Economic Commission for Europe

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

Task Force on Access to Justice

Eleventh meeting
Geneva, 27 and 28 February 2018
Item 2 of the provisional agenda
Access to justice in cases
on the right to environmental information

Information paper N4 revised

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

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

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

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

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

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

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

[1] See para. 14(a) (i) of decision VI/3 of the Meeting of the Parties adopted at its sixth session (Budva, Montenegro, 11–13 September 2017) available from http://www.unece.org/env/pp/aarhus/mop6_docs.html
[2] More information is available from http://www.unece.org/env/pp/aarhus/tfaj11.html

CONTACT INFORMATION
Please provide name and contact data of the person who filled in the questionnaire:
First Name: Anne Last Name: Friel
Position: Lawyer, Environmental Democracy
Organization: ClientEarth AISBL

Address: 60 Rue du Trone, 1050 Brussels, Belgium
Telephone: 003228080172 Fax:
E-mail: afriel@clientearth.org Website: www.clientearth.org

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

1. Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information. The deadline is set by Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. The deadline is 15 working days (Article 7(1)) , which can be extended by further 15 working days "In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents" (Article 7(3)). In our experience, the deadline of 15 working days is routinely extended by a further 15 working days even when the request does not meet the requirement of being an exceptional case. In a significant number of cases, the delays go beyond an additional 15 working days and the EU institutions and bodies takes months to reply without providing any clear timeline to the applicant, only stating that they will reply "as soon as possible". This has serious implications as in addition to not giving access to the requested information on time to be able to use it as sought, it also impacts the right of the applicant to challenge a refusal decision as it creates legal uncertainty as to when the delay to go to Court starts running.

Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision? Yes, this is a requirement of Article 7(1). How is the applicant *informed* about the possibilities to appeal the decision? This information must be included in the written decision to refuse access to environmental information (Article 7(1)).

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

Again, the relevant EU legislation is Regulation 1049/2001. There is first an internal administrative appeal, referred to as a confirmatory application, to the institution that adopted the refusal decision (Article 7(2) of Regulation 1049/2001). Once a confirmatory application has been made, the same institution reassess its initial decision and adopts a "confirmatory decision". In the case of the European Commission, this means that the Secretariat General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage and the decision is signed by the Commission's Secretary General. However, the fact that the Secretariat-General conducts a fresh review does not mean that the review meets the requirements of being "independent" or "impartial", within the meaning of Article 9(1) AC, as the decision is ultimately taken by the same institution.

Once the confirmatory decision has been received, there are two further available avenues of redress which are, in effect, mutually exclusive (Article 8(1) of Regulation 1049/2001). The first is an application for annulment of the review decision to the Court of Justice of the EU (CJEU) in accordance with Article 263 TFEU. There are no issues of standing because the confirmatory decision is addressed to the applicant.

The other avenue for redress is a complaint to the European Ombudsman, who can issue a finding of maladministration and recommendations to the EU institution concerned. Decisions of the European Ombudsman are non-binding. A complaint to the Ombudsman does not suspend the time limit to appeal to the court. Therefore, in effect, a complaint to the Ombudsman effectively rules out review by the CJEU in many cases.

There is a requirement for exhaustion of administrative review procedures (i.e. applicants must have submitted a confirmatory application) in relation to both a complaint to the European Ombudsman and an application for annulment to the CJEU under Article 263 TFEU.

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

As stated above, a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 is decided by a different department of the same institution. Therefore, it cannot be considered to be independent and impartial within the meaning of Article 9(1) AC.

The independence and impartiality of the CJEU is ensured by the EU's founding treaties, as is the independence and impartiality of the European Ombudsman (see Article TFEU) although these decisions are not legally binding.

Review by the CJEU, in accordance with Article 263 TFEU, meets the conditions of an independent and impartial review. This is ensured by the Statute of the Court of Justice. Review by the Ombudsman is also independent and impartial; this is ensured by Article 228 TFEU.

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

There are no costs involved in submitting a confirmatory application or a complaint to the European Ombudsman.

With regard to review by the CJEU, there are no applicable court fees. However, it is obligatory for applicants to be represented by an independent practicing lawyer, which can be costly. Based on article 19 of the Statute, this excludes in-house lawyers from representing NGOs. In addition, it is the CJEU's practice to award the costs of the successful party against the unsuccessful party so there is a risk that the applicant will be obliged pay the costs incurred by the defending EU institution, as well as those of any successful interveners (that are not Member States or other EU institutions). Since the applicant has no influence over the number of interveners and the costs they incur, this represents a significant financial risk for members of the public/NGOs. For instance, in the recent Case T-545/11 RENV *Stichting Greenpeace Nederland and PAN Europe v Commission*, the General Court ordered the applicants to pay the costs of six industry associations that had intervened in the proceedings.[3]

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

As mentioned above, the delays the applicants face during the administrative appeal phase (confirmatory application) is very problematic (15 working days systematically extended by a further 15 working days and very often followed by letters that state that the institution or body will reply as soon as possible without any indication as to when a final reply will be provided). The adoption of a reply to a confirmatory application may take several months forcing us to decide whether to go to Court or the Ombudsman without knowing the institution's position before doing so.

It is true that in the event that the EU institution in question does not answer within that timeframe, such failure to respond is considered a negative reply entitling the applicant to initiative court proceedings or submit a complaint to the European Ombudsman (Article 8(3) of Regulation 1049/2001). However, applicants will most of the time rather wait for the institution's reply in case some information is disclosed but also to know on what grounds to challenge the refusal. It also avoid us, the applicant, to have to adapt our pleas in law once we're before the Court when the EU institution or body finally sent its confirmatory decision.

With regard to Court proceedings, in our experience it takes approximately 4.5 years from the request for information to the Court of Justice's ruling on appeal (see cases C-57/16 ClientEarth v Commission; C-612/13 ClientEarth v Commission).

[3] Case T-545/11 RENV, *Stichting Greenpeace Nederland and PAN Europe v Commission*, ECLI:EU:T:2018:817, para. 118.

In our experience, proceedings before the European Ombudsman last between one year to 20 months without appealing its decision to more than 2 years (in the experience of other NGOs that has been reported to us) . The establishment of the priority procedure for the Ombudsman is therefore a welcome step but it remains to be seen whether it will have the desired effect of shortening the applicable time lines in practice.

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

The CJEU only has the power to annul the refusal decision; it does not have the power to order the institution to take a particular course of action. Therefore, in order to receive the information that was originally requested, the applicant must submit a new request and work through the administrative procedure from scratch in case the institution does not do it on its own motion.

The European Ombudsman has the power to issue specific recommendations to the institutions concerned or to suggest a fair resolution to the dispute. This can take the form of suggesting or recommending to the EU institution that the information should be disclosed within a particular timeframe. However, these requests are non-binding.

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

EU law does not provide for administrative or criminal sanctions against officials/institutions who unlawfully withhold environmental information. We are not aware of internal disciplinary procedures for sanctioning specific EU officials that unlawfully withhold environmental information.

The absence of such procedures combined with the long periods needed to obtain a binding judgement from the CJEU allows the EU institutions and bodies to delay replying to a confirmatory application until the requested information is no longer deemed politically sensitive. To highlight this practice and provide for some kind of consequences, an NGO applicant has previously requested the CJEU to grant a symbolic claim to damages of 1 €. However, the Court refused this claim.[4] In other cases, where the institutions had only replied after the case had been lodged the Court at least recognized this by ordering the EU institution to pay their own costs, despite the fact that they had won the case[5].

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

No.

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

No.

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

The length of procedure, which implies that when environmental information that was requested is finally disclosed, it is no longer relevant.

Enforcement is also a problem, because the CJEU does not have the power to order specific action from EU institutions. As stated above, this forces an applicant to reapply to the institution that had refused access leading to further delays and a possible renewed

[4] Order in Case T-448/15 *EEB v Commission*, ECLI:EU:T:2017:503.
[5] ECLI:EU:T:2013:483, *ClientEarth v EFSA* ; ECLI:EU:T:2013:482, *ClientEarth v Commission*.

conflict over the extend of access finally provided. Moreover, the EU Ombudsman's recommendations are non-binding and are, in practice, sometimes ignored by the EU institutions.

11. Does your legal system provide with any *innovative approaches* concerning administrative and judicial review procedures in cases on the right to environmental information, for example concerning the requirement for the procedure to be expeditious, the use of alternative dispute resolutions (ADRs), costs, remedies, means for execution of review decisions on disclosure or use of e-justice initiatives?

No.

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

Important and innovative cases:

(1) C-60/15 P - *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540: This case served to clarify:
- the application of Regulation 1367/2006 to access to environmental information cases,
- that the exception relating to confidentiality of proceedings (article 4(4)(a) Aarhus Convention) only applies to specific decision-making and not to a whole administrative procedure which led to a decision (para. 76 and following);
- that internal documents may only be withheld if it can be specifically proven that disclosure would seriously undermine decision-making, not based on a mere reference to a risk of negative repercussions and the fact that interested parties may influence the decision-making process (paras. 82-83).

(2) Case C-57/16 ClientEarth v Commission, ECLI:EU:C:2017:540:
- In that case, the General Court had found that the requirement established by the Treaty (TFEU) for the European Commission to be independent when exercising its legislative initiative power meant that it had the right to keep information confidential. This confusion between the need to be independent and the right not to be transparent and accountable is recurrent within EU institutions. Fortunately, the Court of Justice overruled the GC's ruling completely.
- The ruling establishes that exceptions to disclosure "must be interpreted and applied all the more strictly" with regard to documents which are part of a legislative process and, moreover, contain environmental information (para. 101);
- Overruled a judgement of the General Court that assumed a presumption of confidentiality for Commission impact assessments (para. 112).

(3) Cases on emissions into the environment:
- Case C-442/14 *Bayer CropScience and Stichting De Bijenstichting*, ECLI:EU:C:2016:890 include an extensive discussion on the definition of emissions into the environment and information thereon (paras. 60-103). The Court concludes in para. 103:
  - 'emissions into the environment' within the meaning of that provision covers the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use;
  - 'information on emissions into the environment' within the meaning of that provision covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance's drift during that application, whether the data come from studies performed entirely or in part in the field, or from laboratory or translocation studies.
- In Case C-673/13 P *Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, the Court held that:
  - Information related to emissions is not limited to information concerning emissions emanating from certain industrial installations (para. 70);
  - Information related to emissions must not detail the nature and quantity actually released into the environment to fall under the definition (para. 76).

- T-716/14 - *Tweedale v EFSA*, ECLI:EU:T:2019:141: applying the above case law to a study on the toxicity of glyphosate.

Cases on barriers:

(1) The Court has established a general presumption of confidentiality based on Article 4(2), third indent concerning documents exchanged in the context of the EU Pilot procedure (C-562/14 P, *Sweden v Commission*, EU:C:2017:356) and infringement procedures before a case has been initiated (C-612/13 P, *ClientEarth v Commission*, EU:C:2015:486). This means that the public can access very little information on how Member States are implementing EU environmental law.

(2) In its Decision in case 367/2017/CEC, concerning access to conformity checking studies prepared by the EU Commission to check Member State compliance with EU law, the European Ombudsman stated that Article 4 of the Aarhus Regulation was "not entirely clear" (para. 48). This is a problematic finding because it is the main mechanism to implement Article 5 of the Aarhus Convention. While the Ombudsman nonetheless "strongly suggested" disclosure, this decision does not give full effect to the provisions of the Aarhus Convention.

(3) With regard to the enforcement of judgements of the CJEU, as mentioned above the court does not order disclosure but an applicant needs to go back to the EU institution or body that refused access and reapply based on the judgement. The problems of this procedure are demonstrated by Case C-612/13 P *ClientEarth v Commission*, ECLI:EU:C:2015:486. ClientEarth had in this case requested access to certain information from the Commission on 8 September 2010. On 16 July 2015, the Court issued a judgement stating that the Commission had been wrong in refusing part of the information. ClientEarth reapplied to the Commission, which however again refused part of this information. On 6 March 2017, ClientEarth therefore turned to the Ombudsman, who issued its decision on 10 September 2018.[6] Having taken almost exactly 8 years, this case illustrates well the challenges encountered by NGO seeking access to information from the EU bodies and institutions.

[6] Decision in case 367/2017/CEC.