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This document is a report by Professor Jan Darpö, Uppsala Universitet, the Chair of the Task Force on Access to Justice under the Aarhus Convention. Viewpoints expressed in the report belong to the author; the same can be said about shortcomings and errors in the text, the responsibility rests solely on him.

Access to Justice in Information Cases

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1. Introduction

1.1 The study and the synthesis report

The Task Force on Access to Justice has a role to play as a platform for studies and meetings where all aspects of the third pillar of the Aarhus Convention can be discussed. This role as a mere facilitator for a wider debate without any formal significance is in fact the strength of this body under the Convention. Under those terms, the Task Force was mandated by the sixth session of the Meeting of the Parties to the Aarhus Convention in Budva (Montenegro) in 2017 to launch a study concerning access to justice in information cases according to Articles 4, 9.1 and 9.4 of the Convention. Thus, the study deals with procedural issues concerning requests for environmental information and the possibilities open for members of the public to have the decision-making of the authorities and other public bodies holding such information challenged by way of administrative appeal and judicial review in a court of law.

The relevant sections of Article 4 are the following (emphasis added):

> 1. Each Party *shall ensure* that, subject to the following paragraphs of this article, public authorities, in response to a *request for environmental information, make such information available to the public*, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:
>
> (a) *Without an interest having to be stated*;
>
> (b) *In the form requested unless*:
>
> (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
>
> (ii) The information is already publicly available in another form.
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> 2. The environmental information referred to in paragraph 1 above *shall be made available as soon as possible* and at the latest within *one month* after the request has been submitted, unless the *volume and the complexity* of the information justify an *extension of this period up to two months* after the request. The applicant shall be informed of any extension and of the reasons justifying it.
>
> 3. (…)
>
> 4. (…)
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> 5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, *inform the applicant* of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.
>
> 6. (…)
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> 7. *A refusal of a request shall be in writing* if the request was in writing or the applicant so requests. A refusal shall *state the reasons* for the refusal and give *information on access to the review procedure* provided for in accordance with article 9. The refusal *shall be made as soon as possible and at the latest within one month*, unless the complexity of

> the information justifies an extension of this period *up to two months* after the request. The applicant shall be informed of any extension and of the reasons justifying it.
>
> 8. Each Party may allow its public authorities to make a charge for supplying information, *but such charge shall not exceed a reasonable amount*. Public authorities intending to make such a charge for supplying information shall make available to applicants a *schedule of charges which may be levied*, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 9.1 states as follows (emphasis added):

> 1. Each Party shall, within the framework of its national legislation, ensure that *any person* who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, *has access to a review procedure before a court of law or another independent and impartial body established by law*.
>
> In the circumstances where a Party provides for such a *review by a court of law*, it shall ensure that such a person *also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*.
>
> Final decisions under this paragraph 1 shall be *binding on the public authority* holding the information. *Reasons* shall be stated *in writing*, at least where access to information *is refused* under this paragraph.

Further, Article 9.4 puts additional requirements on the access to justice possibilities under Article 9.1, namely (emphasis added):

> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above *shall provide adequate and effective remedies*, including injunctive relief as appropriate, and be *fair, equitable, timely and not prohibitively expensive*. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

For this study, a draft questionnaire was discussed by the Task Force on its 11th meeting in Geneva in February 2018. The questionnaire deals with procedural matters concerning requests for and review of environmental information relating to both Article 4 and Article 9.1. After the 11th meeting of the Task Force, the questionnaire was concluded and distributed by the secretariat to a number of key institutions, experts and non-governmental organizations from 13 Parties to the Convention in the spring of 2018 as suggested by their national focal points. The aim was to cover a limited number of Parties, representing the different Parties and sub-regions, including: (a) the European Union (EU) together with six of its Member States, namely Germany (DE), Ireland (IE), Portugal (PT), Slovakia (SK), Malta (MT), and Sweden (SE); (b) Switzerland (CH); (c) Serbia (RS) and Montenegro (ME) from South-Eastern Europe; (d) the Republic of Moldova (MD) from Eastern Europe; (e) Georgia (GE) from the Caucasus and (f) Kazakhstan (KZ) from Central Asia. The institutions which were addressed included relevant ministries, administrative authorities, specialized bodies such as the Parliamentary Ombudsman and Information Commissioner, national courts, public stakeholders and their organisations (ENGOs) and academia. During the fall of 2018, we received

completed questionnaires from 12 out of the 13 Parties.[1] Of course, the responses vary in coverage and quality. This is mainly due to the number of responses from each Party, ranging from 4 (SE), 3 (IE, RS and SK), 2 (EU, GE, KZ and PT) and down to 1 (DE, MD, ME and CH). The quality of the answers from a studied Party improves noticeable when there are many respondents from a variety of actors dealing with environmental information matters.

The first draft of this report was initially set up to summarize the responses given in order to provide a platform for discussion on the 12th meeting of the Task Force on Access to Justice (Geneva, 28 February – 1 March 2019). Thereafter, comments made during that meeting were incorporated in the report, as well as those submitted to the secretariat during the following months. The report was then discussed at the Bureau meetings in June and September 2019, after which the report was updated and communicated once more with the National Focal Points and other stakeholders to the Convention in the beginning of 2020.[2] After this round of communications, further corrections, clarifications and amendments have been made. It must be noted, however, that owing to the conflicting nature of several comments, it has not been possible to reflect all of them in the text. Instead, I have tried to clearly state where differing opinions have been reported on a certain issue, giving a general picture of the arguments used. Careful consideration has also been given to meeting the different needs of Parties' in terms of comprehensiveness and the degree of detail, bearing in mind the various levels of and approaches to implementation of the Convention's provisions on access to justice in information cases. The progress in preparing the report was presented at the online information sessions of the twenty fourth meeting of the Working Group of the Parties in July 2020. After the meeting, we received some further comments on the representation of the responses in the study, as well as the level of detail on controversial issues. The final text of the report was discussed and finalized on the 13th meeting of the Task Force on Access to Justice (hybrid, Geneva, 15-16 February 2021).[3]

The report is structured as follows. In addition to this introduction and the laying out of the legal context in Article 9.1 (part 1), it contains a summary of the responses under each of the twelve questions posed (part 2). Thereafter I make a couple of remarks in a concluding section about good examples, main barriers and discussion points on access to justice in information cases (part 3).

Finally, the viewpoints expressed in the report belong to the author only. The same can be said about shortcomings and errors in the text, the responsibility rests solely on me.

1.2 Article 9.1 of the Aarhus Convention in text and practice

Article 9.1 first sentence

The study has triggered a couple of questions concerning the implementing of Article 9.1 of the Convention that can usefully be highlighted already in the beginning. The aim here is, however, not to give clear answers to the issues raised, but rather to provide a platform for

[1] The responses received are available from https://unece.org/environment-policy/public-participation/aarhus-convention/analytical-study-ajai-surveyresponses

[2] The comments received are available from https://unece.org/environment-policy/public-participation/aarhus-convention/analytical-study-ajai-commentsreceived

[3] See https://unece.org/environmental-policy/events/thirteenth-meeting-task-force-access-justice-under-aarhus-convention

further discussion. As with the previous studies performed by the Task Force on Access to Justice, ambiguities in the text of the Convention will be pointed at, along with ongoing issues, and conclusions will be drawn from existing legal sources using a traditional method of law. The responsibility for resolving any issues raised obviously lies in the hands of other bodies, namely the Compliance Committee and the Meeting of the Parties to the Convention.

As noted in the beginning of this report, the first sentence of Article 9.1 requires Parties to the Convention to provide the person requesting environmental information with recourse to challenge the authority's decision on the matter *in a court of law or another independent and impartial body established by law*. The same expression can be found in Article 9.2 of the Convention and is reflected in the EU's implementation legislation on Article 9.1, namely Article 6 of the Environmental Information Directive (2003/4, EID[4]). It is widely believed that this expression equates to "any court or tribunal" in Article 267 TFEU, as well as "an independent and impartial tribunal established by law" in Article 6 European Convention of Human Rights and Fundamental Freedoms (ECHR), requiring a fair trial.[5] It also goes without saying that these expressions are "autonomous", meaning that the national label on the reviewing body is of no importance when evaluating its independence and impartiality.[6] As a consequence, the first sentence of Article 9.1 calls for a review mechanism performed by such a body, irrespective of how it is named in the national legal system.

Furthermore, Article 9.1 requires that *any person* has access to a court or tribunal in order to challenge a refusal on a request for environmental information. To date, the Compliance Committee has found non-compliance under Article 9.1 concerning who entitled to make such a request in only one case and that was the early communication ACCC/C/2004/1.[7] This general picture is confirmed in the present study as there are no issues reported concerning applicants for environmental information in this respect. In fact, as all members of the public irrespective of nationality, residence or other belonging are allowed to make such a request without stating an interest, one may note that "standing" according to Article 9.1 is very different from standing in a more traditional sense, meaning the delimitation of those who are concerned by a decision or omission. This distinction is reflected in the two definitions of the concepts "the public" and "the public concerned" in Article 2.4 and Article 2.5 respectively. Thus, when Article 4 refers to "the public", this means that all natural or legal persons and

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[4] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[5] See for example The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014 (cit. "Implementation Guide 2014") at page 189.

[6] For a discussion about the meaning of the expression *court of law or another independent and impartial body established by law*, see the Implementation Guide 2014, at pages 188-189, also Darpö, J: *Environmental Justice through the Courts.* From Environmental Law and Justice in Context (Eds. Ebbesson & Okowa). Cambridge University Press 2009, p. 176-194.

[7] Findings of the Aarhus Convention Compliance Committee on communications ACCC/C/2004/1 (Kazakhstan) (ECE/MP.PP/C.1/2005/2/Add.1), ACCC/C/2008/30 (Republic of Moldova) (ECE/MP.PP/C.1/2009/6/Add.3), ACCC/C/2012/69 (Romania) (ECE/MP.PP/C.1/2015/10) and ACCC/C/2013/93 (Norway) (ECE/MP.PP/C.1/2017/16) seem to be the most important cases on access to environmental information, however mostly dealing with the definition of environmental information, grounds for refusal, timeliness and weak enforcement. The documents and other information are available at: https://unece.org/env/pp/cc/communications-from-the-public

their associations, organisations and groups have the right to make a request for environmental information.[8]

Although not explicitly stated in the first sentence of Article 9.1, the review required here covers *both procedural and substantive issues* under Article 4.[9] As one cannot really draw a clear distinction between the two aspects, it is hard to imagine what a review covering only one of them would actually look like. Although this issue has not really been examined by the Compliance Committee, the Court of Justice of the European Union (CJEU) confirmed in case C-71/14 *East Sussex* (2015) – which concerned the requirements for access to environmental information according to the EID (2003/4) – that judicial procedures in the Member States must enable the national court "*to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness*" of an administrative decision to deny such access.[10] Although this court has no direct competence to interpret the Aarhus Convention, its case-law on the implementation in the Member States provides us with "state practice" concerning the obligations therein.[11]

Article 9.1 second sentence

According to the second sentence of Article 9.1 of the Aarhus Convention, if the review under the first sentence of Article 9.1 is provided by a court of law, the unsuccessful applicant shall also have access to an expeditious procedure for *reconsidering by a public authority* or *review by an independent and impartial body other than a court of law*. The understanding of *what body* and *in what way* the alternative procedure shall be performed is thus of importance here. According to the text, it shall either consist of "reconsideration by a public authority" or a "review by an independent and impartial body other than a court of law". This issue was touched upon in communication ACCC/C/2013/93, where the Compliance Committee stated in its findings:

> The Committee considers that, under the legal framework of the Party concerned, the Parliamentary Ombudsman is an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under article 4 of the Convention. The Committee therefore finds that the Parliamentary Ombudsman of the Party concerned constitutes a review procedure within the scope of the second sentence of article 9, paragraph 1, of the Convention. [12]

Here, it can be noted that the recommendations by the Parliamentary Ombudsman are not binding, although normally respected by the authorities. In communication ACCC/C/2013/93, the time taken for the Ombudsman's review was at issue. When deciding this, the Compliance Committee applied both the requirement for expediency in the second sentence of Article 9.1 and the general timeliness criterion in Article 9.4. All in all, the time span between the request to the Ombudsman for review of the Government's refusal to disclose the information and the

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[8] The Implementation Guide 2014 at page 191.

[9] The Implementation Guide 2014 at page 191.

[10] C-71/14 *East Sussex* (2015) para 58.

[11] Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), see Wouters, J & Ryngaert, C & Ruys, T & De Baere, G: International law – A European perspective. Hart Publishing 2018, pp. 100-103.

[12] Findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2013/93 (Norway) (ECE/MP.PP/C.1/2017/16), para 86.

final recommendation was two and a half years, which was found to be in breach of those requirements. In finding this, the Committee particularly noted that "nowhere in the documentation before it does the Ombudsman appear to have instructed the Ministry to respond within a certain time or even to request it to reply in a timely or expeditious manner".[13] However, while finding that the Party concerned had failed with the requirements to be expeditious and timely, the Committee did not make recommendations to the Party concerned, as there was no evidence that the non-compliance was due to a systematic error. [14] Even so, based on findings on communication ACCC/C/2013/93, a reasonable conclusion is that an Ombudsman institution can be accepted as a review mechanism under the second sentence of Article 9.1.

The rationale for the Committee's standpoint seems to be that as long as the Party provides the appellant with the possibility of appealing to a court or tribunal, the expeditious procedure according to the second sentence of Article 9.1 may well be performed by an independent body issuing recommendations. This reasoning is also in line with the fact that according to the text in this provision, it alternatively suffices for the Parties to provide the information seeking public with access to *administrative reconsideration* to meet the demand for an expeditious procedure. Such a procedure within the administration exists in many countries and is today recognised as "good governance" in administrative law. It may be undertaken by a higher level within the hierarchy of that authority or even by a special organ created for this purpose, but it is always done "within the administration". A certain demand for objectivity can be retrieved from the fact that Article 9.4 also applies to these alternative procedures. How far this will be drawn cannot be foreseen, as the Compliance Committee in findings on communication ACCC/C/2013/93 only elaborated on some of the criteria therein (timeliness), but not all (injunctive relief).

Against this background, it is somewhat surprising that the Implementation Guide 2014 seems to understand that the independence and impartiality requirement in the second sentence of Article 9.1 applies to both administrative reconsideration and review procedures. Under the headline "Alternative to court review", it is said that the additional review process can take several forms, including reconsideration by the public authority or review by an independent and impartial body other than a court of law. Thereafter, it is stated (emphasis added):[15]

> Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. *Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention.*

This statement in the Implementation Guide is not compatible with a straight-forward reading of the text in Article 9.1, or in line with any findings of the Compliance Committee. Instead, a reasonable conclusion is that it suffices for the Parties to have a system where the authorities' decision to refuse the disclosure of environmental information is reconsidered within the administration, however under the condition that that procedure meets the Article 9.4 requirements. Thereafter the discontented applicant must be able to rely on the possibility to go to court.

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[13] Ibid. paras. 89.

[14] Ibid. paras. 87-92.

[15] The Implementation Guide 2014 at page 192.

Article 9.1 third sentence

In the third sentence of Article 9.1, it says that final decisions under Article 9.1 shall be *binding on the public authority holding the information*. This raises the question if all kinds of decisions can be characterised as "final" as soon as the deadline for appeal has expired, irrespective of whether it is an administrative decision or a court judgment. According to the text in the third sentence, the binding requirement applies to all final decisions under Article 9.1, even those which result from a reconsideration procedure within the administration or a review by an independent body outside that administration. Thus, the wording indicates that it does not matter which body took the decision, and when, as all final decisions according to the established definition above must be binding on the authority. This is also how administrative reconsideration processes normally function, as the second decision replaces the first one from the information holding authority.

However, such a viewpoint does not seem to follow the Compliance Committee's findings on communication ACCC/C/2013/93, as recommendations by an Ombudsman were accepted. Instead, from that case one may conclude that the binding requirement only applies to final decisions under the first sentence of Article 9.1. This is also the impression when reading the findings of the Compliance Committee on communication ACCC/C/2008/30, where it was stated (emphasis added):[16]

> If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given legal system. Taking into account article 9, paragraph 1, which implies that *the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities,* the failure of the public authority to fully execute the final decision of the court of law implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.

In the European Union as set out by Article 6 of EID (2003/4), the binding criteria also applies only to review decisions by a court of law or another independent and impartial body. The same line of reasoning is furthermore confirmed in the Implementation Guide 2014.[17] Based on the above, it can be concluded that the Ombudsman institution or an Information Commissioner may be regarded as review procedures according to the first sentence of Article 9.1, but only if its decisions are binding on the information holding authority. On the other hand, when these institutions can issue recommendations only, they still may well be accepted as alternative complaint procedures under the second sentence of that provision.

[16] Findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2008/30 (Republic of Moldova) (ECE/MP.PP/C.1/2009/6/Add.3), para. 35.

[17] The Implementation Guide 2014 at page 189, see also at page 193 about the requirement according to Article 9.1 to provide with – in addition to any advisory processes – a possibility for the applicant to obtain a decision which is binding upon the information holding authority.

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

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

Summary of the responses

All the studied Parties have time frames in law for how soon a request for environmental information must be answered, either by expressions such as "promptly", "immediately" or "as soon as possible" or stated in number of days. In Swedish law, the requirement is to disclose the requested information "forthwith". According to the Parliamentary Ombudsman, this shall be understood as a couple of days, unless special circumstances are at hand. Those Parties applying numeric criteria range from 48 hours to one month, but most lie in the range of 8, 10 or 15 calendar or working days. All of the studied Parties also leave room for extending the time frame due to reasons such as complexity, volume, the need to consult between authorities or to collect data, etc. The extension period commonly is the same as the first time frame, for example 15 days on top of the first 15 days. It is often stated in law that an extension must be communicated with the applicant some time before the first deadline expires. Of the studied Parties, Germany, Ireland and Portugal seem to have the longest formal time frames, allowing up to two months in complex cases. In quite a few Parties, the consequence of not meeting the deadline is that this "silence" is regarded as either a refusal to the request or an appealable omission (EU, IE, ME, PT, MD, RS, SK, CH), enabling the applicant to appeal that "decision" by the authority. I will return to these so-called "negative silence rules" in section 3.

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?

Summary of the responses

First of all, there are no "standing issues" reported in the study. All the studied Parties allow "anyone" to request environmental information and there does not seem to be any restriction to this in administrative practice or case-law. Moreover, most Parties studied give standing to those whose interests may be impacted negatively by the disclosure of the requested information, which seems to be a reasonable point of view from an "equality of arms" perspective. It is also a requirement expressed in the EU law implementing Article 9.1 of Aarhus.[18]

[18] See Article 6.2 in the Environmental Information Directive (2003/4).

Appeals against decisions on a request for environmental information or appealing a failure to reply to a request can be made in a variety of ways. Commonly, there is a possibility to ask for administrative reconsideration and/or appeal to a specialized body, created for the purpose of handling complaints in information cases (information tribunals[19]). The time frames to bring such appeals in the studied Parties lie between 15 days and three months. In addition, there is a possibility to go to court within a similar or slightly longer time limit (one to three months). Normally, these procedures are made in succession, meaning that the reconsideration process or the review in the information tribunal must be concluded before the discontented party can appeal to a court of law. As thus the administrative process is a prerequisite for judicial review, one can say that those systems have an "exhaustion obligation". Under these circumstances, it is consequential that the administrative phase has a "suspensive effect" on the appeal to court, meaning that the time limit for judicial review starts not until the administrative appeal procedure is concluded. However, as the information on such an effect given in the responses is meagre, one cannot draw any firm conclusions on this issue.[20] There are also exceptions to this overall picture, where the discontented applicant can either demand administrative reconsideration or go directly to court. The respondents from Kazakhstan give such an example. Further, Sweden stands out in that the applicant is instructed to go directly to court, although the appeal should be submitted to the authority that made the first decision. When the written appeal arrives to that authority, it undertakes administrative reconsideration of the decision. If the appeal is not satisfied in this procedure, the documents are forwarded to the relevant court. In this way, the administrative phase in the appeal process to court is a mandatory part in the proceedings and has a suspensive effect.

According to the responses, Ireland, Montenegro, Portugal, Serbia and Switzerland have created special tribunals for dealing with complaints or appeals in information cases. The aim with setting up such bodies is to simplify and speed up the conflict handling in these cases, as well as keeping down the costs for the parties involved. Specialization seems to be another reason, as those bodies can be staffed with experts in the subject area. Decisions made by the information tribunals are commonly binding upon the administration. Besides, all or almost all of the studied Parties have an Ombudsman or a similar organ for administrative complaints. Unlike the information tribunals, the Ombudsman's function is mainly disciplinary and his or her decisions are commonly regarded as recommendations only. It is also interesting to note that the information tribunals in Ireland, Serbia and Switzerland can undertake mediation in information cases. This is also possible in the courts of Kazakhstan and the Republic of Moldova by way of settlements between the parties to the proceedings in information cases. I will return to the relationship between administrative reconsideration, information tribunals and judicial review, as well as mediation in section 3.

This question also includes a request for information about the most common derogation grounds used in the studied Parties. However, the responses given here are too meagre to draw any real conclusions from, why we have declined to do so.

[19] The term "information tribunal" is used here to cover all kinds of administrative bodies that have been created outside the information holding authorities in order to handle information cases, irrespective of their national labels.

[20] However, this requirement follows from CJEUs case-law, see C-664/15 *Protect* (2017) where the "exhaustion criterion" was accepted under certain conditions (paras 59-81), also C-73/16 *Peter Puškár* (2017) para 76.

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

Summary of the responses

A lack of the criteria for independence and impartiality in the posed question meant that most respondents just made a blank statement that the reviewing bodies of the Parties studies either are independent and impartial or – in some cases – quite the opposite. In most cases, little support is given for any of these viewpoints. Some of the answers, however, provide a little more food for thought. As pointed at in part 1.2, it should also be noted that the requirement for independence and impartiality does not apply to "administrative reconsideration" under the second sentence of Article 9.1, even though the procedure shall be "fair" and "equitable" according to Article 9.4.

The respondent from the EU Commission states that the reconsideration by the Secretary-General of the Commission is independent and impartial, as it is done by a specific team of the Secretary-General separate from the various Directorates-General and services responsible for decision-making on access to documents upon request. According to the respondent, this is evident through statistics showing that a substantial amount of the initial decisions are totally or partially revised by the reviewing body. However, this is contested by ClientEarth, claiming that that body forms part of the same institution as the one responding to the information request. The German respondents inform that the special body within the administration – *die Wiederspruchsbehörde* – is independent and impartial, as it is unheard of that the administration does not abide to its decision. Respondents from other Parties reported that the independence is guaranteed by law. However, in some of the responses, the analysis is further developed as to why the information tribunal in their country is independent and impartial from the administration. In Ireland, the reporters seem to agree that the Commissioner for Environmental Information (CEI) was created in order to have such a status and to focus on customer services, fairness, empathy and innovation. Further, the independence of the Commission for Access to Administrative Documents (CADA) in Portugal is guaranteed by law and its decisions cannot be altered by other authorities. CADA is chaired by a justice from the Supreme Administrative Court and consists of members from different sectors of society, who cannot be questioned or removed from their positions. Finally, the Commissioner for Information of Public Importance and Personal Data Protection in Serbia is autonomous and independent according to law. This Commissioner must not take instructions from other parts of the administration and can be made liable or be prosecuted only with the consent of the National Parliament.

Without any doubt, some of these information tribunals can be regarded as independent and impartial even to the level that they would be regarded as a "court or tribunal" according to Article 6 of the ECHR. Others may not be in a formal sense, but society places such a high degree of trust in them within the administration, that the actual effect is similar. However, a conclusive evaluation on this issue cannot be done within the framework of this study, as we have not provided with any criteria for this in the questions posed. So for now at least, it will have to suffice with these remarks on the responses. For the future, it would be interesting to study this issue further in order to show good examples and discuss how the criteria according to Article 9.4 apply on these procedures.

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

Summary of the responses

To begin with, it should be noted that the question concerns litigation costs in information cases, not the costs for copying or otherwise providing the requested documents. As for the responses, they mirror the general picture among the Parties to the Convention as regards the different kinds of costs that exist in environmental litigation (court fees and other court costs, lawyers' fees and experts' and witness' fees). However, the overall cost level seems to be lower compared with other kinds of environmental cases. This may of course be attributed to the fact that information cases in general are "simpler" than other environmental cases on permits, EIAs, infrastructural projects, mines, etc. Also the common requirement for the courts to deal with information cases as expediently as possible (fast-tracked, prioritized) or even to use written procedures contributes to lowering the costs. Moreover, there do not appear to be any costs in the administrative appeal phase, irrespective of whether this is performed as administrative reconsideration or review by an information tribunal. But of course, there are also exceptions from this rule, the €50 standard fee for an appeal to the Irish CEI being one such example and can be further reduced, waivered or refunded in certain circumstances.

Concerning costs in judicial review proceedings in information cases, the responses are not very elaborate. Even so, court fees in the studied Parties seem to be common, although there are also exceptions (EU, SE). However, the fees seem to be at a rather low level, ranging from €3,50 (RS) to €70 (SK), €150 (GE) and €210-300 (IE). It also seems quite common for the studied Parties to apply exemptions or reduced fees in information cases (IE, PT). Having said that, the Loser Pays Principle (LPP) seems also to be quite common (EU, DE, CH), as well as the mandatory use of representation by a lawyer (EU, PT, CH). This may of course entail substantially higher litigation costs for the losing party. In Switzerland, for example, the total cost may be as high as €1,000-€3,500 and according to the German Streitwert system, these cases may cost the unsuccessful litigant €5,000. Also one of the respondents from the EU (ClientEarth) claims that the litigation costs in information cases can be significant and unpredictable, partly because the losing party can be ordered to pay the litigation costs of several interveners. At the other end of the spectrum, there are examples where costs do not exist in information cases, or at least are very low (MD, SE). It should also be noted that it is quite common for the courts to waive litigation costs in information cases for those who are in social need or for other personal reasons. In some of the studied Parties, this may also be done when the applicant for information is an ENGO (SK) or when the cases are of public interest (IE). Sometimes legal aid is available in these cases (RS, CH).

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.

Summary of the responses

In general, there are set time frames in law for administrative reconsideration or review. These are often rather short, ranging from 15 days to two months, but can commonly be ex-

tended in exceptional cases. For judicial review in court, formal time frames do not seem to frequently apply, apart from general requirements for the expedient handling of information cases. In some of the studied Parties, the courts seem to successfully deal with these cases in surprisingly short periods of time. Thus, it is reported from the Republic of Moldova that information cases may be concluded within 30 days. In other Parties – with or without requirements for fast-tracking these cases – the time used in the courts range from 3 to 6 months (IE, KZ, RS, SE). In addition to this, however, there are many examples where the court proceedings take more than one year, sometimes several years in complicated cases (EU, GE, SK). In others, there are no statistics available for information cases as such, but only for all kinds of administrative cases. In Germany for example, the average time used in the administrative courts is slightly more than eleven months, in Serbia six months. It should finally be noted though, that there are many reports claiming that the set time frames or general requirements for expediency are often exceeded, especially when the execution phase is included. Some of the respondents claim that the whole process from the information request through the appeal procedure and further to the execution of the court order may take several years to conclude in certain cases (EU, GE, KZ, PT, RS, SK).

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?

Summary of the responses

In all of the studied Parties, decisions from administrative reconsideration or review procedures, as well as judgments from the courts are given in writing. Some of the information tribunals publish all their decisions online (IE, PT). Decisions from the higher levels of the court systems are also commonly published and thus available for the public at large. From the lower court levels, however, judgments are not always accessible, at least not outside fee-based private websites. Exception from this general picture are provided by the Republic of Moldova and Slovakia, where all judgments from all levels are published on the website of the Ministry of Justice.

As for the enforcement, this is consistently performed by way of court orders addressed to the authority to disclose the information requested, or by quashing the administrative decision and remitting the case back to the authority with instructions. In some of the studied Parties, enforcement is reinforced by the power for the information tribunals or the court to combine such an order with a fine for disobedience (DE, PT, ME, MD, RS). In others, it is a criminal offence not to comply with such an order (GE, ME, MD, RS, SK). In a last category, a separate enforcement procedure must be initiated by the information requester in order to have the judgment executed (KZ). However, quite a few of the responses given are merely stating that court orders must be abided to according to law, but without further details about what happens in cases of disobedience. It also seems to be quite common that court orders are met by another decision from the authority not to disclose the information requested, this time applying another exemption ground.

It should also be noted that nearly all of the studied Parties have established an Ombudsman institution, but his or her competence is mainly disciplinary and the decisions regarded as recommendations only. Against this backdrop, I think it is safe to say that the effectiveness of

some of the legal systems is undermined by the failure to enforce the "binding decisions" of information tribunals and courts. I return to this issue in the discussion in section 3.

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*?

Summary of the responses

In most of the studied Parties, there is both disciplinary (administrative) and criminal liability for failure to comply with court orders concerning the disclosure of environmental information. One can assume that such a liability is triggered by what is called "faute grave" or serious maladministration by civil servants. A Swedish case may illustrate this, where a researcher in psychiatry and his assistants were fined for having destroyed documents in breach of a court order. The researcher took the case all the way to the Grand Chamber of the European Court of Human Rights, but without success.[21] The Grand Chamber found that there had been no breach of the researchers' right to private life or his right of negative expression under Articles 8 and 10 of the ECHR. According to the responses received in this study, the requesters for environmental information commonly cannot intervene as a party to the proceedings concerning administrative and criminal sanctions.

In some Parties, refusals concerning disclosure of environmental information can also trigger civil liability (PT, RS). The information provided in the responses is however too meagre to enable any substantive conclusion on this issue. It would be interesting to know more about who may initiate such proceedings and what can be obtained from them.

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?

Summary of the responses

There are no such experiences according to this study, save for anecdotal examples. One of the respondents from Kazakhstan claims that defamation actions are common, and even initiated by the administration. As this statement has not been verified by other respondents, it is hard to draw any conclusion therefrom.

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

Summary of the responses

The EU respondent says that repetitive requests are handled in a simplified manner and notes that there is a special procedure for wide ranging (in substance or in time) requests for information. To what extent these procedures have been used is however not elaborated upon. The

[21] ECtHR 2012-04-03 in Case No 41723/06; *Christopher Gillberg v. Sweden*.

Irish Commissioner of Environmental Information has considered some requests for information which have been regarded as unreasonable, close to misuse (sometimes referred to as "fishing trip" requests). Also in Portugal, there is some experience of repetitive requests, but not concerning environmental information. In one of the Slovak reports, it is reported that there are several cases of abuse in which the authorities have been flooded with requests for environmental information. This has been dealt with by the courts by way of applying "bullying law enforcement". It would be interesting to know more about this concept.

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?

Summary of the responses

Cost issues are mentioned as a barrier to access to justice in environmental information cases from four Parties (GE, DE, IE and CH) and weak enforcement from three (GE, RS, SK). The lack of timeliness is also highlighted in responses received from three Parties, two of which relate to proceedings in court (GE, PT), and one to the absence of time frames for administrative reconsiderations (DE). Further barriers mentioned are lack of resources in the administration (RS) or inadequate staffing of the reviewing bodies (IE), absence of specialized and knowledgeable courts (KZ, ME, RS, SK), or even independent courts (KZ). Against this background, I will expand a little on the lack of timeliness in environmental information cases in section 3.

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?

Summary of the responses

To begin with, it may be observed that respondents from one legal arena are not always the best equipped to answer this question, as what is everyday business for them may be very innovative for "outsiders". This is a general experience from all comparative legal research where the phenomenon that "you cannot see the wood for the trees" is well known. An example of this in this study is when the respondent from the Irish Office for the Commissioner for Environmental Information (CEI) claims that nothing within the domestic legislation provides for innovative approaches. In my view, this is quite surprising, as the CEI itself in an international comparison is an advanced information tribunal and thus very innovative.

Be that as it may, the reporter from EU mentions that the European Ombudsman has a fast-track procedure for dealing with environmental information cases, according to which it takes no more than two months from complaint to decision. The German respondent highlights the in-camera procedure which enables for the reviewing court to ask a special senate within the Federal Administrative Court (*Bundesverwaltungsgericht*) to decide on the disclosure of certain documents without revealing the content to the parties to the proceedings in environmental information cases. In Sweden, the information requested can be disclosed by the court itself if the court finds that there are no grounds for refusal. It should be noted though, that this rarely happens as most documents in the case file commonly go back to the authority. The

possibility of undertaking mediation in information tribunals or courts is mentioned in the reports of the five studied Parties (IE, KZ, MD, RS, CH). In my view, this calls for further clarification as to what, and when, such proceedings can successfully be brought in environmental information cases.

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.

Summary of the responses

A substantial number of cases are provided in the responses received, but almost all concern issues relating to environmental information as such; the definition of "public authority" and "environmental information", the application of exemptions from the requirement for disclosure, etc. Only a couple of cases seem to be related to issues concerning access to justice in information cases. For example, one report from Georgia raises the weak enforcement of court decisions ordering the disclosure of environmental information; in one case the time span between order and actual disclosure was six months, in another the request for information was made in April 2015 and the disclosure came three years thereafter, in March 2018. Further, one respondent from Slovakia claims that the court practice to remit the case back to the authority with instructions for disclosure does not always function well, as the authorities may invent new grounds for refusal. Therefore, such a system can result in an eternal "ping pong" with those cases.

3. Remarks and discussion

Introduction

In this section, I make some remarks on issues that are problematic, challenging or especially interesting from general viewpoint. As for challenges, I will focus on the time issue and enforcement. Thereafter, I comment upon a couple of interesting features in the national legislation concerning access to justice in information cases. Some of these seem very interesting and may therefore be worth studying further.

Unproblematic issues

To begin with, it is worth noting that there are a couple of issues that seem to be unproblematic from an access to justice perspective in environmental information cases in the 12 studied Parties. First and foremost, and as already noted, *standing* does not seem to be an issue in these cases as anyone can ask for environmental information without having to state an interest in the matter. Also other concerned persons and entities are commonly accepted as parties to the proceedings, such as those whose interests may be negatively impacted by the disclosure. However, this conclusion must be caveated as there may be decisions in the legal systems that are not appealable at all. For example, decisions by the Swedish Government on the disclosure of environmental information cannot be brought to any court of law. A reservation was made in this respect at the signing of the Convention,[22] which seems to be endorsed by the domestic courts.[23] And as the questionnaire did not cover the issue of "appealability", we cannot draw any conclusion on the existence of such decisions in the studied Parties.

In addition to standing, there are also other issues concerning access to justice in information cases that seem to be less problematic based on the responses received, such as *formal time frames* for the administrative decision-making and reconsideration procedures. Something similar can probably be said about the review proceedings in the established information tribunals in the studied Parties. Having said that, this statement must also be distinguished from timeliness in practice, where the picture may be quite different.

Moreover, the requirement to provide *written reasoned decisions* in cases concerning environmental information seems to less problematic in the studied Parties. Further, there would appear to be no *costs in the administrative phase of the appeal* of decisions on environmental information. Also, regarding the *availability of decisions and judgments* there seems to be a general fulfilment of the Aarhus Convention requirements, at least concerning those from information tribunals and courts of last instance. The power to *impose administrative and even criminal sanctions for serious misconduct and maladministration* seems to exist commonly in the studied Parties, at least in theory. Further, no clear cases of *harassments and defamation claims* against those who request environmental information were reported. Misuse and abuse of access to information rights seems to be slightly more common, although the evidence given in the study is mostly anecdotal. Interestingly though, the respondents from the European Commission claim that that authority has developed a specific procedure to avoid abuse and handle wide ranging requests. It would be interesting to learn more about that

[22] See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec

[23] Swedish Supreme Administrative Court (Högsta förvaltningsdomstolen), decision 2017-05-17 in case No 5670-16.

procedure. On the other hand, there is also a report from the public concerned in one of the studied Parties that these kinds of specific procedures sometimes are abused by the administration in order to avoid complying with court orders on disclosure of environmental information.

Barriers and challenges

Based on the responses received in this study, it is safe to say that the main barriers to access to justice in information cases are the length of the procedure, weak enforcement and – to a certain extent – costs. The first issue can be illustrated by one of the responses, according to which the court procedure in that Party at first instance is expedient and effective, commonly lasting for no more than one month. On appeal, however, the procedure is slow, unpredictable and the appeal has no suspensive effect on the issue to which the environmental information relates. Examples are also given other Parties of complex cases that have taken more than 4 years from the administrative decision to the final judgment, and sometimes even more. One should also take into account that access to information can be urgent in environmental cases; for example, if the request is made in order to obtain information concerning an EIA on a permit application, the permit might already be issued at the time of the court order for disclosure. This is a typical example of what may be called a "case won in court, but lost on the ground". To this background, the requirements for timeliness should be interpreted with extra care in relation to information cases.[24] Therefore, this issue needs to be further discussed as a major obstacle for access to justice in environmental information cases.

It is similarly evident based on the responses received that the failure to enforce orders for disclosure by information tribunals and courts is another important barrier to access to justice in information cases. Weak enforcement is widely reported in the study, occurring mainly in three situations. The first is when the information holding authority does not respond to the disclosure order, or tries to evade it with silence. The second is when the reviewing court's competence is confined to quashing the administrative decision, which necessitates for the information applicant to make a renewed request. If then the authority finds another ground for refusal, s/he must appeal once again to the court, which may quash the decision once again, etc. Such "ping-pong" seems to be quite a common phenomenon, at least in some of the studied Parties. The third situation is when the enforcement lies in the hands of a body other than the court, or in another procedure separated from the appeal process. Contrasting to this, effective enforcement seems to be achieved when the court or tribunal deciding on the merits of the case also has the power to invoke fines for disobedience, at least as far as this power is actually used in practise. Further discussion on enforcement issues would provide us with knowledge and experience about more organisational and legal instruments to deal with this general problem of environmental law, including in information cases.

Costs are always mentioned as barriers to access to justice in environmental cases, and this picture is – at least to a certain extent – confirmed in our study. As such, these cases are indistinguishable from other kinds of environmental cases, although as already noted, the costs in a number of studied Parties are at a lower level. On the other hand, the litigation costs in some of the studied Parties can be quite substantial. This can partly be attributed to a mandatory requirement to be represented by a lawyer in court. For now, I have little to add to this general

[24] See Compliance Committee's statement in the last sentence of paragraph 88 in findings on communication ACCC/C/2013/93 (Norway) (ECE/MP.PP/C.1/2017/16) and the Report of the Compliance Committed to the Meeting of the Parties at its sixth session (document ECE/MP.PP/2017/32, para. 70).

discussion, except to observe that costs do not seem to be an issue in the information tribunals which some of the studied Parties have set up. As these bodies also seem to provide some solution for the other two barriers mentioned here – lack of timeliness and weak enforcement – it may be fruitful to examine how they are designed and function.

Good examples and interesting features in the studied Parties

I want to draw attention to three features that I find particularly interesting in the reports from the Parties studied. To begin with, I think the information tribunals seem to be very interesting, as they can provide the information seeking public with an expeditious and cheap avenue for appeal of administrative decisions. Furthermore, as such bodies can be specialised on this field of law and may be equipped with a competence to undertake mediation (see below), they may provide with sufficient experience and expertise to guarantee legal certainty and swiftness in these procedures. If they meet the criterion of being independent and impartial according to Article 6 ECHR and Article 267 TFEU, they can also ease the burden of the national court systems. Information tribunals is also a feature that has raised growing attention in international law due to the positive experiences therefrom. For example, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media recommended in 2007 to create such independent oversight bodies in its Member States.[25]

Further, in many of the legal systems, administrative silence is regarded as a negative decision when the deadline given in law is expired. This legal construct for dealing with "administrative silence" or "administrative delay" is in line with a general development of modern administrative law, not least in order to strengthen the application of EU law. The possibility for certain actors to bring a case to the CJEU in order to challenge failures to act by the institutions of EU already exists in Article 265 in the Treaty on the Functioning of the European Union (TFEU). The result of such an action is that the Court declares the omission in breach of the EU Treaties. Also in secondary EU legislation, we have a number of legal constructs in order to deal with administrative omission or silence. According to Article 12 in Directive 2014/65 on markets in financial instruments, the consequence of silence from the competent authority on a notification from someone to undertake an acquisition, is that the authority has no objection to the merger. This is an example of what is a called a "positive silence rule". Examples of the opposite – "negative silence rules"[26] similar to the ones mentioned in the study – can be found in Article 10(6) of the EC Merger Regulation 139/2004. Even more relevant is Article 8(3) of the Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, which states that the failure of the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings and/or make a complaint to the Ombudsman. Also in Member State laws, such negative silence rules have established roots and are today quite common.[27] My general conclusion is that this legal construct – which in essence means that silence is equalled to an appealable refusal – is a good example on how to effectively deal with administrative passivity as regards access to environmental information. Having said this, there can also be drawbacks to such a system; when the information seeking public ap-

[25] See Report by the OSCE Representative on Freedom of the Media on access to information by the media in the OSCE region: trends and recommendations available (30 April 2007, p. 4) at https://www.osce.org/fom/24892

[26] Sometimes also called "implied dismissals" or "deemed refusals".

[27] See opinion by Advocate General Wahl in C-58/13 and C-59/13 *Torresi* (2014), at para 70.

peals "silence", the administration's arguments against disclosure can be unknown, something that may make the procedure in court unpredictable, complicated and – not least – lengthy.

The final good example concerns mediation. As noted under question 11, mediation possibilities are available in information cases in a number of the studied Parties, both in information tribunals and in courts. Respondents noted that an agreement reached through mediation can be effectively executed due to their status as executable documents. Further, mediation may be a useful tool in the initial phase of the proceedings, for getting the parties together, to clarify the controversial issues and to see whether any settlement can be reached between them. This seems very interesting and may be an issue to study further.

Concluding remarks

Access to information plays a crucial role in environmental matters. Without information, the public cannot participate in the decision-making procedures in any meaningful way. It is a vital ingredient in what is regarded as "good governance" on this field of law, aiming at keeping the public well informed and engaged in the procedures. This way, access to information improves the transparency in the decision-making and thereby secures the environmental interests protected in law. It also serves as a means for improving the quality of the decision-making and thereby reduce the need for court proceedings.

Against this background, it is quite surprising that access to justice in information cases has raised relatively little attention in the Aarhus discourse over the years.[28] Cases concerning Article 9.1 and its implementation in the Parties to the Convention are rather few compared with those dealing with Articles 9.2 and 9.3. As already noted, the Compliance Committee has so far dealt with only three cases of interest for this study. Even if there are more cases pending as of today with the allegations concerning the implementation of Article 9.1 (e.g., see communications ACCC/C/2015/134, ACCC/C/2018/161 and ACCC/C/2019/173),[29] it remains to be seen what comes out that may be of importance from an access to justice perspective. As has been illustrated in this study, also on national level there is a limited number of court cases concerning access to justice in information cases. The same goes for infringement cases and requests for preliminary rulings in the CJEU, where the vast majority of some 50 Aarhus cases deal with the implementation of Articles 9.2 and 9.3. To a certain extent, however, this general picture is balanced by the fact that there is quite a number of very interesting cases regarding requests for environmental information from the EU institutions that has been brought by the ENGO community by way direct action to CJEU according to Regulation 1049/2001.

But even so, the general impression is that access to justice in information cases has not been paid the attention it merits in the public debate concerning Aarhus and its implementation in the UNECE region. The primary intention of this study has therefore been to compensate for this silence and start a wider debate on the implementation of Article 9.1 in the Parties to the Convention. It has also become quite apparent that some of the issues raised are quite contro-

[28] Although it has been highlighted in other fora, such as the Council of Europe in its 2002 Recommendation on Access to Official Documents and Principle IX therein, also OSCEs 2007 review of the right of access to information in the OSCE region. For further information, see Open Society Justice Initiative: Right2info: *Information Commission/ers and Other Oversight Bodies and Mechanisms*; https://www.right2info.org/information-commission-ers-and-other-oversight-bodies-and-mechanisms

[29] See https://unece.org/env/pp/cc/communications-from-the-public

versial and need to be debated further. And this is where the Task Force on Access to Justice has a role to play as a platform for studies and meetings where all aspects of Aarhus can be discussed. This role as a mere facilitator for a wider debate without any formal significance is in fact the strength of our body under the Convention.

Stockholm 28 February 2021: *Jan Darpö*