard to the fact that those are not lucrative cases). Moreover, the client has to pay to the lawyer remuneration in an amount that is usually disincentive to the client.

New Act No. 162/2015 Coll. The Administrative Procedure Code has been effective since 1 July 2016, which can be considered a very short period to evaluate it in any way and it is not known yet, which changes it will bring to practice.

## Slovenia

The Provisions of Articles 9.2. and 9.3. of the Convention raise numerous questions concerning a question of systemically suitable implementation of the Convention requirements in the established judicial control system.

Plan B and individuals warn that most problems arise with regard to the implementation of Article 9.3. of the Convention, because the complex and restrictive interpretation of a legal interest which institutes a prerequisite for a proceeding (legal remedy) is interpreted restrictively They support their claims with examples when a direct access to justice was denied on the bases of a lack of a legal interest.

Individuals and environmental NGO’s especially warn of the difficulty of accessing the Constitutional Court, which reviews the constitutionality and legality of general legal acts (including spatial planning acts). With regard to the interpretation of the legal interest, which is prescribed for an instituting of a procedure for the review of the constitutionality and legality of regulations, , the Constitutional Court expressed its view already in 2007 . The view is that one has no legal interest if a regulation does not affect the status of the plaintiff directly – in such cases legal

interest can be shown only when all other remedies have been utilised (Decision U-I-276/07). The non-constitutionality of a regulation must therefore firstly be contested in a procedure against an individual decision.

The described practice of the Constitutional Court also applies to a legal interest of environmental non-governmental organisations. Therefore, their special status does not mean that their interest in instituting a procedure for a review of the constitutionality and legality of general legal acts, which also include spatial planning acts is automatically recognised.

Furthermore, the Ombudsman finds that effective remedies in the field of spatial planning (including the comprehensive environmental impact assessment) do not exist. However, with regard to the Ombudsman's view, the latest case law of the Administrative Court should be mentioned – in procedures for a comprehensive environmental impact assessment, the court acknowledged that recognised environmental NGO's may participate and protect the interest of the environment and nature. Moreover a proposal of a new Spatial Management Act allows interested parties (including NGOs) to seek justice with regard to spatial planning acts before the Administrative Court. It also governs a new special status of non-governmental organisations operating in the field of spatial planning, giving them an option to the procedure against spatial planning act without needing to prove a legal interest, as this is deemed to have been granted to them *ex lege*.

Individuals (separately or combined into civil initiatives – without a special status) feel unsatisfied that they have been unable to assert a wider or public interest also in administrative judicial procedures against individual acts for their was denied on the bases of a lack of a legal interest.

It should be noted that the provision of Article 14 of the ZVO-1, which enables *actio popularis*, has not been utilised in practice, but the reasons for this have not been analysed. The Ombudsman warns that the case law on justice in environmental matters is scarce, and it states that, as far as it is aware, the right arising from Article 14 of the ZVO-1 has not yet been asserted. Furthermore, the Ombudsman states that the frequently highlighted reasons for this are: “a lack of legal knowledge of those who are not institutional decision-makers, potential procedural costs, and the burden of proof.” These reasons, including the need to pay legal and other experts, are also listed as obstacles to the effectiveness of justice (the implementation of Article 9.4.) by environmental NGO's (Plan B and AAG), whereby they also stress the their efforts to change cost-related provisions in a way that would enable NGO's to be treated as the weaker party with regard to costs.

With regard to the possibility of an administrative dispute as per Article 4 of the ZUS-1, it should be noted that – despite the constitutionally defined right to a healthy living environment (Article 72 of the Constitution) – it is not clear if or when a court would consider that another court procedure *s* is provided.

With regard to the regulation of the culling of the wolf population, Plan B also warns that, in their opinion, in some decisions NGO's have been systematically eliminated from decision-making procedures. This is done in a manner that a general act (rules of the minister) is used for decisions that, according to their nature, should be administrative (individual) decisions adopted in an administrative procedure. On the contrary the state has not foreseen an administrative procedure (but a governmental decree) even after the Constitutional Court has ruled that this decision has the nature of an individual act.

Plan B (an NGO network) finds that the state does not meet the requirements of Article 9.5. of the Convention for it does not take active measures (actions) to ensure that the public is informed of their possibilities on access to justice. Furthermore, it warns that the state does not systematically collect information on the participation and legal recourse of the public in environmentally relevant matters.

## Spain

146. Notwithstanding the right to a trial "without undue delays" (Article 24.2 of the Spanish Constitution), the main obstacle to the full implementation of Article 9 lies is the excessive length of judicial proceedings. In this regard, with the aim of expedite the procedures, the Law 18/2011, of 5 July, regulating the use of information technology and communication in the Administration of Justice, was recently passed although the situation of excessive duration persists.

## Sweden

Under the Constitution, a decision concerning the release of an official document that is taken by a minister or the Government cannot be appealed to a court (Chapter 2, Section 15 of the Freedom of the Press Act). On this point Sweden has lodged a reservation in relation to the requirements of the Convention.

## Switzerland

According to several environmental protection organisations the implementation of Art. 9 Convention seems to work on the national level. They have, however, criticized that there is still room for improvement on the cantonal level.

One of the problems mentioned by the organisations are the high fees that the cantonal courts would put on them for certain procedures. In one particular case within the canton of Graubünden, the cantonal court imposed very high procedural costs on the applicant organisation (CHF 26'663 court fees and CHF 27'707.70 legal expenses of the opposing party). The Federal Supreme Court later stated in the same case that costs in this amount were of prohibitive character and could prevent the access to justice (Decision 1C\_526/2015 of 12th October 2016). The cantonal court had thus to lower the costs in its follow-up decision.

Another problem that was put forward was the fact, that some cantonal decisions or even cantonal rules declare that a legal complaint has no suspensive effect. This means that the disputed project can be realized before a legal examination has taken place. For example, there were some cases, where wolves were shot, before it had even been examined, whether the instruction to kill was legally allowed.

Other problems that were stressed also include incomplete weighting of the respective interests, denied access to cantonal court and incomplete publication of cantonal decisions, which do not always really mention all the regulations likely be hurt.

## Tajikistan

- Lack of sufficient experience and necessary knowledge on how to appeal to the judiciary on the part of the PA and the public;
- lack of knowledge about the benefits of this event;
- not wanting to contact judicial authorities;
- payment of legal costs by the plaintiff is not comparable with his minimum salary;
- fear of losing court cases and the absence of compensatory mechanisms;
- stereotype of understanding “judicial authorities” as a “punitive structure”.

## Turkmenistan

When implementing article 9 of the Aarhus Convention, there are no obstacles.

## United Kingdom

Responsibility for civil costs issues in England and Wales rests with the Ministry of Justice (MOJ). Compliance Committee findings on costs were adopted by the Meeting of the Parties in 2014 (decision IV/9n). The European Commission has pursued infringement proceedings against the United Kingdom in relation to the implementation of the requirements under the Public Participation Directive on costs. The MOJ for England and Wales and the relevant authorities in Scotland amended the court rules on costs in 2013. The rules govern the award of costs protection (‘protective expenses orders’ in Scotland) in respect of judicial reviews at first instance and are in part based on case law, including the law as set out in *Garner v Elmbridge Borough Council* [2010] EWCA Civ 1006. These rules were adopted on 1 April 2013. On 15 April 2013, similar provision was made in Northern Ireland (see the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 which have recently been amended (see above)).

The MOJ for England and Wales has previously amended the time limit for judicial reviews in relation to planning decisions, for which statutory appeal procedures are also available. The time period for commencing a claim for judicial review has been changed to six weeks in order to bring it into alignment with that for the statutory appeal procedure, and for such cases, the requirement that the judicial review claim be commenced “promptly” has been removed. Together with the cases involving assertion of rights under EU law, where the requirement of “promptness” is in any event disappplied, Aarhus cases where that requirement would potentially apply are unlikely to arise in practice.

Since the Uniplex case, the courts in Northern Ireland have also been disapplying the promptitude requirement in judicial review challenges on EU grounds. The Department of Justice in that jurisdiction has, however, consulted on a proposal that there should be no requirement to bring judicial review proceedings promptly in any case in that jurisdiction. Following consultation, the Northern Ireland Court of Judicature Rules Committee has made the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017 which removes the promptitude requirement. This amendment will come into effect on 8th January 2018.

### III. Trends and observations

3.1. Of the 44 that submitted 2017 national implementation reports, 39 Parties provided information with regard to obstacles encountered in the implementation of article 9 of the Convention (question XXIX).

3.2. Parties showed varied approaches in their response to the query regarding obstacles faced in implementing access to justice pillar. Some Parties recorded the concerns raised by the non- governmental organisations and civil society organisations in the public consultation process. Some Parties also provided a response to the concerns raised, showing as to what steps are being adopted to address the concerns (Iceland, Ireland, Latvia, Montenegro, the Netherlands, and Serbia). Some Parties did not respond to the particular query (Cyprus, Czech Republic, Denmark, Finland, and Luxembourg). Some Parties stated that they do not face any obstacles in the implementation of Article 9 (Azerbaijan, Kazakhstan, Portugal and Turkmenistan).

3.3. 2017 Synthesis report and national implementation reports indicated various challenges with regard to standing, length of review procedure, costs, capacity of courts and other independent review bodies and clarity of the domestic framework.

3.4. The following issues deserve further attention by the Parties to the Convention as appropriate:

3.3.1. Maintaining a clear, transparent and consistent framework to ensure effective access to justice for members of the public in accordance with the Convention, especially with regard to standing and scope of review requirements, so that rights and legitimate interests of the public are protected and the law is enforced;

3.3.2. Strengthen the capacity and specialization of courts and other independent review bodies to ensure timely review procedures and the possibility of handling environmental cases in a timely manner and consider introducing suspensive effect of the challenged administrative decisions as appropriate;

3.3.3. Ensure provision of legal aid and other assistance mechanisms to remove or reduce financial and other barriers to access to justice and ensure that review procedures are not prohibitively expensive;

3.3.4. Keep the effectiveness of the overall system of access to justice under continuous monitoring, and the latter also could contribute to the review of implementation of Sustainable Development Goal 16 and its target 16.3.