Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union

FINAL REPORT

May 2000
FOREWORD

The European Union Network for the Implementation and Enforcement of Environmental Law is an informal network of the environmental authorities of EU Member States. The European Commission is also a member of IMPEL and shares the chairmanship of management meetings.

The network is commonly known as the IMPEL Network

The expertise and experience of the participants within IMPEL make the network uniquely qualified to work on certain of the technical and regulatory aspects of EU environmental legislation. The Network’s objective is to create the necessary impetus in the European Community to make progress on ensuring a more effective application of environmental legislation. It promotes the exchange of information and experience and the development of greater consistency of approach in the implementation, application and enforcement of environmental legislation, with special emphasis on Community environmental legislation. It provides a framework for policy makers, environmental inspectors and enforcement officers to exchange ideas, and encourages the development of enforcement structures and best practices.

Information on the IMPEL Network is also available through its web site at http://europa.eu.int/comm/environment/impel.

This report is the result of a project within the IMPEL Network. The content does not necessarily represent the view of the national administrations or the Commission. The report was adopted during the IMPEL Meeting of 24-26 May 2000.
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Complaint procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union

Report to be discussed at the EU-IMPEL Workshop, 10 and 11 May, The Hague, the Netherlands.

Tilburg University
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Part I

Introduction and purpose of the project

1. Introduction

The Netherlands Ministry of Housing, Spatial Planning and the Environment (hereinafter referred to as the Netherlands Environment Ministry) has prepared a workshop on the issue of “complaint procedures and access to justice in the field of the environment within the EU”. This workshop will be held on 10 and 11 May 2000, in the building of the ministry, The Hague, the Netherlands. This workshop is an element of the working programme of the EU-Network for the implementation of European Environmental Law (IMPEL-network).

Important reasons for the Netherlands Environment Ministry to take this initiative are the broad recognition at the European and international level of the importance of the involvement of the public in environmental matters,¹ and more in particular the signing of the “ECE Convention on access to information, public participation in decision making and access to justice in environmental matters” (hereinafter referred to as the Aarhus-Convention) in June 1998.² This Convention has been signed by more than 30 states, including all EU-Member States, as well as by the European Commission representing the European Community. The states involved, as well as the European Commission, are now in the process of ratification, which for most states means that steps are taken to incorporate the relevant provisions of the Convention into the national legal order and to ensure the practical implementation of the Convention.

The Convention includes provisions with regard to the “three pillars” of public involvement that were already included in the Principle 10 of the Rio-declaration:³ access to environmental information, public participation in the decision making process and access to justice. In comparison to the first two pillars, “access to justice” is worked out in less detail in the Convention. Furthermore, the wording of some provisions of the Convention, in particular the wording of some elements of section 9 of the Convention, leaves the national authorities a great deal of discretionary powers to interpret these provisions in a way that is consistent with their own national legal system. This also explains why the text of section 9 explicitly refers to the

¹ See Part II of this Discussion paper.
³ Principle 10 of the Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
existing national law on the subject. On the one hand, this is easy to understand in view of the complex character of the issue and the strong link with the national legal systems. On the other hand, however, this means that during the implementation process important questions will arise and the various states may interpret the elements of section 9 of the Aarhus-convention differently. Therefore, it would be interesting to compare the systems and approaches used by the various EU-Member States and possibly other Signatory States, in order to learn from each other and to see whether certain questions that arise during the implementation process of the Aarhus Convention could get answers based on the national experiences or views. Recognising IMPEL as a network that enables an informal discussion on the issue without fixing national positions, the Netherlands Environment Ministry hopes that the workshop will contribute to this process.

In addition to the issues of complaint procedures and access to justice at the level of the Member States, the workshop will also pay attention to the access to justice at the Community level. It might in particular be interesting to compare the access to justice in the field of the environment at the level of the Member States with the access to justice at the community level. For example the case Greenpeace v. Commission⁵, shows that the possibilities for the public to challenge a decision taken at the community level before the Court of Justice of the European Community are very limited.

2. Scope and purpose

The purpose of the workshop is to facilitate and stimulate:
- discussion on the development and further improvement of access to complaint procedures and access to justice for citizens and NGOs in the field of the environment at the **level of the Member States**, in particular in view of section 9 of the Aarhus Convention. It would be challenging to see whether it is possible, based on an identification of selected “key-issues” and the available knowledge of the systems in the Member States, literature and the Aarhus Convention, to develop tools to interpret the elements of Article 9 of the Aarhus Convention or may even add certain elements to this Convention.
- discussion on the development and further improvement of access to justice for citizens and NGOs in the field of the environment at the **community level**, in particular in view of the possibilities that exist at the national level, the ECJ-case Greenpeace v. Commission and other relevant cases, as well as the Aarhus Convention. It would in particular be interesting to explore ideas and suggestions that may be used as an input for discussions on this issue within the framework of a possible amendment of the EC Treaty.

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⁴ See the following phrases of the first three subparagraphs of Article 9:
- subparagraph 1 and subparagraph 2: “within the framework of its national legislation”,
- subparagraph 2: “where the administrative procedural law of a Party requires this as a precondition”,
- subparagraph 2: “where so provided for under national law”;
- subparagraph 2: “determined in accordance with the requirements of national law”;  
- subparagraph 2: “where such a requirement exists under national law”;
- subparagraph 3: “where they meet the criteria, if any, laid down in its national law.”.

Although the workshop is initiated within the EU-IMPEL network, representatives of interested acceding countries are especially welcome to participate in this project, not in the least because of their signature of the Aarhus Convention and in view of the EU-accession process.

3. Preparation of the workshop

As far as the Member States level is concerned, the Ministry has taken the following preparatory steps in order to ensure a fruitful discussion in May 2000:

a) instalment of a preparatory working group (representatives of the Dutch Ministry of Environment) and a steering group (representatives of Ireland, Italy, Germany, Sweden, France and the Commission) and contracting the research team of Tilburg University;
b) identification of the main questions that are relevant within the complex issue of complaint procedures and access to justice, in particular on the basis of the Aarhus Convention.
c) establishing an actual overview of the current situation within the legal order of the EU-Member States, structured on the basis of the “main questions” referred to under a);
d) identification and study (based on a comparison of the national reports, the Aarhus Convention and other sources) of the most important/interesting issues (“key issues”) and try to identify horizontal trends or remarkable approaches in the various systems of the Member States, in particularly in the light of the elements of article 9 of the Aarhus Convention.

Based on these steps, a first draft of this report was drafted by the Tilburg University, which formed the basis for a mid term meeting on 1 February 2000. This meeting was hosted by DG XI of the European Commission. The meeting resulted in a very interesting first discussion with regard to the selected key-issues. The participants assisted the research team to further improve the description of the key issues and to sharpen the questions that should be on the table at the May workshop. Because not all member states could be represented at the mid-term meeting, a detailed report of this meeting has been attached as annex 2. Elements of the discussion at that meeting have been included in this report.

The issue of access to justice at the community level was not discussed at the expert meeting on 1 February. The discussion on this item has been prepared by conducting a general analyses of the issue and identification of the main elements for discussion.

In conducting all these preparatory activities, the organisers and the research team have build on research and other activities that had been carried out with regard to the issue of complaint procedures and access to justice prior to this workshop initiative. In particular the study of M. Prieur for DG Environment of the European Commission (March 1998) on this issue has been a very useful source (hereinafter referred to as the Prieur report). The information of this Prieur-study has been up-dated on the basis of comments of representatives of the Member States (within and outside the IMPEL-network) and more recent literature. Furthermore, the information has been structured on the basis of the main questions that have been identified (see below). Another source that may become available on a short term is a guide or handbook that is

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prepared by the UN-ECE secretariat in co-operation with the Regional Environmental Centre for Central and Eastern Europe (Szentendre, Hungary), on the implementation of the Aarhus Convention. This guide has no official status; the purpose is to assist States that signed Aarhus in the implementation process. The publication of this handbook is expected for the summer of 2000. The part of this handbook that refers to Article 9 of the Aarhus Convention is attached to this report (annex 4). The full text of the handbook will be available on the website of the ECE (www.unece.org/env.).

Although any workshop requires a good preparation to be effective, the complexity of the issue and the fact that the issue is so strongly related to the legal system and culture of the Member States, were extra reasons to put a lot of effort in the preparation of this workshop. In view of these legal and cultural aspects, it was for the organisers of particular importance to take a distance of the so well known own legal system. Therefore, the ministry is very grateful that an international Steering Group could be established, in which representatives of several Member States and the European Commission were willing to participate.

4. Structure of this report

The structure of this report is fully determined by its purpose: assisting a fruitful discussion at the May workshop. As the workshop will not focus on the descriptions and all the details of the national systems, the national reports have been included in annex 1 to this report. As a consequence, this report is structured as follows:

Part II: Complaint procedures and access to justice at the Member States level:
  Short overview of the relevant developments and identification of the main questions
Part III: Complaint procedures and access to justice at the Member States level:
  The key-issues to be discussed at the May workshop
Part IV: Access to Justice at the Community Level
Part II

Access to complaint procedures and access to justice at the Member States level: Relevant developments and identification of the main questions

1. Developments in the field of access to justice

Internationally and within the EU it has often been stressed that the public (individual members and NGOs) plays an important role in the protection of the environment. More in particular it is a common view in international environmental policy and law that the members of the public and NGOs are significant actors in promoting application and enforcement of environmental law.  

As far as Community environmental law is concerned, this role of the public has clearly been stressed by the Commission in its Communication of the 5th of November 1996 on “Implementing Community Environmental Law” (October 1996, par. 36-43)8. This Communication formed the basis for the discussion in the Council of Environment Ministers during the first half of 1997. As a result of these intensive discussions, the Council adopted a Resolution on the drafting, implementation and enforcement of Community Environmental Law, a Resolution of 28th of August 19979. Through this Resolution, the Council:

“stresses the importance that, in order to settle environmental disputes more efficiently (i.e. more speedily and at low cost) and with greater ease for citizens and national authorities alike, all Member States consider appropriate mechanisms at the appropriate levels to deal with complaints of citizens and NGOs regarding non-compliance with environmental legislation and make available information regarding the opportunities for complaints to be dealt with at the Member State level”.

In line with this strong view, the Council invited the Commission to conduct a study on the existing systems within the Member States. As a result, in March 1998, mr. Prieur presented a comprehensive report under the flag of the European Council of Environmental Law and the

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7 See, for example, A.Kiss, Compliance with International and European Environmental Obligations, inaugurale rede Erasmus Universiteit, 15 november 1996, pag.11: ‘Clearly, the most powerful - or the least weak - tool for ensuring compliance with international environmental obligations is public awareness and the will to impose upon governments the protection of the environmental values which are essential for the survival of humanity.’ See also: Susan Subak, Verifying Compliance with an Unmonitorable Climate Convention, International Environmental Affairs, Volume 9, Number 2, Spring 1997, pag.148 – 168: ’Environmental organisations are playing an active role in assessing countries' progress toward meeting their unilateral targets. The environmental organisations' efforts are sponsored by some of the parties and may be viewed as an alternative to countries’ making charges of non-compliance themselves.’ See also Michael Bothe, Compliance Control beyond Diplomacy - The Role of Non-Governmental Actors, Environmental Policy and Law, 27/4 (1997), p.293-297.

8 Communication of the Commission of 22 October 1996, COM(96)500. In paragraph 43 of the Communication the Commission ends with the conclusion that it “will examine the need for guidelines on the access to national courts by representative organisations with a view to encouraging the application and enforcement of Community environmental legislation in the light of the subsidiarity principle, taking into account the different legal systems of the Member States”.

European Environmental Law Association. It is a compilation document of more detailed reports on the various Member States.

In June 1998, the “UN-ECE-Convention on access to information, public participation in decision-making and access to justice in environmental matters”, was signed in Aarhus, Denmark. This Convention includes fairly detailed provisions on the free access to environmental information, public participation in the decision making processes regarding activities that may cause significant adverse impacts for the environment and access to justice. As far as the last pillar is concerned, section 9 of the Aarhus Convention contains provisions concerning:

- access to review procedures for any person who wants to challenge a decision on a request for environmental information;
- access for members of the public who want to challenge a decision based on article 6 of the convention, as well as other decisions (including general regulations and plans);
- access for the public to challenge acts and omissions by private persons and public authorities.

Subsections 4 and 5 of section 9 include a few criteria for remedies that should be taken into account.

Since the adoption of the Convention, the implementation and ratification process of this Convention has got a great deal of attention. For the region of Central and Eastern Europe Countries (CEEC) special activities and meetings were organised by the Regional Environmental Centre for Central and Eastern Europe (REC), Szentendre, Hungary. Within the EU-region no special meeting to enable the exchange of experiences between EU-Member States was initiated yet. From 19-21 April 1999 the first Meeting of Signatories to the Aarhus Convention took place in Chisinau, Republic of Moldova, to discuss the state of play of the implementation and ratification process in the various states. The second meeting will take place in Dubrovnic, Croatia from 3 to 5 July 2000. Information on the Aarhus convention, including translations of the convention in English, French, German, Russian and Spanish, the report of the first meeting of signatories and the state of play of the ratification process, can be found on the UN/ECE internetsite (www.unece.org) The overview of ratifications and approvals indicates that the entering into force of the convention is not likely to take place in 2000. To assist signatory states in the implementation phase, the ECE secretariat started in 1999 with the preparation of a handbook for the implementation of the Aarhus Convention. (See Part I above). This handbook is likely to be published before the summer of 2000. In addition to annex 3 of this report, which contains the text of article 9 of the Aarhus Convention, annex 4 provides for the text of the ECE-Aarhus Implementation Handbook as far as article 9 is concerned.

Furthermore, the European Commission adopted the White paper on Environmental Liability on 9 February 2000. This white paper “explores how a Community regime on environmental liability can best be shaped” and the Commission concludes that “the most appropriate option is a Community framework directive on Environmental Liability”. Except for issues like the scope and character of the liability that should be established for polluters, the white paper also discusses the issue of access to justice for citizens and NGOs in case of environmental damage. According to paragraph 4.7 the public should have the right to go to a court if the polluter and

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11 See for the full text of the white paper the following website:
http://europa.eu.int/comm/environment/liability/el_full.pdf
the government do not act, as well as in urgent cases. The Environment Council has had an orientation debate on this white paper at the March-meeting and will further discuss the document during the meeting of 22/23 June 2000. For the information of the participants of the workshop, the executive summary and paragraph 4.7 of the Whitepaper has been attached to this report as annex 5.

2. Identification of the “main questions

As stated above and as was stressed by the Prieur report, the issue of complaint procedures and access to justice in the field of the environment is a complex issue. The various systems in the Member States show substantial differences and are often evolved during many decades. As a consequence of this diversity, it is important to recognise that it is easy to get lost in all the details of the 15 different systems. Therefore, a number of questions, relevant for all or most systems, have been identified to enable a compact description of the various systems and to assist a comparison of these various systems. Below, the most important questions (“main questions”) has been identified. The structure of these elements is primarily based on the elements of the Aarhus Convention and the information on the systems in the Member States. These “main questions” have formed the basis for the format for the national reports, attached in annex 1 of the report. However, as was explained earlier, it is not feasible to discuss all these issues at the workshop in May. Therefore, on the basis of a comparison of the national reports and on the basis of the discussion during the mid-term meeting on 1 February, a limited number of key-issues has been worked out in more detail in Part III of this report.

To start with, the overall question is:

_What are the possibilities for individual citizens and/or NGOs to complain or to go to a court in cases where there is a possible threat of environmental damage or nuisance, both by administrative acts and decisions and by acts by industry or other private actors?_

When discussing this central question, it is better not to focus too heavily on the distinction that is common in many Member States: civil law, administrative law, and criminal law. This will probably lead to a difficult and sometimes confusing discussion on differences between legal systems. In stead, one should try to focus the attention more directly on the possibilities to complain or to go to a Court in the field of the environment. This has resulted in the identification of the main questions described below. This identification is partly based on Article 9 of the Aarhus Convention. The relevant paragraphs of Article 9 will be quoted in the footnote attached to the relevant element.
1. Procedures against administrative acts or governmental action/non-action: 12

**Licences**

*(decisions on the permission of activities that may have adverse impacts on the environment)*

a) What kind of procedure and where exactly? 14
b) Who has access and under which conditions? 15
c) What can be the (positive) result for the complainant after a procedure has been concluded? 16
d) Practical aspects: 17

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12 See Article 9(2) of Aarhus: “Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention”.

13 A diversity of terms is used for these kind of decisions, for instance, permit, licence, authorisation, approval. For the purpose of this discussion paper, the term licence is used, although the purpose is to include all individual decisions with regard to the allowance of activities that may have adverse impacts on the environment. The term ‘activities’ should be interpreted in a broad meaning, including for example the activities listed in Annex I to the Aarhus Convention.

14 See for the distinction between judicial and non-judicial procedures pag.4 of the Prieur Report: Complaint procedures (non-judicial procedures before institutions that are not considered to be independent and impartial tribunals established by law according to article 6 ECHR) or access to justice (access to a permanent authority established by statute, composed of independent judges, operating according to organized rules of adversarial procedure, but, first and foremost, making binding decisions in settlement of disputes according to the law). See in this respect Article 9(2) of Aarhus: “The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.”

15 Attention will be paid to the position of individuals as well as to the position of (environmental) NGOs. See Article 9(2) of Aarhus: “What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.”

16 See Article 9(4) and 9(5) of Aarhus:

“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, (…)”.

17 See Article 9(4) and 9(5) of Aarhus:

“4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall 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. 5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the
- What are the fees and (possible) other costs of proceeding?
- Are parties obliged to provide for financial security for procedural costs in case they lose?
- How long can it take before a final decision is taken?
- Are parties obliged to obtain legal aid?
- Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?\(^\text{18}\)

**Other environmental decisions (e.g. sanctions, regulations and plans)**

a) What kind of procedure and where exactly?
b) Who has access and under which conditions?
c) What can be challenged in the procedure?
d) What can be the (positive) result for the complainant after a procedure has been concluded?
e) Practical aspects:
   - What are the fees and (possible) other costs of proceeding?
   - Are parties obliged to provide for financial security for procedural costs in case they lose?
   - How long can it take before a final decision is taken?
   - Are parties obliged to obtain legal aid?
   - Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?

2. Procedures against industries or other citizens that pose a threat to the environment:\(^\text{19}\)

a) What kind of procedure and where exactly?\(^\text{20}\)
b) Who has access and under which conditions?
c) What is the subject of the dispute?\(^\text{21}\)
d) What can be the (positive) result for the complainant after a procedure has been concluded?
e) Practical aspects:
   - What are the fees and (possible) other costs of proceeding?
   - Are parties obliged to provide for financial security for procedural costs in case they lose?
   - How long can it take before a final decision is taken?
   - Are parties obliged to obtain legal aid?
   - Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?

3. Criminal/penal procedures:

establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

\(^{19}\) See Article 9(3) of Aarhus: “In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

\(^{20}\) complaints or claims addressed to the actor that pose a threat to the environment as well as complaints or claims addressed to the competent authority to oblige this authority to use the available legal instruments in the relation authority – relevant actor (e.g. the use of administrative sanctions to enforce permit provisions).

\(^{21}\) For example, damage to the environment, to objects, to persons etc.
a) What kind of procedure and where exactly?
b) Who has access and under which conditions?
c) What can be the (positive) result for the complainant after a procedure has been concluded?
d) Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

Specific aspects:

When studying these questions, it is important to recognise that within the legal systems the question must be answered differently for the various components of the environment. Therefore, the distinctions between the following types of environmental risks will be taken into account:
- threat to the quality of water, soil and air;
- threat to nature (specially protected areas or species, biodiversity);
- threat to human health (including the control of major-accident hazards)

These main questions will form the basis for the reports on the Member States, which will follow in Part III of this discussion paper.
Part III

Complaint procedures and access to justice at the Member States level: The Key-Issues to be discussed at the May workshop

1. Introduction

In section 2 of Part II, the complex issue of complaint procedures and access to justice in the field of the environment has been worked out in a number of questions. These questions formed the basis for structuring the national reports of the Member States, attached to this report as annex 1.

As the list of questions and the national reports are fairly comprehensive, it is too ambitious to discuss all these issues at the workshop on 10 and 11 May 2000. Therefore, a number of issues that are of special interest or importance has been selected and worked out in this Part III. These issues are referred to as the “key-issues”.

When selecting the issues, emphasis has been put on those issues that are of particular interest for the improvement of public access to complaint procedures and access to justice in the field of the environment. In other words, not the perspective of the lawyer, but the perspective of the citizen or NGO has determined the focus. As a consequence of this choice, the procedures that exist in the Member States will not be compared in all details, although this may be interesting from a legal/procedural point of view.

The selection is based on the national reports of the Member States, other sources of information (e.g. literature) and the Aarhus Convention.

Below, six “key-issues” will be discussed. With regard to each key-issue, the importance of the issue will be explained, the national reports will be analysed as far as the relevant issue is concerned and the Aarhus Convention will be checked on relevant provisions. When discussing these issues, the discussion of the February meeting is taken into account. Comments of participants has resulted in sharpening the text and making the point for discussion more clear, for example by using some practical cases. Furthermore, the order of the issues has been changed because the discussion at the February meeting showed that some of the issues have a strong interrelationship.

At the end of each subparagraph, the relevant key-issue will be translated to one or more questions for the discussion.

2. The selected Key-Issues

a) Who has access to procedures to challenge authorisations of activities that may harm the environment?

The national reports show that, although the existing national systems are very diverse, most systems provide for public participation, complaint procedures and access to justice in relation to authorisations for concrete activities that may be harmful for the environment, for example permits for the exploitation of industrial installations.

Public participation with regard to the decision making process related to individual activities and installations is also included in some EC-directives. Important examples are the IPPC- and
EIA-directives. Although complaint procedures and access to justice are not an element of these directives, in fact all Member States provide for these means to a certain extend. The national reports show however a great diversity of types of procedures. Differences exist with regard to many aspects and most of these differences derive from the specific legal system and complex of (environmental) legislation in the Member States. One aspect is however of special interest for all these systems, namely the question which actors have access to the available procedures and under which conditions.

A general observation is that the criteria for having access to a procedure appear to be linked with the character of the procedure: the more formal the procedures are, the stricter the criteria for having access to these procedures. While in several Member States (e.g. Den., Nl., Aus.), any person may request an ombudsman to investigate a complaint, access to courts is in most Member States reserved for those who may prove a direct and concrete interest.

Let us have a closer look to the issue, in view of the relevant provisions of the Aarhus Convention. Section 9, subsection 2, of the Aarhus Convention, states that:

“each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest, or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.”

So, first of all, the obligation to provide for access to justice is limited by using the words “public concerned”. According to the first phrase of paragraph 5 of Article 2 of the Convention, “The public concerned means the public affected or likely to be affected by, or having an interest in, the environmental decision-making”. Furthermore, in addition to this general notion, Article 2, paragraph 5 that for the purposes of the definition of “the public concerned”:

“non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.

Article 6 of the Aarhus Convention includes the obligation that every one that falls under the terms “public concerned” has the right to participate in decision making process with regard to annex I activities. However, it appears that the Aarhus Convention does not ensure that all these persons that have the possibility to participate in the decision making process will also have access to justice with regard to the final decisions. By adding the phrase “(a) having a sufficient interest, or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition” the Aarhus Convention seems to include the possibility to formulate further requirements for having access to justice, which might limit the group of actors even further. This seems not to be in line with the approach

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22 The terms “decision, act or omission subject to the provision of article 6” include the authorisation of activities and installations listed in Annex I to the Convention, including the activities and installations that fall under the scope of application of the EIA- and IPPC-directives.
concerning the access to environmental information: those who have access to information (any person) do also have the possibility to challenge a decision concerning a request for information.

But let us go back to the question that should be considered to fall under the description “members of the public concerned (a) having a sufficient interest, or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition”.

For more clarity on these criteria the same paragraph of article 9 of the Convention refers to the national systems:

“What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention”.

This wording invites us to look at the national reports again: What are the criteria for having access to the available procedures in the EU Member States? Although not all the individual pieces of national legislation have been studied, the impression is that most national systems are not very explicit as far as these criteria are concerned; it appears that in many legal systems wording like “interested parties” or “persons that have a legal/sufficient interest” are used in legislation and/or in case law.

In theory, one could make a distinction between the following categories of actors:

Those who aim to protect clear individual and concrete interests of legal or natural persons:

a) The individual legal or natural person, having a clear direct interest, for example persons whose property or health have been effected or is in severe danger.

b) A body or organisation that aims to protect the interests of actors referred to under a), for example associations of persons living in the direct surrounding of an industrial plant;

Those who do not have clear individual and concrete interests but who aim to protect the more diffuse interest of protecting the environment (including nature):

c) The individual natural person that has no direct interest as referred to under a), but who is concerned because of the adverse impacts or danger for the environment (including natural values);

d) A body or an organisation that aims to protect the interest/right of every person on a clean environment.

In all Member States, the actors referred to under a) appear to have a sufficient interest to have access to the available procedures to challenge authorisations of activities or installations that may harm the environment. Furthermore, in many Member States (e.g., Greece, Lux. Den, UK), also the organisations referred to under b) will have a sufficient interest, although certain conditions may apply (e.g., concerning the required grade of representation/number of members). But what about the actors, individuals or organisations, that aim to protect the more diffuse environmental and natural values?

As far as the individual citizens are concerned, the preamble of the Aarhus Convention, as well as article 1 of the Aarhus Convention, make clear that the signatory States, including the EU Member States, recognise
“that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”.

Probably based on this general philosophy, some Member States (e.g. NL, Ireland, Port.) have provided for access to complaint procedures or access to justice for any person, also those persons that can not prove a direct and concrete interest like damage to property or health. However, in several other Member States (e.g. Ger., Fin, Greece, Lux., UK), this “right on a clean environment” has not been translated into a right for every person to challenge decisions concerning activities for a court.

As an alternative for providing any person access to the procedures (the so called “actio popularis”) or additional to the access of individuals, one might allow certain independent bodies or NGOs to challenge decisions in the interest of environmental protection. Careful reading of the Aarhus Convention makes clear that this is in fact a minimum required option: In addition to the above quotations of paragraph 2 of Article 9 of the Aarhus Convention, the relevant subsection states:

“To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.”

So, according to this provision also environmental NGOs, categorised under d) above, should in principle get access to justice, although – as made clear in Article 2(5) – states still have the possibility to set certain requirements. It is likely that the general idea behind this element of the Aarhus Convention is that the environmental interests are often diffuse and that many environmental problems could not become the subject of legal disputes because no direct interest of individual (legal or natural) persons were violated. In these cases, for example pollution of a natural area or violation of emission requirements for carbon dioxide, NGOs may be regarded as actors that protect the complex of these diffuse interests and thereby represent all the individuals that have an interest in the conservation of the environment in general.

In several Member States (e.g. Sweden, Netherlands) NGOs indeed have access to procedures to challenge decisions with regard to activities that may harm the environment. In some Member States (e.g. Germany) access to justice for NGOs has been realised only with regard to certain policy fields, for example natural protection (e.g. Germany).

Also very interesting is that in some Member States a governmental agency (e.g. the EPA in Sweden) or another body or institution (e.g. an Ombudsman (Austria)) has the possibility to challenge a decision with regard to activities that may harm the environment before a court, in order to protect the general interest of environmental protecting. However, as the workshop is

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23 As far as access to environmental information is concerned, this approach has also been followed in the Aarhus Convention. The Convention gives any person access to justice to challenge a decision to refuse disclosure of environmental information (see Article 9, paragraph 1 of the Aarhus Convention) in line with the provisions in Article 4 of the Convention that states that any person can make a request for environmental information, without an interest to having to be stated.
focusing on the role of the public, a relevant question with regard to these systems would be whether the public can initiate these procedures. In the examples of Sweden and Austria, but also in other Member States, members of the public may indeed request the relevant body to start a procedure, however, they are not in the possibility to oblige these bodies to do so.

Above, several arguments have been given for broadening access to complaint procedures and access to justice to actors (citizens and/or NGOs) who aim to protect the environment, without the requirement to prove a direct and concrete interest. Important arguments are for example:

- According to the preamble and Article 1 of the Aarhus Convention, any person has “the right to live in an environment adequate to his or her health and well-being”. In view of this right it is not logical to limit the term “sufficient interest” to situations in which a person can prove a direct legal interest, for example pollution of its property;
- If for access to justice a concrete individual interest is a requirement, in many cases in which the more diffuse interest of the environment (including natural values) is in danger no protection through legal action is possible;
- A broad access to justice of the public ensures that public participation in the decision making process is taken serious. In other words, public participation in the preparatory phase of a governmental decision is weak if the public does not have the possibility to ask for an independent judgement in case their comments are not taken into account.

For the discussion, it is of course also interesting to pay attention to the possible arguments for limiting access to justice.

Possible arguments to limit the group of actors that have access are:

- Broad access may result in too many procedures, which would lay a heavy burden on the courts with the result that procedures are very lengthy;
- Broad access may result in a (legal) uncertainty for those who would like to undertake the relevant activities;
- If NGOs have broad access, the question is whether the NGOs that use these possibilities indeed represent the public and indeed start the procedure to protect the environment;
- Broad access may have the result that actors do not use the more informal instruments to solve a dispute.

Depending on the situation, these arguments may well be valued. In this context also the way in which a court is assessing disputes regarding decisions is important. If for example the court assesses the decision in a very comprehensive and detailed way (e.g. Germany), the aspect of managing the amount and duration of procedures will be of greater concern.

To conclude, on the one hand arguments for broad access (for example based on the relevant provisions of the Aarhus Convention, positive experiences in other Member States, etc.) should not be a reason for a simple “yes”, while on the other hand the possible problems that may arise as a result of a broad access are no reason for a simple “no”. Probably one has to find a balance between the more principle aspects of creating access for certain actors to protect the interest of environmental protection (citizens and/or NGOs and/or certain bodies or institutions) on the one hand, and ensuring a manageable system that takes into account aspects of capacity, costs, duration and legal security on the other hand. To establish such a balance, one might open access for certain actors to protect the general interest of the environment under certain conditions or take other measures, for example related to the court-system. For citizens the requirement could
be established that the informal procedures must have been used first and for NGOs requirements may be established in national law with regard to the minimum amount of members and other aspects that may prevent misuse. Furthermore, with an eye on the capacity of the court and the duration of procedures, one could establish a special environmental court to ensure a high level of expertise.

**For the discussion:**

**General question:**
Who should have access to complaint procedures and access to justice to challenge decisions with regard to activities that may adversely affect the environment (e.g. IPPC-installations and EIA-activities), in cases where no individual and concrete interests of persons (like property) are involved? In other words, who should in these situations have access to protect the more diffuse interests of the environment (including nature)?

**Case that may be used for the discussion:**
A competent authority has issued a permit for an installation (e.g. an IPPC-installation), and members of the public and NGOs think that this installation will cause unacceptable adverse impacts on:
- a natural reserve situated next to the installation (destroying populations of rare flora and endangering animals);
- the world's climate because the emissions of SO\textsubscript{x} NO\textsubscript{x} and CO\textsubscript{2} to the air are very high.

**Who should have access: three categories:**

(i) **Any person:**
Should access to justice be provided for any person (actio popularis) in view of the statement in Article 1 of the Aarhus Convention “that every person has the right to live in an environment adequate to his or her health and well-being”, and (related to this question), how may problems like a too heavy burden on the courts and legal uncertainty for the person that wants to undertake the activity, be avoided or limited to an acceptable level?

(ii) **(Certain) NGOs:**
The Aarhus Convention states in Article 9, paragraph 2 that “the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient” for having access to justice. Article 2(5) states that for the purposes of the definition of “the public concerned”: “non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.  
As a consequence, NGOs should in principle have access to justice, but as 2(5) makes clear, requirements under national law may be established: What requirements may be necessary to balance this general obligation on the one hand and preventing problems of a too wide access on the other hands?

(iii) **Other body:**
Could anybody’s interest in a clean environment be represented by another (independent) body, for example an Ombudsman or Agency that also has access to courts?
If the answer is yes, what may be the role of the public: May access to justice of this body be considered as a full alternative for access to justice for citizens and/or NGOs, if citizens can only request and not force these bodies to undertake action?

b) **Access to complaint procedures and access to justice to challenge plans, programmes and general regulations**

The Aarhus Convention pays also attention to public involvement regarding plans, programmes and policies relating to the environment, as well as public involvement regarding generally applicable legally binding rules that may have a significant effect on the environment. This involvement is however limited to participation during the preparation of these general instruments. It is interesting that both relevant articles of the Convention, article 7 and 8, use the words “the public” and not “the public concerned” as is done in article 6 and 9. As a consequence, public participation with regard to the general instruments like plans, programmes and regulations, have to be ensured for any person, including NGOs. However, reference to article 6 and the phrase in article 7 that “the public, which may participate, shall be identified by the relevant public authority”, raises the question whether this is really meant by the signatory states.

Furthermore, Article 9, paragraph 2, under b) states that access to justice should be ensured “to challenge the substantive and procedural legality of any decision, act or omission subject to (...) other relevant provisions of this Convention.” So, decisions with regard to plans, programmes and general regulation fall under the scope of Article 9 of the Aarhus Convention as well. However, the phrase “where so provided for under national law” in the relevant paragraph of Article 9 limits the legal strength of this provision substantially.

When discussing the issue of access to complaint procedures and access to justice to challenge plans, programmes and regulations, it is important to recognise the great diversity of instruments. The terms plans and programmes may have different meanings in Member States, the legal status of these documents may differ and plans, programmes and regulations may be developed at different levels of government. Furthermore, the question is relevant whether we talk about plans, programmes and regulation in the field of environmental policy, or whether the attention should be concentrated on the instruments that are developed in other policy fields because of the significant adverse impacts on the environment that may derive from these instruments. The Aarhus Convention uses in article 7 the wording “plans, programmes and policies relating to the environment” while in article 8 the formulation “regulations and other generally applicable legally binding rules that may have a significant effect on the environment” has been used. Assumably, in view of the purpose and spirit of the Aarhus Convention all these general instruments that are relevant from the perspective of environmental protection must be considered to be covered by the Aarhus convention.

This great diversity of instruments with a general character is confirmed by the short analysis of the national reports on this issue. The picture of access to complaint procedures and access to justice to challenge general instruments like plans, programmes and regulations is even more complex than the situation with regard to the issue discussed under a). The possibilities of the public seem to depend on many factors, including the legal status of plans, the administrative level (national, regional or local level) on which the regulations or plans are established and the relevant field of policy (e.g. environmental protections, nature protection, spatial planning or
other policy fields). A relevant note in this respect is that there is no EC-legislation that has a harmonising effect on the possibilities of the public to challenge general regulations and plans. Although the directive on Strategic Environmental Assessment is likely to include provisions concerning public participation during the preparatory phase of important plans, provisions on access to complaint procedures or access to justice are not included in text of the Common Position of the Environmental Council as it is now on the table in Brussels. Based on the national reports, one may state that the possibilities to challenge general regulations and plans are in most Member States limited. Certain general complaint procedures, for example investigations by ombudsmen, may also include the possibility to investigate complaints regarding plans, programmes and regulations of the government (e.g. Germany, Denmark), but for most other procedures the possibilities are limited to specific situations with a limited scope. In some Member States the broadest access exists with regard to regulations and plans in the field of nature protection (e.g. Lux, Germany), although in other Member States the possibilities in the field of nature protection are more limited than in the field of the environment (e.g. Ireland). As far as plans are concerned, several Member States provide for procedures to challenge local, legally binding plans in the field of spatial planning (e.g. NL, Aus, UK). Furthermore, some Member States provide for access to complaint procedures to challenge environmental policy plans and nature policy plans as well (e.g. Ireland). For most of these procedures the group of actors that has access is limited to persons that have a direct and concrete interest. In the field of the nature protection some Member States have provided also access to the relevant procedures for NGOs that fulfil certain conditions (e.g. Lux.). There are however some exceptions where this limited approach is not followed: some Member State provide access to complaint procedures and/or access to justice for any person (e.g. Ireland and Portugal). In addition, some Member States have an Ombudsman that may also investigate complaints regarding general regulations and plans (e.g. Denmark and UK).

This diversity makes it more difficult to set up a well-structured discussion. Nonetheless, it is possible to describe a number of general arguments for establishing access to complaint procedures and access to justice with regard to plans, programmes and general regulations. Some are listed below:

- Possibilities to challenge the final plan, programme or regulations form a logical step after public participation in the preparatory phase. The national reports show that in several Member States, public participation during the preparation of plans, programmes and regulations do already exist. Often the group of persons that may express their opinion during the participation phase is fairly big. However, these possibilities of participation are not always followed by access to complaint procedures or access to justice. Why not? What is the value of participation if an instrument to challenge the final decision does not exist?
- Possibilities to challenge plans, programmes and general regulations are often more important than possibilities to challenge concrete authorisations of activities: if the right balance between interests, for example between economic interests and the interest of maintaining a healthy environment, is missing in these more general regulations, the possible consequences are much more serious.
• Access to complaint procedures and access to justice with regard to plans, programmes and regulations may limit the amount of procedures in a later phase with regard to individual decisions substantially.

• As far as the general instruments that focus on other policy fields (e.g. transport, agriculture, industry) are concerned, possibilities for the public to challenge these instruments from the perspective of the possible adverse environmental effects may be acknowledged as an important tool to stimulate “external integration” of environmental protection in other policy areas;

• As far as regulations are concerned, one might question why a person living next to an installation does not have possibilities to challenge certain adopted general regulations that apply to that installation, while that person would have had access to procedures in case the obligations and prohibitions were included in an individual authorisation. In fact, the simple choice of the instrument (permit or general rules) is determining for the existence of the possibility for the public to challenge the relevant provisions.

In view of these arguments, one may question why the possibilities to challenge the general instruments are so limited in most Member States. One of the arguments to limit these possibilities may be that in certain procedures a representing body is involved that is assumed to take into account the interests of the public (the “voice of the public”). However, many procedures to establish plans, programmes or general regulations will not involve representative bodies at all or the way in which such a body is involved is very limited. Another reason to limit possibilities to challenge general instruments may be that complaints and court-cases would adversely affect the “power of government”, with the consequence that the period for making plans or general rules should be twice as long. Or is the content of these instruments too general to give access to the public? For certain plans and programmes this may indeed be the case, although also for these instruments public participation in the preparatory phase is ensured in many Member States.

**For the discussion:**

Although the Aarhus Convention and the legal systems of several Member States ensure public participation during the preparation of general instruments of environmental policy and law, for example plans, programmes and generally binding legislation, there seem to be very limited possibilities in most Member States to challenge the adopted instruments through complaint procedures or access to justice. The great variety of general instruments and the fact that several arguments for and against access may be formulated, makes it difficult to discuss this item, however, the next questions may give some guidance to the discussion:

1. Do you agree with the general statement that the possibilities to challenge a final plan, programme or regulation is a logical step after opening public participation in the preparatory phase of these instruments?

2. Should (taking into account the spirit of the Aarhus Convention and the possible advantages and disadvantages described above) access to complaint procedures and/or access to justice be open for members of the public (citizens and/or NGOs: see issue (a)) with regard to one or more of the following general instruments:
(i) Plans that describe the policy of the government (national, regional or local level) in the field of the environment, without establishing a direct legal binding effect on human activities or projects;
   Example: national environmental policy plan

(ii) Plans that describe the policy of the government (national, regional or local level) with regard to other policy fields (e.g. agriculture, transport and industry), without establishing a direct legal binding effect on human activities or projects;
   Example: national policy plan for transport.

(iii) Plans that include legal binding provisions that must be respected by those who want to undertake certain activities or by the government when taking a decision on the allowance of certain activities?
   Example: Local plans in the field of Spatial Planning.

(iv) General regulations that include (or imply) concrete approvals of activities, installations or projects that may cause environmental impacts;
   Example: General regulation providing for a set of legal requirements for installations, which regulations replace the permit requirement for those installations?

(v) All plans, programmes and regulations that contain elements that violate international– or European (environmental) law?

When discussing the questions formulated above, special attention may be paid to the following aspects:
• the moment on which a plan, programme or set of regulations can be challenged: within a certain period after the adoption of the instrument or at any moment?
• Who should have access: any person and/or certain NGOs and/or another body (ombudsman/agency): see key-issue (a) above;
• What is the level of detail of the assessment of the judge: marginal, in view of the general purpose of the instrument or in depth, taking account of the specific consequences of the plan or regulations for the persons that challenged the instrument?

c) Possibilities for the public to ensure compliance with environmental law, in particular by forcing administrative enforcement or initiating criminal prosecution in case of violations of national (environmental) law.

Key elements a) and b) refer to challenging an authorisation of certain activities and installations that may cause adverse impacts to the environment or to challenge general instruments, including for example direct binding regulations for installations. But what if the final authorisation, the conditions attached to that authorisation or provisions of the general regulations are not respected by the relevant actor? What are the possibilities for the public to make sure that the relevant legal obligations are obeyed?
Is it, for example, possible to request the administrative competent authority to initiate an enforcement action and if the competent authority refuses this request, is it than possible to challenge that decision? Is it possible to complain about the lack of adequate enforcement by the administrative competent authority? Or does the public have its own instruments to enforce environmental law, so that enforcement is not fully depending on the initiative of the relevant governmental bodies?
This is an important issue as the absence of an adequate enforcement of the legal requirements, for example the conditions attached to a permit, will undo all the possibilities of public participation, complaint procedures and access to justice relating to that permit. If, for example, a person has challenged a permit before a court and the court has required the competent authority to attach conditions to the permit in order to limit the emission to water, that person is back to where he started if these conditions are violated and enforcement is lacking. The Aarhus Convention does not pay much attention to the role of the public in the field of enforcement. In fact, in the whole convention the term “enforcement” is used only once and the term “compliance” only twice. Both terms are used in the context of enforcement of the Convention itself and not in the context of the role of the public in the field of enforcing environmental law. However, Article 9, paragraph (3), states that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”.

The national reports show also on this issue a diversity of systems/approaches between the different Member States. An important note is that the type of enforcement instruments and the characters of the available procedures are different. This has also consequences for the available instruments for the public to ensure compliance with environmental legal obligations or prohibitions. Nonetheless these differences, it is possible to discuss this issue by making the following distinction:

i. procedures for the public to force the administrative authority, for example the authority that is competent to enforce the permit, to take enforcement measures,

ii. procedures for the public to undertake direct legal action in the relation public – polluter, for example by asking the court to prohibit the activity that is causing adverse impacts for the environment, and,

iii. procedures to initiate criminal prosecution, directly or via the public prosecutor.

Below, these categories will briefly be discussed.

i. procedures to force the administrative authority to take enforcement measures

Although the background information was not sufficient to get a complete picture of all different systems, the following examples may illustrate this diversity:

• In several Member States the possibility to request for enforcement indeed exists (e.g. Lux, NL, Sp, Fin, S). In some Member States this possibility has specifically been codified in the national environmental law (e.g. NL, Fin), while in other Member States the possibility appears to derive from more general legal sources. For a number of Member States, the available information was not sufficient to determine whether the relevant possibility for the public exists. In most Member States where the possibility to request for enforcement exists, a refusal of that request may be challenged before a court or other body;

• In most Member States that have an ombudsman/ombudsmen (e.g. Fin, F, NL), the competence of the ombudsman also includes the investigation of complaints related to the (lack of) enforcement of environmental law by the relevant administrative authority;

• In some Member States, members of the public might challenge the competent authority under general liability rules, as the refusal to undertake enforcement measures may form a
violation of his or her legally protected rights (property, health or may be even a clean environment).

Also here the question is who should be entitled to make use of the possibilities summarised above. Is it a condition that the violation of environmental law will effect a legal right of the plaintiff? If this is indeed a requirement, the issue discussed under a) becomes relevant again: what about the more diffuse interest of the protection of the environment (including natural values). Is it not reasonable to assume that most environmental legislation has been developed to protect everybody’s right on a clean environment (see article 1 of the Aarhus Convention), and, as a logical consequence, should not any individual or at least certain NGOs, have possibilities to challenge an administrative body that is refusing enforcement action in case of violation of that legislation?

**ii. Procedures in the direct relation between members of the public and the actor (citizen/company) that violates the environmental legislation**

Element i) discussed above refers to enforcement action via the competent public authority. The question is however whether the public should always address its complaint or legal action to the public authority. Article 9, paragraph (3), states that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”. This formulation indicates that the public should indeed also have the possibility to undertake direct steps in the relation to the actor that contravene national (environmental) law. This is in line with paragraph 4.7 of the White paper on Environmental liability of the European Commission states: “Since the protection of the environment is a public interest, the State has the first responsibility to act if the environment is or threatens to be damaged. However, there are limits to the availability of public resources for this, and there is a growing acknowledgement that the public at large should feel responsible for the environment and should under circumstances be able to act on its behalf.”

**iii. Procedures to initiate criminal prosecution.**

Linked with the issue under c(i) and c(ii) is the question whether citizens and/or NGOs have the right to initiate criminal prosecution in case environmental crimes have been committed. As the criminal enforcement has some specific characteristics, for example, the punitive aspect, this issue should get special attention.

The national reports show that, generally speaking, the systems of the Member States may be divided in two groups:

1) Member States in which criminal prosecution is an exclusive competence (sometimes duty) of the public prosecutor, however where members of the public have the possibility/right to request the public prosecutor to start a case. If this request is refused, there is access to procedures to challenge this decision. (Examples are Germany, Italy and the Netherlands);

2) Member States in which criminal prosecution is a primarily task of the public prosecutor, but where members of the public (under certain conditions) also have the possibility to start a case them selves. (Examples are France, Spain and the United Kingdom).
Also here the question is who is entitled to make use of the relevant procedures. In most Member States access to the procedures is limited to those who are affected by the offence. However, in some Member States (e.g. France) also NGOs that fulfil certain criteria have access.

**For the discussion:**

1. a) Do you agree with the general statement that the public has a role in ensuring an adequate enforcement of environmental law?

   b) Do you agree that, if a person and/or NGO has the right to challenge an authorisation for an activity, installation or project, this right is of little value if that person or NGO can not do anything about lack of enforcement of the relevant legal requirements?

2. **Procedures to force the administrative authority to take enforcement measures:**
   Should members of the public (individual citizens and/or NGOs that fulfil certain requirements) have the possibility to:
   - request the competent authority to take enforcement action and
   - to complaint or to go to the court if the competent authority refuses to take enforcement action, with the possible result that the authority is ordered to use its enforcement power?

3. **Procedures in the direct relation between members of the public and the actor (citizen/company) that violates the environmental legislation:**
   Should members of the public (individual citizens and/or NGOs that fulfil certain requirements) have the possibility to undertake direct legal action addressed to the polluter, for example by asking the court to prohibit the activity that is causing adverse impacts for the environment?

4. **Procedures to initiate criminal prosecution:**
   Should members of the public (individual citizens and/or NGOs that fulfil certain requirements) have the possibility to start a criminal procedure or to force the public prosecutor to start a criminal procedure?

**In discussing the questions above, please pay attention to the question Who should have access:**

Is the outcome of the discussion on key-issue a) of this report also relevant for access to enforcement procedures or should the procedures to ensure enforcement have a wider access than the procedures to challenge decisions relating the allowance of activities or projects?

Related to the question who should have access, the following case may be helpful for the discussion:

An installation (e.g. an IPPC-installation) is violating the environmental permit. As a consequence:

a) The soil of the people living in the neighbourhood of the installation is polluted;

b) a natural reserve situated next to the installation is polluted, destroying populations of rare flora and endangering animals;

c) the CO2 and SO2 emission into the air is much too high.
Another important issue concerns the effectiveness of the remedies that are linked with the complaint procedures and access to justice. This issue is important because the value of “having access” is limited if the remedies are not adequate or effective. Therefore, Article 9, paragraph 4, of the Aarhus Convention obliges the Contracting Parties to ensure that “the procedures (…) shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”.

It is fairly simple to determine when a remedy is not adequate or effective: if a procedure will not be started, although the person involved has access, because the procedure does not provide for remedies that will safeguard his interests, it is clear that these remedies (and in fact thereby also the whole procedure) is not “adequate or effective”. But is it possible to work out the criteria for determining the effectiveness of a remedy in more detail? The difficulty of this issue is that the question when a remedy is effective may depend on several factors, including:

- the decision and/or act that is the subject of the dispute (authorisation of an activity, plan or programme, general regulation, enforcement action),
- the type of procedure (complaint, access to a court, civil, administrative or criminal),
- the seriousness of the environmental damage that may be caused.

In fact, whether a remedy is effective may even depend on the aims of the plaintiff. For example, if a person who suffers damage because as a result of a violation of a permit condition, his primarily aim will probably be to receive financial compensation, but may be his interest is more focused on the punitive aspect. In some Member States the civil- and administrative procedures will not be considered “effective” if the primarily purpose is to punish the person involved, while the criminal procedure will not in all Member States provide for adequate compensation of the damage that has been caused.

These factors explain the diversity of remedies discussed in the national reports of the Member States. Just to give a short overview, the most obvious conclusions are listed below:

- the remedies for informal complaint procedures are less strict than for more formal complaint procedures and access to justice.
- as far as decisions with regard to individual authorisations are concerned, in many Member States the access to justice procedures provide the courts the competence to directly interfere with the content of the decision. For example, in Fin, F, Lux, It, Aus, UK and Den, the court may replace the original decision or amend the content of it. Another notion with regard to these legal procedures against individual authorisations is that in some Member States (e.g. Fin, Germ.) the procedure suspends the decision, but in most Member States this is not the case (although a specific request for suspension may be available).
- in the horizontal relation citizen – other citizen/company, the most common remedy is the claim for compensation. However, in several Member States (e.g. UK, Ger, It, S, Nl), the injunctive relief is available as well.
- in several Member States (e.g. Fin, NI, Germ, Greece, It.), the criminal procedure also includes the possibility for citizens (sometimes even NGOs) to become a third party in the procedure in order to claim compensation for damage.
• some Member States have some specific interesting remedies, for example the publication of offences in a newspaper (F).

This overview learns that the available remedies may depend on the sort of procedure and that members of the public sometimes have to choose the right procedure, depending from their aims.

**For the discussion:**

According to Article 9, paragraph 4, of the Aarhus Convention the Contracting Parties must ensure that “the procedures (…) shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”. Whether a remedy is effective depends on many factors, in particular the purpose of starting the relevant procedure (e.g. prevent further damage, getting compensation, punishment of the polluter). As the Aarhus Convention does explicitly include the injunctive relief, the discussion may focus on the situations in which this remedy should be available.

1. Are in the following three situations procedures available that provide members of the public for the possibility to request a court to order that the activity will be cancelled, suspended or changed? (These procedures may be available in the relation citizen – responsible public authority or in the horizontal relation between citizen/installation.)
   a) a certain activity or installation has been authorised by the relevant competent authority, however members of the public (that already used their public participation possibilities during the decision making process) are of the opinion that the activity should not be authorised because they think that the activity will cause unacceptable environmental effects;
   b) an installation has been in exploitation for the last 10 years and members of the public think that this ongoing activity is causing unacceptable adverse impacts on the environment. The relevant environmental legislation and the permit is not violated, however, the permit is more than 5 years old;
   c) an installation is causing adverse impacts on the environment, which impacts are unacceptable in the eyes of members of the public. The installation is clearly violating environmental legislation (e.g. the permit).

2. The effectiveness of the remedy in the situations described above will also depend on the burden of proof with regard to the adverse impacts. Do you agree with the following statement:
   Based on the prevention and precautionary principle, the possibilities referred to under 1) should be available if there are serious arguments to believe that significant adverse impacts on the environment are (likely to be) caused; in other words, 100% proof should in these situations not be required.

e) **Establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.**

Access to justice may be legally guaranteed, but if there are practical barriers to use these legal possibilities, the purposes of creating the relevant procedures will not be achieved. Examples of possible barriers are the costs involved, the duration of a procedure, the requirements of legal representation or the requirement to provide for financial security in order to make sure that the
costs of the opponent are covered if the plaintiff loses the case. An even more simple but important barrier may be that the public is not familiar with the possibility to challenge certain decisions or acts.

On the basis of the available literature, it is difficult to get a good picture whether in the Member States barriers exists that make it difficult to use the complaint procedures and access to justice in practice. In fact, this requires practical experience with the relevant procedures and facilities in the Member States and most authors that contribute to the discussion on the issue in literature do not have that experience. Nevertheless, on the basis of the national reports some general conclusions may be drawn.

Generally speaking, the practical barriers seem to be marginal for using most complaint procedures, for example complaints addressed to the relevant competent authority, to a higher administrative authority or to a national or regional ombudsman. In most of these procedures there are no costs involved and the period in which the findings or the decision are available appears to be reasonable. Furthermore, legal aid is generally not required.

As far as judicial procedures against governmental decisions (administrative procedures to challenge an authorisation, plans, regulations or other decisions or procedures to oblige the government to start criminal prosecution) are concerned, in most Member States fees are required. In most Member States these fees are not very high (not exceeding 150-200 EURO). Interesting is that in several Member States, certain NGOs are exempted from the obligation to pay fees (Ireland, Portugal), while in other Member States the court can take account of the financial position of the relevant actor (Lux). An interesting approach used in Ireland is to require a smaller fee for those who would like to make observations, without the intention to appeal.

In some Member States, the plaintiff has to bear all cost of the procedure if he/she looses the case. However, this approach is certainly not being followed in all Member States. In several Member States (e.g. Portugal, Finland, NL), NGOs and/or citizens do not have to pay (100% of) the cost of the procedure if they lose the case, with the exception of clear unreasonable use of the procedure. Furthermore, in most Member States a final decision will take more time than in most complaint procedures, but probably not as long as in civil procedures (see below).

As far as access to justice against industries or other citizens is concerned, in most Member States, there are serious barriers to use the available procedure (in most Member States procedures on the basis of civil liability rules). More often than in the procedures with an administrative character, the plaintiff will have to bear the cost of the procedure if he/she looses. Legal aid is generally required (with certain exception, for example if the damage does not exceed a certain amount of money) and the procedures may take a long period, in particular if all instances are used (in several Member States three or more). The reason for these “barriers” may be that in these situations the claim is addressed to other citizens or companies and that these persons should be protected against unreasonable claims. This sounds reasonable, however, in environmental cases the financial position and the available legal and technical expertise of the relevant parties in a procedure are often not equal.

The Aarhus Convention acknowledges the aspect of practical barriers to use the available procedures. Article 9, paragraph 5, states: “In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to
administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.” The wording of the title of this key-issue has directly been copied from this article. As there are many gaps in information with regard to the practical barriers in the Member States, it is at this stage difficult to identify the most important barriers that exist in most Member States. Therefore, this issue must be worked out in more detail in February and March. This study should not be limited to the “passive measures” to take away certain barriers, for example the limitation of fees, but should also pay attention to the question whether Member States have developed initiatives to really stimulate the use of procedures, for example by providing legal aid.

For the discussion:

Access to justice may be legally guaranteed, but if there are practical barriers to use these legal possibilities, the purposes of creating the relevant procedures will not be achieved. It appears that the more formal the procedure gets, the more barriers exist. Procedures like investigations by ombudsmen seem to be free from any practical barrier, while in particular the judicial procedures to challenge acts or omissions of companies or other citizens are characterised by high cost and long duration. This general notion seems to be related with the possible result of procedures: generally speaking, an investigation of an Ombudsman often results in an advice to the relevant public authority, while access to a Court is characterised by a final legal binding decision. On the basis of this background, the discussion could be focused on the more formal procedures, leading to legal binding decisions of an independent body (court).

1. Do you think that in the current situation in your country, there are practical barriers that make it difficult or risky to use certain procedures? Please think of the following examples of possible barriers:
   - cost involved, including the risk of being under the obligation to compensate the cost of the opponent in case the plaintiff loses the case,
   - the duration of a procedure,
   - the requirements of legal representation,
   - knowledge with regard to the procedure or with regard to the dispute itself.

2. Do you think that – from the perspective of improving the enforcement of environmental law and stimulating the involvement of the public in environmental matters - the government should not only take away barriers as discussed above, but should also actively stimulate the use of the possible procedures by citizens and NGOs, for example by making available a fund for enforcement procedures or by sponsoring/making available technical and legal assistance for cases in which certain requirements are fulfilled? Can you give examples of such initiatives in your country?
Part IV

Access to Justice for Citizens and NGOs on Community Level

1. Introduction

The Aarhus Convention has also been signed by the European Community. Since the European Commission is in the process of ratification, this means that the EC also has to take the steps necessary to ensure implementation. Before one can decide if and what steps will be required, it is necessary to take a look at EC-law to find out if it is in conformity with the provisions of the Aarhus Convention. Besides that, such a study is also of importance for determining the division of competence between the national and Community courts to ensure legal protection of Community rights enjoyed by European citizens.  

In this Part IV of the report, we will focus the attention on two items:
I. Procedures that are available at the community level to complaint about decisions and/or acts (under)taken by Member States;
II. Procedures that are available at the community level to challenge decisions or acts (under)taken by institutions of the EU.

The paragraphs 2 and 3 will focus on the procedures under I). Paragraph 2 will discuss the relevant provisions of the EC-Treaty and/or practice with regard to the available procedures. In paragraph 3 we will focus on the current problems concerning the complaints procedure before the European Commission (non-judicial).

Paragraph 4 and 5 will focus on the procedures under II). Paragraph 4 will discuss the relevant provisions of the EC-Treaty and/or practice with regard to the available procedures. In paragraph 5 we will discuss some of the case-law concerning access to justice in environmental matters on a Community level (judicial), especially the now famous Greenpeace case of 1998.

2. Procedures to challenge decisions/acts of Member States

2.1 What kind of procedure and where exactly?

Non judicial: Although there are no provisions in the Treaty on a complaints procedure, in fact there is the possibility to file complaints on the implementation of EC-legislation by member states. Or, as it is said on the Commission’s webpage:

"Anyone may lodge a complaint with the Commission against a Member State about any measure (law, regulation or administrative action) or practice which they consider incompatible with a provision or a principle of Community law.

(…)
To be admissible, your complaint has to relate to an infringement of Community law by a Member State."

Such a complaint may eventually lead to the bringing of a case before the ECJ by the Commission on the basis of Art. 226. It must be noted though, that these procedures do not relate to complaints on acts by the institutions of the Community.

**Judicial:** third parties have the possibility to get involved as a Party in preliminary rulings under Art. 234. On numerous occasions the Court of Justice has offered third parties such as interested environmental associations the possibility to play a role in preliminary rulings, apparently without much problems regarding the locus standi of these associations.27 These cases are all on matters pending before national courts and concerning the implementation of EC-law, rather than EC-law itself.

### 2.2 What can be challenged in the procedure?

**Non-judicial:** In the complaints procedure any measure (law, regulation or administrative action) or practice by a Member State which is considered to be incompatible with a provision or a principle of Community law can be challenged.

**Judicial:** the judicial option described above, gives third parties the possibility to give their interpretation of European law, in order to influence the Courts decision in a way that is favourable for their personal interests.

### 2.3 Who has access?

**Non-judicial:** In the case of the complaints procedure before the Commission, anyone has access.

**Judicial:** The admittance of third parties in procedures under Art. 234 has not explicitly been laid down in the Treaty, but this question is in practice approached in a very liberal way by the Court.

### 2.4 What can be the (positive) result of the action?

**Non-judicial:** When the Commission ‘adopts’ a complaint, the Commission will start a discussion with the Member State on the relevant matter. If the Commission is not satisfied with the respons of the Member State, she may start an infringement procedure under Art. 169 of the Treaty.

**Judicial:** In a procedure under Art. 234, preliminary rulings can be given in a case pending before a national court.

### 3. Problems concerning the complaints procedure

The complaints procedure is usually considered to be a very valuable tool to bring cases of non-compliance with EC environmental law to the attention of the Commission. The ease of access

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and the cheapness have made it of the utmost importance to NGOs. But Commission and complainers alike acknowledge that the complaints procedure is overloaded, so that the Commission is unable to react promptly. Most complaints concern habitat protection of birds and other species of fauna and flora, environmental impact assessments and water protection. The enormous amounts of complaints, that probably will grow further once citizens really start complaining about breaches of EC environmental law more or less systematically, result in the need for a legally fixed procedure. The latter would also be useful in the light of legal certainty and the reduction of political interference in complaint cases. Other aspects of the complaints procedure that met some criticism is the lack of legal certainty of procedures. It has been suggested to find a means to filter out spurious, mischievous or otherwise ill founded claims, so that the Commission can broker technical solutions and is able to act as a real arbitrator. Several options are conceivable, such as the option to limit the access to complaint procedures in environmental matters to (certain) environmental organisations, or to create a fast procedure during which the admissibility is considered on the basis of relevance.

4. Complaint related to decisions or acts of the Community institutions

4.1 What kind of procedure and where exactly?

Non judicial: According to art. 195 of the EC-Treaty, a European Ombudsman has been appointed by the European Parliament, who has the power:

| to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of first instance acting in their judicial role. |
| In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries. |

The Ombudsman is an independent body (as explicitly stated in Art. 195) and has to submit an annual report on the outcome of his inquiries to the European Parliament. There have been

31 Krämer, note 10 above, p. 63.
32 Faulks and Rose, note 8 above, p. 208.
several inquiries on complaints on environmental matters against the Commission, all of which can be found on the Ombudsman’s homepage.  

**Judicial:** Member-States, the Council, the Commission and the European Parliament can submit cases before the ECJ. The Court can, according to Art. 230 EC-Treaty, review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. Grounds for annulment of such acts are: lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of powers. For individual citizens or associations, Art. 230 provides:

<table>
<thead>
<tr>
<th>Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern of the former.</th>
</tr>
</thead>
</table>

In the Greenpeace-case (Case C-321/95P) in 1998 the Court has ruled that natural persons and associations only have locus standi before the Court if they are individually concerned by the act. As long as the specific situation of the applicant of a case under Art. 230 has not been taken into consideration in the adoption of the act, and therefore the act concerns him (only) in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the Act.

It is thought that the same might be true for procedures under Art. 242 and Art. 243 (on suspension and interim measures), at least in those cases where judges consider the applicants to be not admissible in the main case.  

Also there is the possibility to hold the Community liable for damages caused by its institutions under Art. 288:

<table>
<thead>
<tr>
<th>In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.</th>
</tr>
</thead>
</table>

According to case law under Art. 288 it has to be demonstrated that there is personal damage. For associations this means that either the association itself must have suffered damage, or that each of the persons that is represented by the association has suffered damage.  

**4.2 What can be challenged in the procedure?**

**Non-judicial:** Before the Ombudsman cases of maladministration can be lodged, including acts by the institutions of the Community.

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33 http://www.euro-ombudsman.eu.int/DECISION/EN/env.htm
35 Case C-175/73, [1974] ECR 917, Union Syndicale; Case C-18/74, [1974] ECR 933, Algemeen Vakverbond.
Judicial: In the procedure under Art. 230: the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. In the procedure under Art. 288: damages caused by the institutions of the Community. In the procedure under Art. 234: the interpretation of the Treaty, the validity and interpretation of acts of the institutions of the Community and the ECB, as well as the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

4.3 Who has access?

Non-judicial: Admission standards in non-judicial procedures are very liberal. As far as the Ombudsman is concerned, any citizen of the Union or any natural or legal person residing or having its registered office in a Member State has access.

Judicial: Besides Member-States or institutions of the Union only citizens who are directly affected by a decision have a right to go to the ECJ on the basis of Art. 230. A person only has access when a decision has been addressed to that person or when a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern of that person. A liability action under Art. 288 can be brought forward by anyone who has suffered damages as a consequence of Community action.

4.4 What can be the (positive) result of the action?

Non-judicial: The Ombudsman refers the matter to the institution concerned, which then can give its own view. After that, the Ombudsman forwards a report to the European Parliament and the institution concerned.

Judicial: The Court of Justice can declare the act concerned to be void (Art. 231). In the case of a regulation, the Court can specify which of the effects of the regulation are considered to be void definitively. In a procedure under Art. 288 damages can be awarded.

5. *Stichting Greenpeace Council and Others v Commission*

5.1 The case

The facts of this case can be summarized as follows. The Commission decided to finance two fossil-fuelled power stations, to be constructed on the Canary Islands, through the European Regional Development Fund. Under the decision, twenty nine million ECU was to be paid immediately, whilst further funds were to be paid annually, subject to progress, in accordance with a financial plan.

A group of applicants consisting of Stichting Greenpeace Council (Greenpeace International), two Canary Islands based environmental associations (Tagoror Ecologista Alternativo (TEA) and Comisión Canaria contra la Contaminación (CIC)) and sixteen Canary Islands’ residents (local residents, farmers, fishermen) brought an action under Article 230 (4) (ex 173 (4)) EC Treaty. They contested the legality of the operations carried out in Spain, as the Environmental Impact Assessment (EIA) Directive had not been respected. Article 7 of Council
Regulation 2052/88 provides that projects which are financed by the Community structural funds should be in keeping with the provisions of the Community treaties, the instruments adopted to those Treaties and with Community policies, including the rules on environmental protection. Under the EIA Directive, the construction of a power station is a development for which it is compulsory to conduct an assessment of potential environmental impact of specific works. The Directive gives members of the public certain rights to participate in the assessment. Within the terms of the above mentioned Article 7 of Regulation 2052/88, this Directive is an instrument adopted pursuant to the Community treaties. Accordingly therefore, the funding of the power stations would infringe Article 7 if the requirements of the EIA Directive had not been met.

The applicants brought to the attention of the Commission, by letters and in different meetings with EC officials, the infringement of the EIA Directive. After all, construction of the power stations began before any environmental impact assessment studies had been carried out by the competent Spanish authorities. Environmental impact studies were only made more than a year after the project on the Islands had started. The local environmental associations (TEA and CIC) instituted national proceedings to challenge the validity of these (late) EIAs. At the same time, Greenpeace Spain also initiated proceedings in the Canary Islands to challenge the validity of local government authorisations for the construction work.

At the EC-level, Greenpeace International, together with private individuals, initiated judicial procedures as well. Because of the irregular procedure preceding the construction decision, the Commission should have suspended the financial aid. Consequently the applicants decided to bring an action before the Court of First Instance for Annulment of the Commission’s decision to disburse the second tranche of aid to the Spanish Government.

5.2 The Decision of the Court of First Instance (Case T-585/93, [1995] ECR II-205)

The Court of First Instance ruled that the applicants had no locus standi to bring action under Art. 230(4) EC. The Court established first that the individual applicant were not suffering from the decision in any other way than all of the other residents of the Canary Islands. Therefore they cannot be considered to be ‘individually concerned’ in the sense of Art. 230(4). The fact that they had submitted a complaint or provided information to the Commission cannot individualize them as if they were the addressee of the decision, since no procedure was defined by the Treaty or secondary Community law to confer them a right to participate in the elaboration of the relevant decision.

This line of reasoning is consistent with earlier case law. Originally, only in special cases, individual applicants had been able to address to Court under Art. 173(4), especially in cases concerning competition rules, in anti-dumping cases and in some cases of State aid. In most of these cases the applicants had played a major part in the procedure leading to the

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36 Council Regulation No. 2052/88/EEC, 24 June 1988, on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the EIB and other existing financial instruments, O.J. 1988, L 185/9
37 Other environmental cases, in all of which it was decided that the applicants were not individually and directly affected by the challenged decision are discussed by Ludwig Krämer, Public interest litigation in environmental matters before European Courts, Journal of Environmental Law 8:1, 5 (1996). Krämer mentions cases T-460/92, T-461/93, T-475/93 and T-117/94.
adoption of the contested measures. The 1990ies, however, have shown some relaxation of the requirements for individual applicants. In principle, every applicant who can show a direct and individual concern, will be granted standing. In theory this even applies to individuals who wish to challenge a Directive, although it seems to be almost impossible to establish that it constitutes a decision of direct and individual concern to an applicant.

As far as the associations are concerned, the Court of First Instance ruled that an association is entitled to contest a Community act only if it represents individuals who themselves fall under the scope of Art. 230(4), or if special circumstances exist which sufficiently individualize the associations. When looking at both of these criteria in earlier case law, it is obvious that either of them is difficult to establish. The decision must apply to ‘a closed circle of persons, who were known at the time of its adoption and whose rights the Commission intended to regulate’. Only if the association represent all of these persons (and these persons alone), so it seems, they can be granted standing under Art. 230(4). Although it is thought that participation of an association in the adoption of the act as one of its main negotiators can constitute an individualizing factor as well, in the Greenpeace-case this was not enough. The participation of Greenpeace was not initiated by the Commission on the grounds that Greenpeace was considered to be the main interlocutor for the matter to be decided.

5.3 The decision of the Court of Justice (Case C-321/95P, [1998] ECR I-1651)

The applicants brought an appeal before the Court of Justice stating that special attention should be paid to the fact that the environment is a common good. The usual test whether a decision is applicable to a closed group of individuals affected does not take into account the nature of decisions in environmental matters. Also, they claimed that the right to be informed and consulted in an EIA-procedure before a project is carried out, as laid down in Art. 6(2) of the EIA Directive, gives them a right to go to court as well. After all, there was a breach of the rights conferred upon them by Art. 6(2) of the Directive. And thirdly, they claimed that there is a vacuum in the enforcement of environmental Community law now individuals and public interest groups or NGOs have no means of access to a court whenever a decision at Community level is involved. This vacuum should be ‘closed’ by new case law.

The Court however decided not to do so. In rather brief considerations, the Court found that the Court of First Instance did not err in law determining the question of the appellants’ locus standi. As far as natural persons are concerned, ‘the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and in fact, like any other person in the same situation, the applicant is not individually concerned by the act.’ According to the Court, the same applies to associations, which cannot thought to represent persons who are individually concerned by the contested decision. The mere fact that Greenpeace and the applicants were able to bring the case before national Spanish courts shows that the rights afforded to individuals by the EIA Directive are fully protected by these national courts.


5.4 Suggestions for change

The Greenpeace Court decisions were met with a lot of criticism, not only within environmental NGOs, but also in most of the scientific legal debate.\(^{42}\) Most authors point at the need to have special consideration for the fact that environmental matters usually are difficult to relate to personal interest. Also it is often shown that several EC-documents stress the special role of citizens and NGOs in the enactment, the execution and enforcement of European environmental law,\(^{43}\) for which the Community also offers financial support,\(^{44}\) but that this role is not reflected in the possibilities to enforce EC-legislation at the EC-level. ‘There is a certain irony in the difference between the standards which the Community obliges the Member States to apply, i.e. to ensure effective judicial protection for Community rights, and those to which the Community is itself committed.’\(^{45}\) Many authors plead for ‘a fundamental change in traditional legal thinking.’\(^{46}\)

A new test when applying Art.230(4)

Several suggestions for change were made. The applicants themselves, in Case C-321/95P, proposed a new test to assess whether they were individually concerned. According to the applicants, associations should be recognised as having locus standi where their objectives concern chiefly environmental protection and one or more of their members are individually concerned by the contested Community decision, but also where, independently, their primary objective is environmental protection and they can demonstrate a specific interest in the question at issue.

Several authors think it theoretically acceptable to interpret the current wording of Art.230(4) in this way; they even refer to case law by the European Courts to show this.\(^{47}\) The big advantage of such an approach is that it leaves the responsibility for determining the precise limits of Art.230 where it belongs: in the hands of the Courts.\(^{48}\) However, since the Court of Justice in its ruling in the Greenpeace case explicitly did not enter this road, it is unlikely that such a progressive interpretation of Art. 230(4) will see the light of day in the near future.

Inclusion of environmental rights in the Treaty


\(^{43}\) E.g. Resolution 97/C321/01.

\(^{44}\) Decision 97/872/EC, OJ L354/25 (Council Decision of 16 December 1997 on a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection).

\(^{45}\) Schikhof, note 19 above, p. 280.


\(^{48}\) Arnulf, note 24 above, p. 49.
Also it was proposed to include the acknowledgement of environmental rights in the Treaty which the European Court of Justice must protect. Proposals to include such rights in the Treaty have been put forward, especially by NGOs, during the preparations of the Amsterdam Treaty. The proposal suggested introduction of a ‘right to a clean and healthy environment (...) and justice as part of a general right to human development’. It also suggested giving the rights under Art. 230 to ‘any natural or legal person’ and to delete Art. 230(4) ‘which provides a severely restricted right to natural or legal persons to challenge the legality of acts.’ These suggestions, however, remained without effect. To amend Art. 230 in the way suggested it would mean the introduction of an ‘actio popularis’ in all fields of policy on EC-level, which clearly was a bridge too far. In the current process of establishing a European constitution, the same kind of environmental rights are being brought forward again.

Amending Art. 230(4) giving access to the Court only to (certain) public interest groups
Instead of creating an ‘actio popularis’ another option would be to just give (certain) environmental protection associations the right to start proceedings under Art. 230. These organisations usually are better informed, have more expertise and financial means and are better co-ordinated (even in a European context) than individuals. This probably would achieve better results than an ‘actio popularis’. Another big advantage is that in this case the number of potential applicants can be limited. Although it is by some considered unlikely that floods of cases would arise, some reasonable criteria that organisations would have to fulfil could be introduced.

Legal action by the Ombudsman
This suggestion was raised and rejected by Krämer. ‘If the Ombudsman were capable of challenging Commission decisions (...) his power would go beyond the powers of the actual Parliament. He would thus become a Community institution of its own, which is hardly compatible with its function as a Parliamentary Ombudsman or with the possibility of other institutions to influence the regulations and general conditions governing the Ombudsman’s performance.’

6. For the discussion

When discussing access to justice at a European level, two issues are especially relevant at the moment.
The first question concerns the possibility to complaint at the Community level about the conformity of decisions or acts of Member States with European law.
The second issue which we would like to discuss during the workshop relates to the possibility to challenge decisions or acts of the Community institutions. In paragraph 5.4, some suggestions for improvement have been made.

49 The same proposal is described by Diana L. Torrens, note 19 above (1/99), p. 16.
50 Krämer, note 14 above, p. 13.
52 Schikhof, note 19 above, p. 281.
53 Krämer, note 14 above, p. 10.
1. **Complaints addressed to the European Commission**
   It has been suggested that the amount of complaints addressed to the European Commission should be limited from a perspective of available capacity and subsidiarity. One of the possibilities is to limit the group of actors that has access to these procedures or to require that the national procedures are finalised before sending in a complaint.

   What do you think of the following statements:

   a) “Problems relating to application and enforcement of Community environmental law at the domestic level should primarily be dealt with through adequate procedures in the Member States”;

   b) “Limiting access to the Commission’s complaint procedure on the basis of statement a) (‘problems should be solved at the national level’) is only acceptable if the national procedures are adequate. As a consequence: if there are major difficulties for the public with regard to one of the key-issues discussed in Part III (for example no access because no sufficient interest, no access to justice with regard to general regulations although these regulations violate Community law, procedures are too expensive, it will take more than 2 years to get a legal binding decision, etc.), the public should be in the position to send a complaint to the Commission.”

   (This statement makes clear that the subject of Part III of this report is related to this issue.)

   c) “Also if there are adequate procedures available at the national level, the Commission should get informed about important cases of serious violation of Community environmental law in the Member States, because:

      • in these cases it is important (for the parties involved as well as for the complaint body or court) to have the opinion of the Commission in an early stage of the dispute settlement at the national level;

      • if national procedures should be fully finalised before a complaint can be send in, this may make it impossible to get a timely decision of the European Court in cases of serious violations of Community environmental law: actors will send in their complaints years after the violation started and therefore, if the Commission is not familiar with the case, an infringement procedure will start later than necessary.”

2. **Article 230(4) EC Treaty:**

   a) Do you think that the Art.230(4) procedure should be open for (members or representatives of) the public to discuss the conformity of acts and decisions of the EU-institutions with Community (environmental) law in situation in which the general interest of protecting the environment (including nature) is at stake?

   b) Who should than have access (compare key-issue I of Part III of this report):
      - Any person (actio popularis);
      - Non governmental organisations that are designated by the Commission (positive list) or that fulfil certain minimum requirements;
      - The European Ombudsman, after consultation with the EP, or the EP on the basis of the advise of the European Ombudsman?

   c) If you think that access to the European Court should be broadened (question 2a and 2b), should this be realised by jurisprudence or by amendment of the treaty?
Annex 1

National reports

Austria

I Characteristics of the country
Austria is a federal state comprising nine states with a legislature and administration of their own. The competences between the Federation and the states are distributed by the Federal Constitution. The states thereby do not only participate in the enforcement of legislation passed by the Federal Council, but also introduce environmental legislation of their own. Any subject the constitution does not exclusively allocate to the Federation will be the responsibility of the states. Certain subject matters, for instance water law and health care, are fully allocated to the Federation, whereas others, such as general regional planning and building law as well as nature preservation, are exclusively reserved to the states. In other matters, laws are enacted on federal level and enforced on state level. The municipalities also have authority to enforce some of the laws enacted.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: Both the setting up and operation of installations will regularly require a licence under the relevant environmental laws governing the specific subject matters. Licences are required under the circumstances stipulated in the different environmental regulations (Trade Act, Water Rights Act, Clean Air Act for Boiler Plants, Waste Management Act and Forestry Act). Although the main features of the different licensing procedures are quite the same, there are some differences, so the questions that we deal with here can only be answered in detail when referring to each individual act. The procedures are started if an application is filed by the person wishing to realise a project. The scope of a licence granted by the authority will also depend on the contents of an application. Although the authorities do have considerable discretion in carrying out the investigation procedure, it is subject to certain administrative rules. In environmental law, for instance, these rules generally provide for oral hearings for the parties involved. These are applicant, as well as neighbours affected. When a project falls under the scope of environmental impact assessment regulation, local communities in general can participate, as well as ‘Bürgerinitiative’ (groups of at least 200 persons from affected communities) and the ‘Umwelthanwalt’. Sometimes the general public has access to the application and the material concerning the project, and can even make statements. However, the general public does not have specific procedural rights to participate in the decision-making process; this position is reserved to ‘Bürgerinitiative’.

The licensing procedure regularly ends with a decision issued by the competent authority, granting or dismissing the licence, orally or in writing and actually served on the applicant. Each party of the administrative procedure is allowed to appeal to the superior authority against the granting of the licence. Apart from stating the reasons for the appeal, the appeal as such must
also contain an application to overturn the challenged decree or to amend it to a certain extent. The applicant may appeal to this decision to the supreme authority, provided three instances are available in the case under consideration.

A form of extraordinary appeal applies in situations municipalities make decisions (e.g. building permit). They are under some form of state supervision, although the form in which this is exercised differs in the various states. It is regularly exercised by the district administrative authorities or by the state government. An appeal against a decision handed down by municipal authorities in final instance, can be lodged only to the competent supervisory authority.

**Judicial:** If the supreme authority has handed down a decision, a complaint may be lodged with the Administrative Court or the Constitutional Court. For the Constitutional Court to adjudicate a complaint, the appellant must either claim that the decree as such infringes upon his fundamental rights or that the decree is unlawful because it is based on an unlawful ordinance or act. A complaint to the Administrative Court can be lodged by persons claiming an infringement of their rights guaranteed by laws through a decree issued by an administrative authority in the final instance.

b. **Who has access and under which conditions?**

**Non-judicial:** All persons involved in a matter through a legal claim or a legal interest have the right to participate in the procedure conducted by the authorities. Whether a person is entitled to a legal claim or legal interest will be defined in the applicable environmental laws. These laws will regularly acknowledge as a party not only the applicant, but also other persons if subjective interests are affected. Aside from these parties, other specifically mentioned persons or bodies can be parties in administrative procedures, such as environmental lawyers, municipalities and ‘Bürgerinitiative’ (i.e. the groups of at least 200 persons from the affected local community mentioned above). These can only be parties if so explicitly provided for in the applicable law, which is the case when an environmental impact assessment is required.

**Judicial:** A complaint with the Courts can generally be lodged by persons whose subjective rights are affected by the decision of the appellate authority. In most cases, these persons are the parties of the preceding administrative procedure. In those cases where ‘Bürgerinitiative’ or the ‘Umweltanwalt’ is involved in the decision-making, they can file a compliant with the Administrative Court as well (which again is the case when an environmental impact assessment is required).

c. **What can be challenged in the procedure?**

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54 A remark that has to be made beforehand is that on the level of the states (at least, in seven out of nine) so-called Umweltanwaltschaften - ‘attorneys for the environment’ - have been appointed to deal with complaints, give information, put forward suggestions and render recommendations. Moreover, they are competent to examine and report on draft laws, ordinances and other legal acts. They are party to certain administrative proceedings concerning questions of environmental protection and have the right to file complaints to the Administrative Court. The possibility of having ius standi is still rather limited and depends on the respective legislation.
**Non-judicial/judicial:** licences, the refusal to grant a licence and in case the competent authority fails to make a decision within the six-month time limit.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial:** A new decision on the merits in any way whatsoever: it is not bound by the reasons for appeal. That is unless a municipal decision is challenged before the supervisory body. In that case, the authority can only revoke the decision, as a result of which the municipal council is obliged to take a new decision following the legal opinion adopted by the appellate authority.

**Judicial:** The Administrative Court and the Constitutional Court can only reverse the decree if they share the view adopted by the applicant. The matter will be referred to the authority having originally issued the decree for another decision.

The filing of an appeal will suspend the effectiveness of the decision.

e. **Practical aspects:**
1. What are the fees and (possible) other costs of proceeding?
   Each party has to bear their own expenses. The respective legal entity will also have to bear the costs arising from the authorities’ work in the administrative procedure, unless they exceed the general expenses of the authorities. Other out-of-pocket expenses must be borne by the parties having requested the authorities to act (‘polluter pays’ principle). These costs will however have to be borne by another party involved, if the authorities were caused to act through the fault of that party. The procedure does in fact trigger only comparably low administrative fees and other expenses.
2. Are parties obliged to provide for financial security for procedural costs in case they lose?
   No, deposits can however be required for some parts of the procedure, like expert opinions or on-sight inspections.
3. How long can it take before a final decision is taken?
   2 to 3 years
4. Are parties obliged to obtain legal aid?
   Yes.
5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
   There is limited access to justice for NGOs en non-affected citizens (see above).

**Other environmental decisions**

a. **What kind of procedure and where exactly?**

**Non-judicial:** The institution of an Ombudsman has been created on the federal and state level, and also there are special ‘Umweltanwaltschaften’ (‘attorneys for the environment’) at state level. It may be seized with any alleged maladministration of the federation or the state, and can thus in principle not remedy shortcomings of the judicial or legislative branch, the latter especially when environmental matters are concerned.

In the procedures to adopt sectoral plans, in some cases parties do have the possibility to express their views (e.g. plans of restoration for certain watercourses, zoning plans) and in some cases they do not (e.g. environmental emergency plans). As regards already existing plans, the
right to file objections or appeals depends on the legal quality of the respective plan. In case the plan has the legal quality of an individual administrative decision, relief may be found in the ordinary administrative procedure in which appeal to a higher administrative authority is possible. In case the plan has the legal quality of an ordinance, there is no non-judicial remedy. Article 41 of the Constitution provides for the possibility of a petition for a referendum. This is a request to the National Council signed by at least 100,000 persons or 1/6 of each of three states to enact a certain law.

**Judicial:** The articles 139 and 140 of the Federal Constitution furnish each individual with the right to apply to the Constitutional Court in case the individual believes to be directly injured in his or her rights. Under article 139 the Court has jurisdiction to examine whether an ordinance has no basis in a law, has been rendered by an incompetent authority, or has been published in a way contrary to the law. Under article 140 it has jurisdiction to examine whether a federal or provincial law has been rendered by an incompetent legislative body, has been published in a way contrary to law, or is inconsistent with the constitution in any matter.

Finally, plans with the legal quality of an individual decision can be brought to the Administrative or Constitutional Court. In case the plan has the legal quality of an ordinance, article 139 of the Constitution, as described above, is applicable.

**b. Who has access and under which conditions?**

**Non-judicial:** The Ombudsman may only be seized with a matter, if the person affected by the maladministration has no other remedy available. In most cases, all persons can express their views during the procedure to adopt certain plans. Everyone can try to initiate a referendum.

**Judicial:** Each individual that believes to be directly injured in his or her rights, has the right to lodge an appeal to the Constitutional Court. The same applies to appeal before the Administrative Court.

**c. What can be challenged in the procedure?**

**Non-judicial:** The Ombudsman may deal with alleged maladministration of administrative authorities. In a referendum laws can be challenged.

**Judicial:** Ordinances and federal and provincial laws can be challenged on the basis of the articles 139 and 140 of the constitution before the Constitutional Court.

**d. What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial:** The Ombudsman may issue recommendations to the administrative authorities. The authority concerned must either conform with the recommendation or state in written form, why the recommendations have not been complied with. The National Council is bound to deal with a referendum, but not bound to act as requested.

**Judicial:** The Constitutional Court can declare the challenged ordinance or law null or void.

**e. Practical aspects:**
1. What are the fees and (possible) other costs of proceeding?
See licences (above)

2. Are parties obliged to provide for financial security for procedural costs in case they lose?
See licences (above)

3. How long can it take before a final decision is taken?
See licences (above)

4. Are parties obliged to obtain legal aid?
See licences (above)

5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
See licences (above)

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

Judicial: It has to be mentioned that Austrian civil law is relatively insignificant in connection with Austrian environmental legislation. Austrian civil law does not contain uniform regulations regarding liability for environmental damage: damage claims are governed by the general provisions on damages. These provisions award damages only in case of fault. A special environmental law liability does exist in the Civil Code. Owners and lessees of real estate have the right to demand the discontinuance of all activities resulting in emissions of waste, water, smoke, gases, heat, odours, vibrations etc., in excess of the maximum permissible levels customary for that region which essentially impair the customary use of the real estate.

There are also a number of provisions governing no-fault ‘liability for interference or hazards’. The Water Right Act 1959 stipulates for instance that the holder of a water permit is liable for damage caused as a result of the lawful existence or operation of a water installation to real property or a building having already existed at the time the water permit was granted, if the extent of such damage could not be foreseen at the time the permit was granted.

b. Who has access and under which conditions?

Judicial: These rights extend to any individual affected, not just neighbours. An individual, however, may not start civil proceedings if the emissions emanate from a mining facility or other plants licensed by the authorities.
c. **What is the subject of the dispute?**

**Judicial:** Damage caused by fault, or in case of no-fault liability without fault.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** Compensation for financial damage. If the damage is due to gross negligence, the injured party must also be compensated for lost profit, while compensation for non-financial damage is possible only if the damage was caused through an act prohibited by a criminal law, or out of mere misbehaviour or maliciousness. In these cases ‘the value of the special preference’ the injured party has in the damaged object would also have to be compensated.

e. **Practical aspects:**
1. Are parties obliged to provide for financial security for procedural costs in case they lose? Foreign plaintiffs may under certain circumstances be required to make a certain deposit upon application of the defendant. Furthermore, for certain parts of the proceedings, such as expert opinions and on-sight inspections, the Court may require deposits (irrespective of nationality).

3. **Criminal/penal procedures:**
Not reported
Belgium (Flemish region)

I. Characteristics of the country

Belgium is a federal state, made up of three communities and three regions. The environmental competences are to a large extent attributed to the regions, and this means that five environmental legislations have to be taken into account. The differences between the regional environmental legislations can be great, as regards organisation as well as contents. The Flemish environmental legislation has been reviewed very thoroughly during the last past years. For these reasons, this report will only deal with the Flemish environmental legislation and the federal legislation which is applicable in this region. The right to a clean environment is in some form recognised in the Belgium Constitution: article 23 contains ‘the right to the protection of a healthy environment’. The reverse of this right of every citizen, is the obligation for the government to protect the environment.

II. The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: The Flemish law makes a distinction between three categories of classified installations. A licence is needed for the more or less dangerous establishments belonging to the first or second category. The third category, which contains merely inconvenient establishments, does not require a licence, but a mere prior notification to the competent authorities.

After the verification of the admissibility and completeness of the application, a public inquiry will be started. In case of the application for a licence of a class 1 installation for which an EIA report or a safety report must be drawn up, at least one public information meeting must be organised. At the initiative of the municipal authorities such information meeting may be organised for all other first and second category establishments. This inquiry implies that third parties can consult the application and that a notice needs to be affixed at the place of the operations, in order to give third parties a chance to formulate their remarks.

An appeal against a decision of the municipal authorities is lodged by registered letter before the provincial authorities. An appeal against a decision (in first instance) of the provincial authorities is handled by the Flemish Government. The appeal does not suspend the decision unless it has been presented by the Governor, the College of Mayor and Aldermen or the advising departments and institutions.

Judicial: When it is impossible to present an appeal to a higher authority in the administration, there still is the possibility of asking for an annulment of the challenged decision to the Administration Department of the Council of State. Awaiting a final decision, the Council of State can, as the only judicial institution, suspend the disputed act or impose certain provisional measures on the basis of ‘serious arguments’. It has the task, when all receptivity conditions are fulfilled, of judging the legality of administrative acts in general, and decisions about permit demands or appeals in particular.

The Council of State can annul an act when it contains a violation of legality. An administrative act can be illegal because of incompetence, non-fulfilment of substantial (or on penalty of nullity) prescribed conditions, non-application of the law, or diversion of power, in
this sense that another goal is pursued by the act than the one on the basis of which the decision was taken.

b. Who has access and under which conditions?

**Non-judicial:** Everyone may make remarks concerning the application. An appeal to a higher administrative authority can be presented by the applicant, the Governor, the advising departments and institutions, the College of Mayor and Aldermen, any person who may experience a direct nuisance as a consequence of the settlement and the exploitation of the installation, and any legal person which has as a goal the protection of the environment.

**Judicial:** Every natural and legal person who is legally able to act, according to the Civil Code, and who has an interest, can lodge an appeal to the Council of State. This interest must be a personal, direct, positive and lawful interest, and must remain so during the whole procedure. Interested parties can also include legal entities whose statutory purpose is the protection of the environment.

c. What can be challenged in the procedure?

**Non-judicial/judicial:** The decision to grant or refuse a licence.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** The powers of the appellate bodies are similar to the powers of the decision-making authorities in first instance. The licence can be refused or granted under certain specific conditions.

**Judicial:** The Council of State can annul the decision of the administrative authority. The appeal against a decision does not suspend the decision, unless it is filed by the Provincial Governor, the local board, or the advising authorities.

e. Practical aspects:
The procedure costs are rather low (e.g. 7000 BEF for the introduction of an annulment procedure and 7000 BEF for the introduction of a suspension procedure). Fees of specialized lawyers, however, can be considerable. Although legal assistance is not obligatory, it is highly recommendend, given the strict formal rules for the formulation of the complaints and the imposed procedural deadlines. Parties are liable for procedural costs, but they do not have to provide for financial security.

The final decision, including judicial review, can take up to two or three years (annulment procedure only), or 1 to 1,5 years (if there was already a suspension of the decision by the Council of State).

*Other environmental decisions*

a. What kind of procedure and where exactly?
Judicial: The complex division of competences as far as environmental law-making is concerned, led to the creation of a court of arbitration, which has to settle conflicts of competences and abuses of power. An appeal to the Court of Arbitration is only possible when the challenged legal depositions are either violating the established rules concerning the division of powers between the states, regions and communities; or violating one of the following principles codified in the Constitution: the equality principle; the non-discrimination principle; the freedom of education.

The above mentioned procedure before the Department Administration of the Council of State is also applicable when other environmental decisions, besides licences, are taken. The acts of which annulment is asked, must meet the following conditions. It must be an act of a Belgian administrative authority, it must be a definitive act of law which is bringing, or avoiding, a change in an existing legal situation, and it must be an act taken in a final (administrative) instance.

b. Who has access and under which conditions?

Judicial: Every natural or legal person who shows an interest can go to the Court of Arbitration. The interest which one has to prove may not coincide with the general interest; one has to be directly touched by the relevant disposition. (Council of State: see above)

c. What can be challenged in the procedure?

Judicial: The Court of Arbitration can pass judgement on (environmental) laws, decrees or ordinances. Before the Council of State, whatever administrative decision can be disputed.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: The Court of Arbitration can suspend or annul the challenged disposition if it agrees with the complainant. (Council of State: see above)

e. Practical aspects:

The procedure costs are rather low. Fees of specialized lawyers, however, can be considerable. Although legal assistance is not obligatory, it is highly recommendend, given the strict formal rules for the formulation of the complaints and the imposed procedural deadlines. Parties are liable for procedural costs, but they do not have to provide for financial security. Thu whole procedure may take 1 to 2 years.
2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

Judicial: The Civil Code provides for a duty to compensate for the tortfeasor who negligently caused damage to another. The victim has two ways of proving negligence: he can either prove that the party causing the injury violated the general duty of care, or he could prove that a statutory duty was breached. This article can play a considerable role in remedying environmental damage.

In addition, the tort law contains a wide variety of strict liability rules, some of which are also important for environmental liability. The guardian of a defective property is liable for the damage caused by the particular defect of that property. There is supposed to be a defect as soon as there is an abnormal feature that is deemed to cause damage. For instance, real property of which the soil has been polluted with oil, should be considered a defective property. This very strict liability leads to a broad liability, including for the innocent owner or lessee of a polluted soil.

The president of the court of first instance can ascertain the existence of acts which form a (serious threat for) recognisable infraction of one or more dispositions of laws, decree, ordinances or decisions concerning the protection of the environment. This is the so-called claim for suspension procedure. It is introduced and dealt with as the short-cause procedure.

The legislator has also introduced specific strict liability regimes for a few specific cases of environmental harm. A statute introducing strict liability for nuclear accidents has been instituted, and a strict liability regime for oil pollution.

b. Who has access and under which conditions?

Judicial: In general tort law: everyone that claims to have suffered damage. A Claim for suspension can only be introduced on the basis of the law of 12 January 1993 on the demand of the attorney of the King, an administrative authority and an association operating on a non-profit-making basis, which has been an entity for at least three years and is able to prove that there is a real activity which is in accordance with its statutory goal and which concerns the collective environmental interest that it aims to protect.

c. What is the subject of the dispute?

Judicial: The act causing, or likely to cause, damage. The victim should in principle be fully compensated if the conditions for liability are met. All damage, direct loss as well as lost profit, should therefor be compensated. The preferred way of compensating, however, is that ways should be found to restore environmental harm as far as possible: compensation is only the second option. Obviously specific problems, as the question how ecological damage can be estimated, arise when compensation is awarded.
d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** In general tort law: compensation for damages. In the application for interim measures the president of the court of first instance can order all measures which are, in his opinion, necessary for the provisional solution of a threat or urgent case and he can also order the provisional stop of works, the prohibition of activities, etc. In the claim for suspension procedure, he can order the stop of activities implementation of which has already started, and can impose measures preventing the implementation of those activities or preventing damage to the environment. In some cases a restoration order can be imposed. According to the case law of the Belgian Supreme Court, recognised environmental groups may also demand a restoration order.

e. **Practical aspects:**

The costs of proceeding before a civil court may rise to a considerable amount. If a party losses a case, it has to pay (all of) the procedural costs (which however do not include the fees of the lawyer of the counter-part/parties). Legal representation is not obligatory in civil procedures, except for some specific exceptions. There is no obligation to provide for financial security. As a procedure can go before htree instances, it can take up to a few years before getting a final judgement.

3. **Criminal/penal procedures:**

Environmental infringements can be prosecuted by the Office of the Public Prosecutor as a result of an official report of violation or a complaint from a third civil party, before the criminal court, ("**Correctionele Rechtbank**", which is a division of the Court of First Instance). The public prosecutor has the competence to decide whether to prosecute or to renounce from prosecution. There is in principle no control by any other authority whether or not this decision is "right". However a directly interested party who suffered damage from the environmental infringement may complaint to the court as third civil party. In that case, the public prosecutor can not renounce from prosecution. Decisions of the criminal courts can be appealed with the Court of Appeal ("**Hof van Beroep**").

The current attitude of Public Prosecutors seems less likely to criminally prosecute each and every environmental violation. This indeed differs from the much stricter attitude prevailing in the beginning of the 1990's, when environmental legislation was very new (Flemish region) and criminal charges were filed systematically in the event of infringements, in order to realize a change of attitude on behalf of the industry. For that reason, the Office of the Public Prosecutor may be willing to consider not to file criminal charges in cases were the offence is due to an accidental event or has a merely administrative character, and instead will propose a settlement out of court resulting in a fine, or even will dismiss such cases.

It should be noticed that the same environmental infringement may at the same time lead to criminal prosecution as well as to and administrative measures taken by governmental bodies (e.g. suspension of an environmental permit). In the event a criminal charge is filed for an environmental violation, a distinction must be made between (i) the criminal liable party and (ii) the civil liable party for the feasible imposed fine.
In a criminal court case the defendant would most likely be an individual human being, i.e. the plant manager or other employees who might be held criminally liable as actors of the crime. Since the New Federal Law of 4 May 1999 introducing criminal responsibility for legal persons (a.o. companies), a company itself may be held criminally liable as well.

Furthermore, the employer can be prosecuted as a civil liable party before the criminal court if the offended law or regulation explicitly prescribes it (e.g. article 40 of the Flemish Environmental Permit Decree prescribes this possibility). Such a ‘conviction’ of a company only had a civil character.
Denmark

I Characteristics of the country
The Danish Constitution has as basic principles a constitutional monarchy and the division of powers, as well as certain basic freedoms. The right to a sustainable development has no constitutional basis.

The ministers are politically responsible for general administrative regulation. They make the statutory orders, circulars and guidelines within the framework of the law. The regional and local administration is based on the autonomy of the independent 14 county councils and 275 municipalities. These municipalities have the right to manage their own affairs independently, but under state supervision. Unless otherwise stated in the acts, complaints against the decisions of local councils and the regional council cannot be made to the agencies or appeal boards. Local self-government has in practice been curtailed by rules of law, giving the ministers the authority to regulate municipal decisions through general rules and also the convening of special cases.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: The Environmental Protection Act (EPA) provides that a number of listed forms of enterprises, plants and activities cannot be established or commenced without the prior approval of the public authorities. An application must be filed with the local council of the municipality in which the applicant desires to establish the activity and must be addressed to the approval authority (either the local or the regional council; depends on the activity). The application must contain information about the location of the activity, the establishment of the activity, the layout and operation, the technology chosen and a detailed account of the pollution of the environment by the activity. In principle, an application for approval of particularly polluting activities is considered in a cooperation between the applicant and the approval authority. Generally, no other private parties participate in this procedure. However, in some cases, where the authority realises before the decision is made that an approval will give rise to problems in relation to neighbours, the authorities have chosen to involve the affected parties in the approval phase. An approval will be sent to the applicant and to other persons, organisations and authorities having a right to appeal. At the same time, the approval will be notified by public announcement.

This approval decision can be appealed to the Environmental Protection Agency. The appeal shall be made to the authority that made the decision and they will then resubmit the appeal with the material on which the decision was made to the appellate body.

Only decisions of major importance or principle made by the Agency can be appealed to the Environmental Appeal Board (for cases concerning the Environmental Protection Act) or the Nature Protection Board of Appeal (for cases concerning the Nature Protection Act). These are the highest administrative appeal authorities, which organisationally are placed within the Ministry for Environment and Energy. However, they work independently from the Minister, and they also have an independent chairman, which gives the Appeal Boards some ‘judicial’ status, although non-lawyers are seated in these Boards as well.
Judicial: Ordinary courts deal with administrative law cases, not necessarily only after administrative appeal possibilities have been exhausted. However, ordinary courts show respect for the self-control of the administration. It is considered desirable to first make use of the administrative appeal system before going to the courts of law. All actions by the administration can be brought before the courts, to be tested against the observance of the material and procedural rules limiting the power of public authorities. Judgements by the lower courts can be appealed before the Higher Courts. There is a Supreme Court, which exclusively is a court of appeal hearing primarily cases which, in first instance, have been adjudicated by the High Courts.

b. Who has access and under which conditions?

Non-judicial: The addressee of the approval, public authorities involved and everybody with an substantive, individual interest in the decision can appeal the approval. Moreover, a number of interest groups have a further specified right to appeal pursuant to the EPA (such as Greenpeace Denmark and the Danish Society of Nature Conservation). Furthermore, local environmental and nature protection organisations usually are granted a right to appeal as well.

Judicial: There is no 'actio popularis' in Denmark. Any person who is protected by the rules according to which the matter has been settled, and who has been affected by the decision in a significant manner compared to other citizens has the right to go to court. Close neighbours to an environmentally unfriendly activity have the right to go to court, as well as organisations that represent individually affected persons. It has not (yet) been accepted by the courts that organisations that have a right to administrative appeal can also go to court, so until now, environmental organisations, such as Greenpeace, only have access to the ordinary courts in cases where they represent the interests of individually affected persons.

c. What can be challenged in the procedure?

Non-judicial: The granting or refusal of the licence. However, decisions on whether an activity is a listed activity and refusals based on planning law cannot be appealed. The Minister of the Environment is authorised through Government Orders to lay down rules that decisions in matters of minor importance cannot be appealed.

Judicial: All actions by the administration can be brought before the courts, to be tested against the observance of the material and procedural rules limiting the power of public authorities.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Non-judicial: The appellate body may uphold the decision. It may also alter the terms or fully refuse to approve the application.

Judicial: The principle of proceedings applies, which involves that the courts can only decide on claims made. The courts are also limited by the maxim that the courts do not fully test the free discretion of the authorities. As mentioned above, the courts generally show respect to the administrative appeals system.
The presentation of a case to the court does not automatically suspend the decision. However, the law or the courts themselves may determine a suspensive effect in a concrete case.

d. **Practical aspects:**
   1. Are parties obliged to obtain legal aid?

   **Non-judicial:** No. The administrative appeal procedure is rather informal. The public authorities have to assist the private citizens with their claims, and together they clarify the case (‘official maxim’).

   **Judicial:** Yes. In the judicial procedure, citizens have to present their case to the courts in a clear manner, so that the courts can decide upon the material presented to them (‘negotiation maxim’).

**Other environmental decisions**

a. **What kind of procedure and where exactly?**

   **Non-judicial:** The above on licenses largely applies to individual decisions according to the Nature Protection Act as well. All decisions made by the county and municipal councils and the nature conservation boards, on the basis of this Act can be appealed, as well as some decisions by the Minister. The Nature Protection Board of Appeal decides on cases of significant interest and decisions brought before the Board via the Minister. Planning decisions can be appealed on the basis of the Planning Act before the Nature Protection Board of Appeal, but only on legal issues, and not on the discretionary part of planning (so a rather restrictive test). Appeal possibilities against sectoral plans are limited (depends on sectoral legislation). There are no possibilities for appeal against Acts of Parliament (including specific acts on large scale facilities of national importance such as roads and bridges), statutory orders, Parliamentary plans, circulars and guidelines of a technical nature.

   However, the national Ombudsman has the power to control all parts of the public administration and those parts of semi-private or private organisations, that are covered by the administrative management acts. The main purpose of the Ombudsman’s activities is to ensure that the administration complies with current law and administrative principles, and that the public bodies behave in a proper manner in relation to citizens. He personally decides his jurisdiction in each claim made to him and he is personally responsible for the consequences of the decisions he makes in each case. The Ombudsman plays a very important role in the Danish legal system.

   **Judicial:** All actions by the administration can be brought before the courts, to be tested against the observance of the material and procedural rules limiting the power of public authorities, i.e. concrete actions, general rules, plans, administrative agreements and concrete administrative decisions. Laws can be tested against the Constitution. Draft laws and draft administrative rules cannot be brought before the courts.

b. **Who has access and under which conditions?**

   **Non-judicial:** On decisions regarding the Nature Protection Act again the same applies (cf. above). Under the Planning Act anyone with a legal interest in the outcome of the case has the right to appeal. This usually is the addressee, neighbours and sometimes local associations. Every citizen who feels that someone has been unjustly treated by the public administration may turn to
the Ombudsman: the claimant does not have to prove specific interests (anyone has access). The Ombudsman may also implement investigations on his own initiative.

**Judicial:** Like with licenses, any person who is protected by the rules according to which the matter has been settled, and who has been affected by the decision in a significant manner compared to other citizens has the right to go to court (cf. above).

c. What can be challenged in the procedure?

**Non-judicial:** Legal aspects of plans can be reviewed. The Ombudsman may review individual acts and regulations, inter alia statutory orders, circulars and guidelines, issued by administrative bodies conform the Act on the Ombudsman. Questions brought before the Ombudsman often concern the right of access to information.

**Judicial:** All actions by the administration can be brought before the courts, to be tested against the observance of the material and procedural rules limiting the power of public authorities.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** The appellate body may uphold the decision or alter or annihilate it. A request with the Ombudsman has no suspensive effect, unless the involved environmental authorities decide that the complaint does have that effect (based on a balancing of the involved public and private interest). The Ombudsman has no power to reverse or quash administrative decisions. Therefore, his power does not interfere directly with administrative decisions, but he has considerable influence on the behaviour of the administration. If the Ombudsman decides that the claimed decision or inaction has been unsatisfactory, he will reprimand the officials concerned and try to ensure remedial action. He may for instance recommend free legal aid to the claimant, or changes in law and practice. He also prepares an annual written report to the legislature, which demonstrates a far greater incentive towards the administration than the courts.

**Judicial:** Such testing can lead to annihilation of the said decision. As mentioned above, the courts generally show respect to the administrative appeals system.

The presentation of a case to the court does not automatically suspend the decision. However, the law or the courts themselves may determine a suspensive effect in a concrete case

e. Practical aspects

(none reported)

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

**Non-judicial:** It is stated in the Environmental Protection Act that in relation to environmental contracts the Minister for the Environment has the power to make supplementary rules on settlement of disputes by arbitration, and on the composition of the arbitration tribunal. This procedure has, however, never been used. This rule cannot be interpreted as a complete
description of the powers afforded to the parties in a contractual situation. Based on a ministrial order, an arbitration tribunal may have the power to settle disputes arising out of standing environmental contracts (e.g. through litigation). It cannot, however, be presumed that the arbitration tribunal should be involved during the negotiation pertaining to the renewal of these contracts. It is not possible to set up an arbitration tribunal which would have the power to assess the environmental conditions of the non-contractual parties.

**Judicial:** The law on relations between neighbours is traditionally defined as the sum of legal rules which limit the owner’s rights on the property. These limitations of property rights granted by private easements rest on agreements, testaments, court decisions, prescriptive rights, expropriation and the like, whereas limitations by law or by principle fall outside the concept of easements.

Court decisions regarding environmental pollution liability are usually based on the general liability rules. The general conditions for liability are as follows: culpable actions; loss; causal relation between the culpable action and the occurrence of loss; and the injured party has not shown own guilt. In the field of environmental liability there is a strong interplay between fault-based liability and public environmental statutes. Therefore, previous environmental legislation may be relevant to decisions on liability for damage. A specific problem arises in the case of environmental damage, as it is often not possible to establish a causal connection between the activity and the damage. Especially when this is the result of activities of many different parties, as joint-and-several liability is not used in Denmark. Difficulties also arise if the damage does not manifest itself until after a lapse of time.

The Act on Environmental Liability introduces a regime of strict liability in respect of environmental damage caused by activities on real property. Environmental damage from mobile objects is not covered by the Act. The Act may help owners of property to restore their property or their land; it does not deal with the situation where there is no proprietary interest in the harmed natural resources. Liability is triggered if there is an impact on the environment coming from an establishment and causing death, bodily injury or damage to property. The polluters acting in conformity with a licence will normally not exclude liability. Strict liability (liability without fault) will only fall upon the commercial or public activities included in the list attached to the Act. Only the operator (owner of the polluting facility) can be the strictly liable person.

**b. Who has access and under which conditions?**

**Judicial:** Only the person who has an actual or possible disposal of the damaged property may institute an action and claim damages. This means that environmental organisations who according to legislation do not have a special right of disposal of damaged property cannot commence proceedings before a civil court.

**c. What is the subject of the dispute?**

**Judicial:** The act that caused the damage. Damage can consist of personal injuries (including direct and indirect costs and non-pecuniary losses), property damage, other economic loss, reasonable costs of measures to prevent or minimise damage or to reinstate damaged components of the environment. Damage to the environment which does not in itself have an economic value but may have great value in other terms (e.g. the loss of a species) cannot be compensated directly in terms of economic loss. The owner of a damaged property can demand compensation
for a restoration only if these costs are not out of proportion to the value of the damaged property.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: The owner of damaged property can demand compensation, and it is up to him to decide whether or not he wants to restore the property. Prohibition of the emission in question or claims for pollution reduction or remediation may also be sought.

e. Practical aspects:
(none reported)

3. Criminal/penal procedures:

a. What kind of procedure and where exactly?

Non-judicial: Criminal law cases are usually reported to the police by the local or regional supervision authorities, however, citizens and environmental organisations are free to report complaints on possible criminal behaviour by firms or citizens to the police as well. [We did not find a specific procedure giving these complainers access to justice on the decision to start criminal proceedings].
**Finland**

I. **Characteristics of the country**

The main administrative (environmental) powers are vested with both state and municipal authorities. Practically all individual decision-making according to the environmental enactments has been delegated to the Regional Environmental Centres (13). They are rather independent in their decision-making, within the limitations of the law. Between the regional and the ministerial level there is no longer a central agency. There is, however, the Finnish Environment Institute, that has to do research, general monitoring of the environment and environmental consultation. The Institute has been vested with a little environmental decision-making competence for example regarding chemicals and trade in internationally protected species.

The Municipal Environmental Authorities make up the important local level of environmental administration and enforcement. Their duties have been regulated in detail in the environmental law statutes, and their decisions are in general no more discretionary than those of the state environmental authorities. There are also three Environmental License Agencies, and they function in practice mainly as administrative licensing and enforcement authorities.

The Finnish Constitution explicitly recognises environmental interests. It includes a task for the Government in developing the environmental legislation and citizens’ participation.

In March 2000 the new Environmental Protection Act has entered into force as a consequence of the IPPC-Directive. Changes that have occured with this new Act have been included in this report.

II. **The procedures**

1. **Procedures against administrative acts or governmental action/non-action: licences**

a. **What kind of procedure and where exactly?**

**Non-judicial:** Finland had till 1999 no single comprehensive environmental law, but rather various individual acts and secondary regulations. This has also resulted in considerable variations in the aims, control systems and licence procedures, with no internal co-operation. There were systems for the prevention of water pollution, for the prevention of air pollution, for waste management, for the protection of public health, and for neighbourhood relations (this one being of a civil nature). In 1992 the licensing procedures in all sector acts (the Water Act excluded) were procedurally combined into one, but the substantive regulation is still found in the respective underlying acts. There are in addition to the licences combined in this act a multitude of other licences, for which a person starting an activity will have to apply. For practical reasons it is not possible to account for all these licences. In 2000 a new Environmental Protection Act has entered into force. This is due to the requirements of the EC Directive on Integrated Pollution Prevention and Control (IPPC Directive). The main amendment is the incorporation of the water licence procedure (see below, III) with the environmental licence procedure as described here.

   The procedure starts with an application to be filed with the licence authority. An account of the facility, its impact on the environment and any other facts that may be of significance with respect to the consideration on granting a licence should be enclosed. The authority must request any opinions it feels are necessary for the consideration of the application. A regional environment centre is always obliged to ask an opinion from the municipality where the activity
is to be located and from the local authorities for those areas which will be manifestly affected by the substantial impact of the facility. When necessary, the provincial government must also be asked for an opinion. The authority shall further ensure that those whose rights or interests may be affected by the decision have an opportunity to lodge objections to the application in writing. It may also initiate a public oral hearing, where information regarding the application will be provided. This happens often in cases when the project is likely to have considerable impact on the environment or when very different opinions have been expressed in the initial stage of the procedure. The applicant has the opportunity to respond to the objections and opinions expressed. Other persons and bodies that do not represent interested parties are also entitled to express their opinions within the same period.

After assessing the application on the basis of the obtained material and considering the criteria in the different sectoral acts, the authority will grant or refuse the licence.

Finland had Water Courts since 1962, consisting permanently of legal, technical and ecological experts; they were competent in a wide range of matters dealing with water issues. These matters were of a varying legal or administrative nature and included private law suits, criminal cases and certain administrative appeals. The Water Court was a judicial body, but, in practice, it acted as an administrative authority, because its main task was to decide as first instance on applications concerning discharges and other use of waters. However, compensation for future damages to individual victims such as the water area and shore area owners were ex officio and typically on the basis of established calculation formula decided upon by the Water Court as part of the licensing procedure. After the entering into force of the new Environmental Protection Act, the Water Courts have been replaced by corresponding administrative bodies (Environmental Licence Agencies).

Judicial: The applicant for a licence and all those whose rights or interest may be affected by the matter, as well as the local board and authorities whose duty it is to watch over the public good in a matter, shall have a right of appeal against a licence decision. The appeals shall be lodged to one of the provincial administrative courts, where there are additional expert members (technology, biology). The decisions on appeal can be appealed against to the Supreme Administrative Court, as shall the decisions of other permit bodies as well, e.g. the regional environmental centres.

During the procedure, a person or company whose rights and interests are subject to the appeal must be heard regarding the claims of others as well as regarding further accounts that may affect the final decision of the court. The court is, if necessary, obliged to seek the opinion of the authority who gave the initial decision, and it may arrange an oral hearing (it is obliged to if a party requests for a hearing).

As a general rule, a licence decision may not be observed until it has achieved the force of law. The Environmental Protection Act states, however, that the licence authority may, on the request of the applicant, order that the licence decision shall be observed despite appeal, provided that the applicant deposits acceptable security for restoring the environment to its original state or compensating any losses should the licence decision eventually be repealed or changed. This may only be ordered if implementation will not lead to ineffectiveness of appeal. Only the court may forbid the implementation.

Also in matters according to the Water Act (1961, amended in 2000), the decisions of the Environmental Licence Agencies may be appealed against in the above mentioned administrative court (located in Vaasa), and after that to the Supreme Administrative Court.
b. **Who has access and under which conditions?**

**Non-judicial:** Affected person or bodies representing affected person may lodge their objections to the authority. Affected parties are natural or legal persons whose rights, interests or obligations may be affected by the matter. Associations engaged in the protection of the environment in general do not have the right to lodge objections. Any other person or body may express their opinions.

**Judicial:** The applicant for a licence and all those whose rights or interest may be affected by the matter, as well as the local board and authorities whose duty it is to watch over the public good in a matter, may lodge an appeal. The case law on the subject of affected persons follows that of the sphere of persons entitled to lodge objections against the application. The prevailing assessment criteria are the impact and directness of the harmful effects.

When the decision to grant a licence according to the Environmental Protection Act is contrary to the provisions of the Nature Conservation Act (1996), rules of standing from this Act apply as well. This means that any registered local or regional association whose purpose it is to promote nature conservation or environmental protection has ‘locus standi’ as well. In ordinary licensing-cases, NGOs do not have locus standi. However, according to the new Environmental Protection Act the same broad concept of standing as adopted in the Nature Conservation Act will be introduced.

According to the Water Act, standing before the Agency and the Provincial Court is the same as in most other administrative procedures, although in practice, the locus standi has been extended a little further by these courts. Standing has been granted to, for instance, shore owners hundreds of kilometers from the location of the discharge, to professional fishermen, shipping and rafting people etc.. Locus standi has been refused only if it has been obvious that the project cannot influence the use of the property in any relevant way. NGOs are denied locus standi as well.

c. **What can be challenged in the procedure?**

**Non-judicial/judicial:** The licence and its terms.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** The appellate authority has the power to amend the material contents of the initial decision and/or the regulations attached thereto.

Appeal suspends the decision to grant a licence: a decision only can be observed after a judgement in appeal has been reached. However, an applicant can request to order that the decision does take effect immediately, despite the appeal.
e. **Practical aspects:**
1. What are the fees and (possible) other costs of proceeding?
   Parties have to cover their own costs. Costs and expenses can be awarded against an unsuccessful objector appealing to a court, but in administrative court procedure this very seldom happens.
2. Are parties obliged to provide for financial security for procedural costs in case they lose?
   No
3. How long can it take before a final decision is taken?
   8.5 months
4. Are parties obliged to obtain legal aid?
   Yes
5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
   None reported

**Other environmental decisions**

a. What kind of procedure and where exactly?

**Non-judicial:** Anybody can write a complaint on the legality of actions of public officials and the public administration to either the Chancellor of Justice or the Parliamentary Ombudsman. Planning decisions can be appealed against by municipal appeal. Registered NGOs and people who suffer damage or inconvenience because of offenses against environmental legislation have the right to initiate an enforcement procedure under several environmental acts.

**Judicial:** Decisions under the Nature Conservation Act can be appealed before the administrative court. Decisions by the building committee can be appealed before administrative courts. Decisions by administrative authorities turning down the request to enforce environmental regulation can be appealed by the initiator before the Provincial Administrative Court and the Supreme Administrative Court.

b. Who has access and under which conditions?

**Non-judicial:** Anybody can write a complaint to the Chancellor of Justice or the Parliamentary Ombudsman. There are no conditions, except that persons involved in a legal procedure cannot address these instances during such a procedure. Planning decisions can be appealed against by municipal appeal by all members of the commune. Registered NGOs and people who suffer damage or inconvenience because of offenses against environmental legislation have the right to initiate an enforcement procedure under several environmental acts.

**Judicial:** Decisions under the Nature Conservation Act can be appealed before the administrative court by those whose rights or interests are affected, the Municipal Board, and any registered local or regional association whose purpose it is to promote nature conservation or environmental protection. This right of the NGOs however does not apply to matters of compensation, nor to decisions to grant derogation from certain protecting provisions. Decisions by the building committee can be appealed before administrative courts by the owners and holders of neighbouring sites and by those whose property may be essentially affected by the decision. As already mentioned above, decisions by administrative authorities turning down the
request to enforce environmental regulation can be appealed by the initiator before the Provincial Administrative Court and the Supreme Administrative Court.

c. What can be challenged in the procedure?

**Non-judicial:** The legality of actions of public officials and the public administration.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** The Chancellor of Justice and the Parliamentary Ombudsman cannot set aside decisions of the public authority, nor can they order payment of compensation. They do however issue a reprimand or give instructions for future cases to public authorities, including the legislator.

e. Practical aspects:
1. What are the fees and (possible) other costs of proceeding?

**Non-judicial:** No costs are involved in the procedures before the Chancellor of Justice or the Parliamentary Ombudsman.

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

**Judicial:** In general, compensation for non-contractual damage is based on the Act on Compensation for Damage. The basic system in fault-based, although there are several special acts based on strict liability. One of them is the Environmental Damages Act, as discussed below. In addition, legal practice has introduced strict liability for example for explosion damages.

The rather progressive Environmental Damages Act is comprehensively based on strict liability, and covers in principle all types of damage resulting from pollution or nuisance caused by stationary activities. The notion of ‘activity’ is to be understood in a broad sense, covering any industrial, commercial, agricultural, silvicultural and municipal activities, except carriage. The relevant damage may be temporary or continuous. Undesirable incidents and accidents are covered by the Act, as well as the consequences of regular activities.

Because there is no provision for a positive list on installations or on chemical substances, the scope of application of the Act is general and comprehensive. The (non)existence of any licence or compliance with the environmental regulations has in general no effect on the liability. For the operator to be found liable, it is sufficient if the claimant proves the link between the activity of the defendant and the occurred damage to be ‘probable’ (a probability of clearly more than 50 per cent). If one damage has been caused by several activities, all the respective operators are jointly and severally liable.
b. Who has access and under which conditions?

**Judicial:** Victims of personal injury of damage to property.  
**Remark:** A governmental committee has drafted a proposal for a Group Actions Act. Environmental damage proceedings have been one of the intended targets. However, it seems today that there is not a sufficient political will to make a governmental bill possible.

c. What is the subject of the dispute?

**Judicial:** The act causing (environmental) damage. ‘Pollution’ in the Act refers to water, air and soil alike.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** Compensation for damages (it is also possible to claim compensation in advance, before any damage has occurred).

e. Practical aspects:

None reported

3. Criminal/penal procedures:

a. What kind of procedure and where exactly?

**Judicial:** The role of criminal police and public prosecutors regarding environmental crimes is in many respects subsidiary to that of the environmental supervisory authorities. Although they are often able and even obliged to act without the initiative and the assistance of the environmental authorities, the activity of the latter is normally decisive. And to the administration, other measures than criminal proceedings are often of primary interest. Therefore, contacting the police or prosecutor (by private victims) as such may not result in injunctions or reinstatement orders. The victims may bring a criminal charge without the prosecutor too, though it is not common. Claims for compensation may also be brought in criminal proceedings, but it is normally required that the accused person is first sentenced to punishment.
France

I Characteristics of the country
Although the present law on classified installations stems from a Napoleonic decree of 15 October 1810, French environmental law in general is fairly recent. Despite recent efforts, French laws regarding the environment still remain to be codified. To date, there is no direct reference to the environment in the French Constitution.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: The operator must first determine from the listing whether the contemplated activities are to be authorised or simply declared in advance. When the activity is subject to a prior authorisation regime, the installation’s operating licence will take the form of an individual administrative order. If only subject to prior declaration, the licence will take form of a mere receipt including a reference number according to the listing for each of the declared activities and referring to corresponding standard orders regulating each activity under the listing. The authorisation (or receipt) must be granted before the installation starts to operate.

Once the administrative body decides that the application file is complete, a public enquiry procedure may begin. The information that is provided to the public during the public enquiry must be carefully organised, as incomplete information often opens the ground for challenge in court by third parties. During the procedure, the public has access to public hearings and it can file comments in an official register. After the procedure, the inspector, who carried out the investigation, sends a written report with a summary of the steps of the public enquiry and the setting out of his opinion on the basis of the foundings to the administrative body that takes the decision. Un unfavourable opinion does not prevent the granting of the authorisation, but does nevertheless give a court, during an appeal procedure, the authority to order that the authorisation be immediately stayed pending the court’s review on the merits.

The same administrative body decides on the licencing of the declaration. Once the formal regularity of the applicant’s filing is checked, a declaration must be delivered to the applicant. The authority may not further appraise the impact that the declared installation may have on the environment. However, the authority may sometimes include additional, more specific terms and conditions relating to the operation of the installation.

Judicial: These decisions (licence-related and receipt-related) may be appealed before the local administrative court. Special rules apply to this procedure, for instance the time limit to lodge appeal (see point b below).

b. Who has access and under which conditions?

Judicial: Third parties, whether individuals or legal persons, interest groups or societies, interested municipalities or groupings thereof, have four years after the publication of the decision to lodge an appeal. Individuals who have settled in the neighbourhood after the date and
publicity of the authorisation do not have standing in court. Applicants have to lodge their appeal within two months (in general).

c. What can be challenged in the procedure?

Judicial: This procedure applies to all administrative decisions listed under article 14 of the Law of 19 July 1976. These include among others the authorisation (or denying) of an installation, receipts following a declaration procedure, special standards imposed on an installation submitted to an authorisation regime, administrative sanctions for failure to comply with statutory or administrative obligations, etc.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: The administrative courts have full power to decide on the issues deferred to them. They may cancel the order, substitute their own discretion to that of the administration and modify or impose new technical standards with which the operator will have to apply. They also may afford damages to plaintiffs having suffered a damage of their own.

Appeal does not suspend the licence. Should a court decide to cancel a licence, the operator must immediately stop operating the plant. Usually a temporary order allows the operator to keep operating the plant.

e. Practical aspects:

1. Are parties obliged to obtain legal aid?

Parties are not obliged to use an attorney before the courts of first instance. It becomes compulsory, however, during the appeal procedure before the administrative court of appeal and before the administrative supreme court, where the plaintiff must hire the services of a special type of barrister qualifying to appear before the civil supreme court and the administrative supreme court.

Other environmental decisions

a. What kind of procedure and where exactly?

Non-judicial: There is an ombudsman-like institution, the Médiateur de la République, who can address complaints regarding governmental organisations and bodies put before him by individual citizens. Complaints have to get admitted before the Médiateur: only serious questions are dealt with.

Also there are several institutions that enable environmental organisations to get governmental information on a certain topic or to raise a specific question on a policy issue. These are (among others) the Conseil pour les droits des générations futures (Council for the rights of future generations) and the Commission départementale des sites (Commission for nature reserves). There are specific statutes concerning the access to information in the field of wastes and of radio-active materials.

Judicial: Apart from decisions on authorisations and declarations many other administrative decisions in the area of installations or the environment at large may fall under normal legal review by administrative courts. This proceeding is known as the claim for excessive use of
authority and may normally be brought against any administrative decision with a view to obtaining a cancellation of the decision for lack of legal basis.

b. **Who has access and under which conditions?**

**Non-judicial:** any person can address the Médiateur de la Republique. Most of the special non-judicial procedures mentioned under a. are only accessible for certain specially appointed organisations active in the field of nature protection. Some procedures, like the procedure to receive information on wastes, are open to any person.

**Judicial:** The case may be brought before a local administrative court by any party upon which the decision is productive of legal effects, whether intended recipient of the decision or third parties. The plaintiff will have to present the administration a prior conciliatory written demand in view of a possible amicable settlement before going to court.

c. **What can be challenged in the procedure?**

**Judicial:** Administrative decisions, leaving aside the article 14 procedures, ministerial decisions, decrees or orders defining general rules or technical prescriptions applicable to installations at national level. In the last case, however, the competent court would be directly the Supreme Court due to the high hierarchical level of the author of the challenged decision.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial:** The ‘Médiateur’ can give (non legally binding) recommendations only.

**Judicial:** Unlike in article 14 procedures, the court has no authority to substitute its own decision to that of the administration, so it will refer the case back to the administrative body to take a new decision. Sometimes, compensation is awarded.

e. **Practical aspects:**

None reported

2. **Procedures against industries or other citizens that pose a threat to the environment:**

a. **What kind of procedure and where exactly?**

**Judicial:** French civil law deals with environmental damages using the general principles of civil liability found in the Civil Code. As a matter of principle, a victim of an environmental damage may choose between various possible liability grounds to bring a case:

1. Fault or negligence: the plaintiff will have to show that he or she has indeed suffered prejudice and that this prejudice was caused by the negligence or fault on the part of the operating company; the causal link.
2. Strict liability of the possessor of goods: a separate legal regime of so-called strict liability for damages for caused by goods (personal or real property) one has under one’s possession. Liability is attached to the control or the possession (not to the goods) and the presumption of liability is in most cases irrefutable. However when an external event, unrelated to the defendant
has caused the damage the defendant cannot be held liable. And when the plaintiff was also at fault and this fault contributed to the damage, the liability may be mitigated.

3. The theory of neighbourhood nuisances: although no specific statutory basis, the theory is linked to the legal theory of property under the Civil Code, following which the owner of a thing may use that in an unrestricted and unfettered manner. The owner’s right to use its property should not cause an abnormal nuisance to neighbours. This theory may be used in cases involving liability for pollution caused by local industrial or agricultural activities. This is unless the victim has settled in the vicinity of the operator after the nuisance had already started, as long as the operator follows the prescriptions of its licence and the licence has not altered since.

There are also laws adopted in certain specific areas involving highly polluting activities that retain a principle of strict liability of the operator, for instance in the area of nuclear energy and as regards ship owners where the vessel causes pollution through hydrocarbons. Even if defendant has an authorisation under the law and acts in compliance with the terms of the licence, third parties suffering damage may claim compensation. The operator cannot use the authorisation as an excuse for causing damage to third parties.

b. Who has access and under which conditions?

**Judicial:** The victim of environmental damage may bring a case: the damage to the environment must bear consequences on persons or properties. Following a general trend however, French law has circumvented this difficulty by allowing certain interest groups and specialised agencies to bring actions. The courts consider that interest groups must be specifically entitled by law to initiate proceedings: various statutes provide for such a right.

c. What is the subject of the dispute?

**Judicial:** The act that caused the environmental damage (to property, persons, the natural milieu at large, and consequences on collective interests).

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** The court can award compensation in proportion to the damage actually suffered (without punitive damages). This is often fairly easy to quantify when the damage affects persons or property, but is more difficult when it affects general interests. In such cases, courts tend to award symbolic amounts (often one French franc) and, in an increasing proportion, a publication in one or more newspapers. Courts generally hesitate to impose that the award be used directly for the rehabilitation of the damaged site.

e. Practical aspects:

none reported

3. **Criminal/penal procedures:**
a. What kind of procedure and where exactly?

**Judicial:** In general, the public prosecutor may decide whether or not to initiate criminal proceedings. Under French criminal procedure rules however, individuals or legal persons may
claim compensation before criminal courts. If they do so, the public prosecutor is bound to initiate criminal proceedings.

b. Who has access and under which conditions?

Judicial: Those who have suffered a personal and direct damage may seek compensation for it. This means that Environmental groups are generally barred from claiming compensation, because it would need to establish that itself has suffered direct damage as a result of the pollution. However, some statutes have authorised a series of groups to claim compensation before criminal courts for indirect damages in relation with the collective interest they defend. This applies to consumer groups, groups in charge of protecting animals, or groups which are recognised as societies acting for the protection of the environment. This right was subsequently extended to the benefit of all recognised groups having existed for more then three years and to infringements pertaining to the protection of nature, water, air, soil, sites, landscape, urbanism, qualified by law as a criminal offence.

c. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: The perpetrator will be prosecuted and may be convicted. That, and possible additional compensation will be the positive result.

d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

None reported
Germany

I Characteristics of the country

Following its traditions, Germany is organised as a federal state. As a result of that, there are three levels of government in Germany: federal level, state level and local level. Legislative powers concerning environmental legislation are allocated to the Federation and the states, although for important issues (e.g. the use of nuclear energy, waste disposal etc) the states are only allowed to legislate if the Federation has not used its competence. Thus, the main part of environmental statutes are federal law, but in a few areas the states may adopt statutes because of the absence of federal law. On the other hand, the state authorities are explicitly competent to implement and enforce environmental law and to establish the relevant authorities and the appropriate rules of procedure. The Federation has in most cases just supervisory powers as to the question of legality. In some areas -nuclear energy, air traffic, federal roads-, however, the Federal Government is entitled to give instructions to the state authorities, even in specific cases.

Plans to revise the entire system of environmental legislation with the ‘Umweltschutzgestezbuch’ were dropped in 1999, although drafts for both the ‘Allgemeiner Teil’ and the ‘Besonderer Teil’ had been elaborated in quite much detail.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: Institutionalised procedures to raise objections before a decision is taken may relate to different kinds of decisions, ranging form normative decisions to different kinds of individual decisions. Three kinds of procedures can be distinguished when an individual decision is being taken. Firstly the normal procedure, which applies in all cases where no special rules apply. To be able to have access to the files and raise objections, one must have a legally protected interest in the matter. Secondly, the open permit procedure (Federal Emissions Control Act and Nuclear Energy Act) obliges public notice, the possibility for anybody to raise objections and a duty to organise some kind of public hearing. Thirdly, a specific type of administrative decision authorising certain infrastructure projects as provided in the relevant statutes: the ‘Planfeststellung’. This procedure is designed to give a very secure legal status to the project. The rules of procedure provide for a public notice and the possibility for anybody whose concerns are affected by the project to raise objections. Since a public or general concern cannot be a part of those concerns, citizen groups or similar associations are excluded. However, a specific provision for recognised environmental organisations provides for participation if a project constitutes an impairment of nature and landscape.

The Environmental Impact Assessment (EIA) requirement is linked to the necessity of a permit under the Federal Emissions Control Act, Section 7 of the Nuclear Energy Act and a series of decisions requiring a Planfeststellung. The provision of the EIA Act refers to the procedure of public participation under the provisions concerning the Planfeststellungverfahren. This means that the possibility to raise objections is limited as provided in that provision.

After an individual decision has been taken -and only in that case-, there is a possibility for administrative review. The appeal goes to the authority that adopted the appealed decision,
unless an administrative decision is taken by the highest authorities of the Federation or a state (no appeal admissible at all).

The right of petition is guaranteed by the Federal Government. Each year more than 15,000 petitions go to the Federal Parliament and they reflect a broad spectrum of private and public grievances (including environmental concerns).

Judicial: The administrative court system consists of three instances: the Administrative Court, the Administrative Court of Appeal and the Federal Administrative Court. The first two are authorised to review questions of law and facts (federal or local), while the third is a federal court whose jurisdiction is limited to questions of federal law. For a suit to be admissible, the plaintiff must assert (no full proof required) that through the administrative act or omission his legal rights have been infringed upon. The legal rule asserted to be violated, must at least be one designed to protect the interest of individual persons rather than only the public at large. Moreover, the plaintiff must belong to the class of persons to be protected: the protective law theory. This theory makes it very hard for ‘third parties’ to institute legal proceedings before an administrative court. There are however tendencies to broaden the standing in environmental law. Another result of this theory is that public interest standing is not permitted. Because this is not excluded as a matter of principle, the Federal Government, or the states, may introduce forms of public interest standing. So far the Federal Government has refrained from introducing association standing, leaving the matter to the states. In the meantime, 12 out of 16 states have introduced association suits in the field of nature protection, although with various criteria.

In very exceptional circumstances an affected person may be granted standing even if he cannot avail himself of a protected law. Standing may be based on the constitutional protection of property or the right to life and health. These fundamental rights may also be invoked in a constitutional complaint against allegedly insufficient legislation for the protection of these rights. However, until now all these complaints have been rejected on the merits.

Construction permits given in the absence of a local plan, can be challenged if the kind of use is in question (e.g. the zoning), but not when the degree of permissible use is concerned. Construction permits that do not confirm with protective determinations of a local plan can be challenged by affected neighbours.

b. Who has access and under which conditions?

Non-judicial: To have standing in administrative review procedures, a legally protected interest must have been harmed.

Judicial: Anybody whose legally protected interest has been violated (an actual injury) and has exhausted the administrative remedies, has standing in judicial review procedures. Also an unacceptable risk (not mere precaution) is enough to have access. In the field of nuclear radiation standing requirements are somewhat more generous, as a distinction between actual danger and precaution is not made. In the water pollution area, the rules are more restrictive now in principle only lawful water users (industrial, commercial and agricultural) as well as operators of water works have the right to challenge acts. Land owners and holders of fishing rights do have standing to a limited extent.

As stated above, in some states some form of group standing (in the protection of nature law) has been introduced. Although these provisions vary each state, they all have in common that standing is limited to “recognised” associations. This means that these associations must
have been recognised by the state or the Federal Government, on grounds such as geographical scope, proper performance (including financial responsibility) and openness to all persons who support the objectives of the association.

c. What can be challenged in the procedure?

**Non-judicial:** Raise objections and administrative review (see under a.)

**Judicial:** Judicial review: individual decisions. A heavy burden is imposed on the plaintiff, following from the principle of preclusion. Under most environmental and planning laws belated objections in the preceding administrative procedures are excluded form assertion before the courts. Another important aspect relates to the scope of the review. In order to annul a decision or to require the authority to take a (new) decision, it is not sufficient that the court finds objective illegality. The plaintiff must also be violated in his rights. This means that the grounds on which the grant of standing rests also the scope of review determines.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** Individual decisions can be annulled (in these actions no compensation or direct order to third parties possible), the plaintiff can ask for a decision to be taken (if the authority refuses to do so) (*mandamus action*) and in some cases an action for a declaration is admissible.

Appeals have a suspensive effect. Sometimes special laws regulate that a decision can be immediately made use of, even if third parties take action against it.

e. Practical aspects:

1. What are the fees and (possible) other costs of proceeding?

**Judicial:** The losing party has to bear all costs of the litigation: court fees, lawyer fees (both sides) and the costs of hearing evidence. These costs can get very high.

2. Are parties obliged to obtain legal aid?

**Judicial:** Actions instituted before an administrative court of first instance do not need to be filed by a lawyer. However, before the court of appeal or the Federal Administrative Court, parties must be represented.

**Other environmental decisions**

a. What kind of procedure and where exactly?

**Non-judicial:** Although there are no general rules, certain environmental statutes provide for a procedure to raise objections before a decision concerning a regulation or administrative guideline has been taken. According to the Federal Emissions Control Act, the Federal Recycling Economy and Waste Management Act and the Chemical Substance Act, the Federal Government may adopt regulations after having heard the parties concerned. The Building Code specifically provides for publication of draft zoning plans and the possibility of public discussion. Under the Nature Protection Act, recognised nature protection associations must have the opportunity to take notice of the proposed measure and to express their opinion, regarding the designation of specific protection areas and general plans.
**Judicial:** In very exceptional circumstances an affected person may be granted standing even if he cannot avail himself of a protected law. Standing may be based on the constitutional protection of property or the right to life and health. These fundamental rights may also be invoked in a constitutional complaint against allegedly insufficient legislation for the protection of these rights. However, until now all these complaints have been rejected on the merits.

**b. Who has access and under which conditions?**

**Non-judicial:** A specifically selected group of representatives of the scientific community, of those affected, of economic actors concerned, of relevant transportation enterprises and of those land agencies being competent for matters of pollution control may raise objections to draft regulations. It is by now also recognised that certain environmental organisations do have that same possibility, and sometimes a wider group of persons, e.g. with local zoning plans.

**Judicial:** Addressees of decisions under nature protection law and property owners whose legal rights are taken or restricted by a decision, are the only ones granted standing to invoke the illegality of the state measures. The same restriction goes for decisions taken under other law insofar as the protection of nature is concerned (e.g. infra structural projects -for as far is nature decisions: other decisions in these projects can be legally reviewed by anyone affected by them-). Another area with very limited standing is the toxic substances regulation, where standing is ‘simply’ denied because the circle of individual affected persons cannot be determined (affects all citizens). Twelve out of sixteen states have introduced association suits in the field of nature protection, although with various criteria.

With regard to local plans the courts used to apply rather liberal criteria, as only injury was required. However, since 1996 a more subjective concept underlies this action, and it remains to be seen whether the courts will now apply the same restrictive criteria.

**c. What can be challenged in the procedure?**

**Non-judicial:** objections can be raised in a public discussion.

**Judicial:** Judicial review of local plans and some other decisions (see under a.). In many states, the same is true for regulations ranking below parliamentary acts as well as other state and regional plans having the force of law.

**d. What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** annulment of the (few) decisions that can be brought before a court.

**e. Practical aspects:**

see above

2. **Procedures against industries or other citizens that pose a threat to the environment:**
a. What kind of procedure and where exactly?

**Judicial:** The general rule of tort law is that the plaintiff must show injury or -in the case of injunctive relief- imminent injury to his subjective rights (health, property). The Environmental Liability Act imposes strict liability on a number of listed dangerous activities, while the Federal Water Management Act is somewhat broader and also protects competing holders of a permit. Finally, under neighbourhood law only adjoining property owners, lessees and similar possessors are protected against emissions.

A legal permit is normally a defence for an operator in actions for injunctive relief, limiting the claim of the affected neighbour. The affected neighbour can only request additional protective measures where feasible as well as compensation. This is not true of construction permits.

b. Who has access and under which conditions?

**Judicial:** As stated above, German tort law exists of a rights-orientated concept. A certain extension of this narrow liability concept is that an action for damages or injunction also is applicable if the defendant has violated a statutory rule which is designed to protect private interests. Thus, the protective norm theory as developed by administrative courts has its counterpart in civil law. This means that rules of environmental law which can be invoked as a ground for standing before the administrative courts, also give rise to a claim directly against a polluter. The requirement of individual or imminent harm does however limit the scope of this possibility.

Association suits are not admissible as a result of the rights-orientated concept, whether they invoke subjective rights of their members or vindicate the public interest.

c. What is the subject of the dispute?

**Judicial:** The act that has caused the damage, and the liability is in principle based on fault. This includes ecological damage only insofar as the affected natural resource is encompassed by the notion of property in land.

d. What can be the (positive) result for the complainant after a procedure has been concluded?
e. Practical aspects:

1. Are parties obliged to obtain legal aid?
   **Judicial:** Yes, they generally have to be represented by a lawyer, unless the case goes to a court of first instance (if the amount of controversy of which is below 10,000 DM).

3. Criminal/penal procedures:

   a. What kind of procedure and where exactly?

   **Judicial:** A person who has been injured by a crime and formally applied to the public prosecutor to open criminal proceedings has a remedy against the decision to discontinue proceedings, first to the superior public prosecutor and then to the criminal court.

   An injured person can also join the criminal proceedings as a party in order to bring an action for damages which normally would have to be instituted before a civil court.

   b. Who has access and under which conditions?

   **Judicial:** Standing is limited to persons who are “injured”: the affected person must have suffered some harm which distinguishes him from the public at large. Association suits are not admitted.

   c. What can be the (positive) result for the complainant after a procedure has been concluded?

   Prosecution

   d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

   None reported
Greece

I  Characteristics of the country

The form of government of Greece is that of a parliamentary republic. According to the Greek Constitution, the administration of the state is organised on the basis of decentralisation. This means that there are regional authorities entrusted with important powers within their region: the administration of local affairs is explicitly assigned to the local governments (article 102(1) of the Constitution). The Constitution provides for two levels of local government: municipalities and communes are the local government agencies of the first level, while ‘Prefecture self-government entities’ are the local government agencies of the second level. Besides that, regions have been structured as unified decentralised administrative entities. With respect to the central government and its structure, there is no constitutional provision for the number or the scope of the ministries. Environmental policy is exercised by central, decentralised and local government, and environmental competencies are assigned to ministries, the regions and to the Local Government Agencies of the first and second level.

The constitutional protection of the environment (article 24) covers all of its main aspects: the physical environment (24(1)), the environment of regional (urban) planning (24(2-5)) and the cultural environment (24(6)). Although phrased as an obligation of the state, this article has been recognised by most of the theory and by the jurisprudence as providing an individual and social right to the environment. It has a direct and imperative character and is binding for all powers of the state: the legislative, the executive and the judiciary. It must also be mentioned that the Constitution, among all the environmental factors, chooses to make a special provision for the protection of forests (articles 24 and 117).

Greece is organised as a state under the rule of law. As a specification of this principle, the Constitution subjects public administration to judicial review and guarantees the citizen’s access to the courts as a fundamental right. Moreover, the Greek legal system provides for mechanisms of judicial protection of the citizen’s rights or interests, as specified by law. In relation to environmental protection, access to the administrative law is important, as well as to the criminal and civil courts.

II  The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: In order to determine whether a licence is required, one has to make recourse to the different categories of activities, separated according to their impact on the environment. The law defines two major categories, A and B, of application of the law for works and activities, of both the private and public sector, with the exception of works falling within the scope of national defence. Category A is subdivided into two groups: area I includes the activities most harmful for the environment (e.g. nuclear energy plants, oil refineries, etc), while area II includes activities which are less harmful, but which may have an impact on the environment (e.g. cement industries, fish hatcheries, etc). For both areas, an Environmental Impact Assessment is needed, in the form of a complete and detailed study. Category B includes works and activities not included in areas I and II for which a relevant licence is required pursuant to the law.
For new category A (most of them) works and activities or for the change of existing ones, to the extent that substantial differences occur in relation to the environment, a pre-approval with respect to area planning is required. For category B projects, such pre-approval is optional.

The procedure starts with the application of the licence, accompanied with a possible EIA and pre-approval for area planning. The interested party may not affect the decision-making procedure further to the submission of documents. However, third parties may take notice of the EIA and express their views in writing. The authority has to publish an announcement and invitation to the citizens to do so in the local newspapers. The decision will also have to be published.

**Judicial:** The decision to grant a licence can be challenged by a petition for annulment before the Supreme Administrative Court. There has to be a legitimate interest is violated in order to start proceedings. This may be happening in the present, but also in the future. The suspension of execution of an act may be exercised together with the appeal before the Committee for Suspensions of the Supreme Administrative Court. This suspension is granted when the execution of the act may provoke irreparable damage or damage which is difficult to repair as well as under certain specific conditions. The suspension is granted until the hearing date of the appeal before the court.

b. **Who has access and under which conditions?**

**Non-judicial:** Every citizen or body can participate in the decision-making process.

**Judicial:** An individual or a legal entity affected by the administrative act or whose interests are affected by the same, may file a petition for annulment. Members of a board of directors of an organisation or of a legal entity of the public sector may do the same, in the event that upon adopting their resolutions their legal rights as members have been disregarded. Also unions of individual may file a petition to the extent that they are considered holders of certain rights and obligations. Finally, the Local Government Organisations are also considered as having a legitimate interest for the protection of the environment.

c. **What can be challenged in the procedure?**

**Non-judicial/judicial:** The licence and its terms.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** The Supreme Administrative Court may reject the petition, or annul the act, or suspend its execution until the final decision of the said court.

e. **Practical aspects:**

None reported

**Other environmental decisions**

a. **What kind of procedure and where exactly?**
Non-judicial: In case of an administrative act, originating within the legal person of the state, hierarchical control is exercised by superior authorities over subordinate authorities, upon application of the interested party. In case of an act of a regional authority, the interested party may take a special administrative appeal to the Minister of the Environment, asking for the annulment of the act. The Minister exercises, in this case, a control of legality. In case of an act of a local authority, the interested party may apply to the responsible regional authority, which will also exercise a control of legality. The exercise of this administrative review is not compulsory: interested persons may apply directly for judicial review.

Judicial: Environmental disputes can be brought directly before the Council of State which can annul the appealed decision. The petitioner may ask for suspension of the act until the judgement on the case is completed. Apart from the Council of State, citizens have the right of access to the ordinary administrative courts of first and second instance. The remedy before these courts should be provided by law. When the law provides for a full (substantive) judicial review of the administrative authorities’ action on grounds of both law an equity, this judicial review falls into the scope of the ordinary courts. Against their judgements the Council of State decides as the Supreme Administrative Court when the proper remedy is submitted.

b. Who has access and under which conditions?

Non-judicial/judicial: Any interested party, i.e. whoever has a legal interest offended by this act, and the addressee of the decision. The circle of interested persons is quite broad, as not only the inhabitants of the ‘offended’ area, but also citizens who do not have their domicile there but only their residence, as well as NGOs, and legal entities in general, interested in the protection of the environment, may lodge an appeal.

c. What can be challenged in the procedure?

Non-judicial/judicial: individual administrative acts or unlawful failure to act, or a statutory instrument, not against a law (act of parliament).

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: The Council of State may annul the decision, and remand the case back to the competent authority in order to look into the case and take the necessary measures. Judgements of the ordinary courts may declare a contested act null and void or transform it and order the state to compensate the plaintiff.

e. Practical aspects:

None reported
2. Procedures against industries or other citizens that pose a threat to the environment:
   a. What kind of procedure and where exactly?

   **Judicial:** Access to civil courts is secured by the Constitution, but also by the Greek civil law in the framework of offences against the right of personality (one’s name, likeness, etc), protection of possession and ownership, and unlawful acts (torts).

   Under private law, the right of the individual to use and enjoy environmental goods is protected as a right deriving from personality. Many things subject to public use (e.g. freely and perpetually running water, the seashore, etc) also constitute substantive elements of the environment. This means that every citizen in a territorial relationship with an environmental good against which an offence has been committed can bring the action before the civil court, because he is considered to suffer an offence against his personality.

   By the invocation of provisions concerning the protection of possession and ownership, in combination with the provisions of the so-called neighbour law, citizens may achieve protection against air or sound pollution, or against the foundation of industrial establishments or other constructions of professional use in resort areas or in areas where only buildings for housing are permitted.

   When the damage constitutes a tort, citizens have the right to pursue a claim for reparation of damages. More concretely, the Civil Code presupposes an unlawful act or omission which has been willfully or negligently committed by a person and which has caused damage to another. The injured party must establish the elements liability: damage, unlawfulness of the act or omission, culpability of the author, and an adequate, legally relevant, connection between the fault and the damage. The Civil Code provisions can be supplemented by the provision of article 29 of Law No. 1650 of 1986, when dealing with environmental damages. Every individual or legal entity that causes pollution or other degradation of the environment is liable to pay damages, unless it is proved that he/it is not responsible, because the damage has been caused by force majeure of by the fault of someone else, who acted intentionally. This provision establishes a kind of objective liability, and its application leads to the plaintiff’s relief of the burden of proof with respect to the culpability of the perpetrator. The plaintiff may legally found this claim in combination with article 24 of the Constitution, hereby the civil courts implicitly accept the German doctrine of *Drittwirkung*, or in combination with the other above mentioned relevant provisions of the Civil Code.

   b. Who has access and under which conditions?

   **Judicial:** Any injured party. NGOs only can be an unjured party when they actually own property that has been damaged.

   c. What is the subject of the dispute?

   **Judicial:** Damages constituting a tort.
**d. What can be the (positive) result for the complainant after a procedure has been concluded?**

**Judicial:** The plaintiff is entitled to claim reparation, covering pecuniary injury as well as for moral harm suffered as a consequence of the unlawful, environmentally harmful attitude, the court having the power to evaluate the indemnity to be awarded. The plaintiff is also entitled to have the act stopped and undone as well as to demand that it will not be repeated, i.e. to demand some kind of environmental rehabilitation through the ordinary judicial procedure or by means of provisionary measures.

**e. Practical aspects:**
None reported

3. **Criminal/penal procedures:**

   **a. What kind of procedure and where exactly?**

   **Judicial:** Apart from the crimes provided for in special environmental laws, the Greek Criminal Code also includes many provisions concerning the environment, under which many kinds of acts or omissions are criminalized (e.g. forest arson, explosion and garbage and waste pollution). The public prosecutor of first instance is competent to press charges, after receiving information about the commission of an environmental crime. The information comes from individuals, as well as from NGOs or the authorities. If the complaint is legally founded, the public prosecutor is bound to press charges against the offender. In addition, an individual who has been directly damaged by the crime, as well as the interested self-government corporations or other legal entities may participate in the criminal proceedings as civil claimants and pursue a civil claim for reparation of damages or for an indemnity for non-pecuniary damage.

   **b. Who has access and under which conditions?**

   **Judicial:** Anyone can lodge a complaint about an allegedly committed crime.

   **c. What can be the (positive) result for the complainant after a procedure has been concluded?**

   **Judicial:** A possible conviction, and perhaps compensation for damages (if civil proceedings have been started along with the criminal trial).

   **d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?**

   None reported
Ireland

I Characteristics of the country
The sources of public environmental law are mainly of a statutory nature. The other principal sources are the Constitution, European Law, the common law, delegated legislation and administrative circulars.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: Different environmental licences are required for various types of activities which have an impact on the environment. These include (land-use) planning permission under the Local Government (Planning and Development) Acts 1963 to 1999, licences to discharge to the water (Local Government (Water Pollution) Acts, 1977 and 1990) and to the Air (Air Pollution Act, 1987), and integrated pollution control licences (Environmental Protection Agency Act, 1992). Procedures under these legislative codes may vary.

However, in general terms, applications for licences are available for public inspection by anyone (all individuals and groups). A good number of named bodies who have deemed to have a particular interest in the matter must be specifically notified. These include almost always the most important Irish environmental NGO (An Taisce), adjacent local authorities and certain government ministries. Local authorities may be obliged to consult with specific other authorities, such as for instance conservation authorities in order to achieve compliance with EC conservation legislation (protection of wildlife habitats). Any individual or statutory consultee may make representations or object to the proposed activity and these objections must be put on the file which is available to the public. If an IPC (Integrated Pollution Control) licence is involved, the applicant may be required to provide more information. The EPA (Environmental Protection Agency) deals with these licences.

When making the decision, the competent authority (local or the EPA) has to take certain specified matters (e.g. environmental management plans, any environmental impact statement submitted and the reactions to it, etc.) into consideration. They may decide to refuse the authorization or to grant it with or without conditions attached. The authorities are especially prohibited from granting authorizations which would result in non-observance of EC environmental standards. A notice of the decision must be given to anyone who submitted written objections or representations. This notice may alternatively be given to the public by publication in a newspaper. The EPA takes a draft decision which will also be published in newspapers. If this decision if not appealed, a final authorization is issued within four or five weeks of the draft decision.

Decisions on applications for certain authorizations in the environmental area made by local authorities (decisions on applications for planning permission, on applications for licences to discharge effluent to waters and on applications for licences under the Air Pollution Act, 1987) may be appealed to the Planning Appeals Board. The Board considers the merit of the decision, and it can annul or confirm (with or without modifications) the local authority decision.

The EPA has also special powers for the enforcement of environmental controls over local authority activities, many of which are not subjected to authorization requirements. If the
EPA is of the opinion that a local authority has failed to perform (or not satisfactory) a statutory function in relation to environmental protection, it can request a report. After reading the report the EPA can either give advice and recommendations to the authority, or provide for assistance and support in consultation with the local authority. If the authority does not response properly to the EPA action, the EPA may direct the local authority to take such action relating to the function in question as it considers necessary for the purposes of environmental protection within such period as it specifies. If the authority fails to comply to the EPA direction (without reasonable cause), the EPA is obliged to take action to ensure compliance with its direction. The only situation in which the EPA is not allowed to give a direction, is mindful of other demands on public expenditure.

**Judicial:** Licences, like all administrative decisions and all decisions of inferior courts may be challenged by way of judicial review or plenary summons. In environmental matters the Irish courts have been extremely generous in according standing to challenge environmental decisions. The alternative remedy by way of administrative appeal will not necessarily bar an action for judicial review. That depends on the adequacy of the administrative remedy and the issues which have arisen in a particular case. Judicial review will be granted if these issues are unsuitable for resolution by an administrative body. The grounds on which the exercise of a statutory discretionaty power granted to an administrative body may be challenged can be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will.\(^{55}\) Other grounds for annulment of decisions by the courts are if they are made in a manner which does not comply with applicable statutory procedures or if they violate the rules of natural or constitutional justice.

**b. Who has access and under which conditions?**

**Non-judicial:** Any person, whether or not he or she has a personal interest in the matter, may appeal against decisions on applications for planning permissions, licences to discharge trade or sewage effluents to waters and licences for certain processes to discharge to the atmosphere. Appeals against decisions to discharge trade or sewage effluents to local authority sewers may only be brought by the applicant for the licence.

**Judicial:** Only an applicant with ‘sufficient interest’ in the matter to which the application relates will be granted leave to apply for judicial review by the High Court. This means that normally decisions do not come before it unless there are questions of law involved. Against decisions of the High Court there is an appeal to the Supreme Court.

**c. What can be challenged in the procedure?**

see under a.

\(^{55}\)According to Lord Radcliffe in *Smith v East Elloe RDC*, (1956) Appeal Cases 736
d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** re-evaluation of the decision by the competent authority

**Judicial:** The remedies available are:
1. declaration of the rights or the legal position of the parties to the action,
2. *mandamus* (ordering the authority to do some act),
3. *certiorari* (quashing the illegal decision of the public authority),
4. prohibition (requiring an authority to refrain from acting in excess of its jurisdiction),
5. injunction and/or damages.

e. Practical aspects:

**Non-judicial:** The fees for appealing are £100, and there are usually reductions for *An Taisce* and other specified public bodies (the fee for appealing to the Planning Appeals Board is now £120). Persons who do not wish to appeal can make observations on the matter for a smaller fee (£30 or £36 with the Planning Appeals Board). The only limitations on rights to object are necessary procedural limitations (time limits, inadequate fees, etc) and the objections must not be frivolous and vexatious or repetitious. In 1998, the average time taken by the Appeals Board to make decisions on applications for planning permissions was eighteen weeks. Taking the fact that one generally expects that any planning permission for a major industrial or infrastructural project will now be challenged into consideration, one could say that there are no real obstacles to start the procedure in this matter.

**Judicial:** none reported

*Other environmental decisions*

a. **What kind of procedure and where exactly?**

**Non-judicial:** The Ombudsman can determine that the correct administrative procedures are carried out by both central Ministries and local authorities.

**Judicial:** All administrative decisions and decisions of inferior courts may be challenged by way of judicial review or plenary summons, including Environmental Management Plans for the reasons set out above. Draft laws, rules, administrative rules, practices or circulars may also be challenged by way of judicial review, although they are not subject to an appeal as such.
b. Who has access and under which conditions?

**Non-judicial:** All individuals have the right to object to air, water, waste and land-use management plans. Only *affected* individuals may object to proposed designations of nature reserves, special conservation areas and special protected areas. Where the EPA has specified powers, it also is the only one having access to these procedures.

**Judicial:** Against any decision of the High Court there is an appeal to the Supreme Court, but in planning matters the High Court must certify that the case involves a point of law of exceptional public importance.

c. What can be challenged in the procedure?

see under a.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** re-evaluation of the decision by the competent authority

**Judicial:** The remedies available are:
1. declaration of the rights or the legal position of the parties to the action,
2. *mandamus* (ordering the authority to do some act),
3. *certiorari* (quashing the illegal decision of the public authority),
4. prohibition (requiring an authority to refrain from acting in excess of its jurisdiction),
5. injunction and/or damages.

e. Practical aspects: see above (licences)

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

**Non-judicial:** Local authorities and the EPA (in case of IPC licences) have the power to serve notices requiring specified measures to be taken to limit or prevent water or air pollution. If the person does not comply with the notices, necessary measures may be carried out by the authority concerned. They can also take measures to prevent, remedy and clean up the effects of the pollution themselves or assist others (e.g. environmental organisations) to do so. The costs of doing so are recoverable form the person served with the notice.

   The EPA has the power (on its own initiative), or sometimes a duty (if required by the Minister for the environment) to investigate the causes and circumstances surrounding any environmental pollution incident. It can make a report, or arrange for an inquiry. The reports will be published and the costs will be recovered from any person responsible for the subject of the inquiry.

**Judicial:** Any person may apply to the appropriate court if a person is causing or permitting polluting water to enter waters or causing or permitting the discharge of trade or sewage effluents to waters except under and in accordance with a licence (Water Pollution Act 1977).
Any person may go to the High Court to prohibit, remedy or prevent past, present or possible future entries or discharges or escapes of polluting matter to waters (unless in accordance with a licence or other regulations). This extremely wide jurisdiction can be exercised against persons who obtain custody or control over polluting matter liable to cause water pollution, whether or not it is their fault. A similar action may be taken in the High Court to prevent the continuance of seriously polluting unlicensed air emissions or the non-compliance to air emission licences.

Furthermore does *any* person who has suffered any injury, loss or damage to his person or property from water pollution or air pollution to recover damages from:

1. the *occupier* of the premises from which the pollution originated, unless the pollution was caused by an act of God, or by the act or omission of a third party over whose conduct the occupier had no control and which the occupier could not reasonably have foreseen or guarded against, or
2. *any* person whose act or omission constitutes a contravention with any provision of the Water Pollution Acts 1977-1990 or the Air Pollution Act 1987.

That is unless the supposed perpetrators comply with statutory licences. The fact that a person is ‘authorized to pollute’ does however not mean that he cannot be liable for common law torts.

Also, the Waste Management Act 1996 grants *any* person the right to seek an order from the High Court, where the Court is satisfied that waste is being held, recovered or disposed of in a manner that causes, or is likely to cause, environmental pollution, requiring a person holding, recovering or disposing of the waste to carry out specified measures, or to cease making any specified omission, to prevent, or limit, or prevent a recurrence of such pollution, or to discontinue the holding, recovery or disposal of waste within a specified period, or mitigate or remedy any effects of such holding, recovery or disposal.

### b. Who has access?

**Judicial:** Any local authority, the EPA (to enforce IPC licences) and indeed any person has the power to initiate civil action. Environmental organisations have the same standing as individuals. *An Taisce* does even have special privileges as to get free copies of documents, to be specially notified and consulted and to bring appeals at a cheaper rate. No citizen, foreigner, association or individual has ever been denied standing in an environmental case in the courts or before an administrative tribunal.

### c. What is the subject of the dispute?

**Judicial:** The act by the defendant. In case the defendant is a decision-making body, to win the case the complainant must show that this body violated procedures or constitutional rules for fair hearings or that the decision was extremely manifestly or unreasonable.

### d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** The court has the power to order the prevention, mitigation and remediation of water pollution damage and the payment of compensation for losses consequential on the damage. If the defendant does not comply with this order, the local authority or Fishery Board may take the required action at the defendant’s expense. The court has very wide powers as to the orders it can
make, for instance to order a clean-up of land polluted by a previous owner if pollutants from that land were likely to escape into waters.

e. **Practical aspects:**

**Judicial:** Requirement to provide security for costs in case one loses the case? Not usually: the court may determine to do so, but in most cases it refuses to exercise this power.

3. **Criminal/penal procedures:**

a. **What kind of procedure and where exactly?**

**Non-judicial:** As a general rule, only local authorities can bring criminal prosecutions for environmental offences. Affected private individuals and Regional Fisheries however, have express powers to prosecute on indictment for the main water pollution offences. In common law, any individual has the power to initiate a summary prosecution for any criminal offence by the Director of Public Prosecutions.

b. **Who has access?**

see under a.

c. **What can be the (positive) result for the complainant after a procedure has been concluded?**

Prosecution.

d. **Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?**

None reported

**III Specific aspects**

Measures or activities that pose a threat to nature (specially protected areas or species, biodiversity):

There is no provision for public participation in plans designating nature reserves, special protected areas or special areas of conservation under the EU Birds and Habitats directives. However, provision is made for affected individuals to object to proposed designations. As a general rule, extensive provision is made for public participation when plans are made at local level, but not when they are made at national level.
Italy

I Characteristics of the country
The Italian Republic is a unitary state divided into various decentralised territorial entities, namely, regions, provinces and municipalities. The most important of them are the regions, which enjoy a certain degree of legislative, administrative and financial autonomy. Their powers may be divided into two functions: autonomous and delegated. The provinces and municipalities have exclusive administrative powers in certain specific areas, such as, among others, protection of the soil and the protection and the evaluation of the water and energy resources (the provinces), or town-planning (municipalities). The region controls the provinces and the municipalities, while the state reviews the legality of regional acts.

In the Italian constitution there is no express reference to the protection of the environment. However, article 9 (protection of landscape) and article 32 (protection of health) have been commonly regarded as the more appropriate constitutional parameters. The Court of Cassation has even decided that article 32 includes the right of the people to a healthy environment. Starting from this point, case law elaborated more detailed rules regarding, in particular, an individual’s legal standing, rights of environmental organisations, responsibility of public officials and the notion of indemnifiable environmental damages.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licenses

a. What kind of procedure and where exactly?

Non-judicial: The Italian environmental health and safety licensing system suffers from several problems, such as the enormous amount of related legislation which was issued, without sufficient coordination, over an extensive period of time (from the 1930s), while the regulators were often overly optimistic as to the speed of the requisite administrative procedures and mandated that companies may not start without certain licences which in the end involved rather lengthy proceedings. It is not easy to indicate basic features of environmental licensing procedures, since they are all quite different. In general, the procedure starts with the filing of an application accompanied by technical documentation, environmental impact studies, laboratory analysis, plant lay-outs and everything else that may be required. Certain procedures to take the decision are quite straightforward, while others involve the participation of several authorities. A special form is the ‘conference of services, which is carried out through one or more meetings of all the authorities involved, who make a joint decision on whether or not to grant the licence, or to authorise the plant as a whole. This decisions replaces all the licences to be issued by participating authorities. The conference may be initiated by the authorities, or is sometimes provided for by law (e.g. for a plant for disposal of waste).

Sometimes the various environmental statutes contain special rules for participation. There are also general rules for participation. Any interested party is entitled to be informed of all steps of the procedure, to review and obtain copies of all documents, to submit briefs and, in general, to actively intervene in the procedure. Besides that, public authorities are under the obligation to disclose all information regarding the environment to whomever requests access to them. The disclosure can only be denied for specific public interest reasons and the denial can be challenged before a regional administrative tribunal.
Judicial: Licences (or refusals to give them) may be challenged before administrative courts, i.e. the competent Regional Administrative Tribunals, with the possibility of appeal to the Council of State. The appeal may be based on:
1. a violation of applicable legal provisions,
2. a lack of power by the issuing authority to issue the decision, or
3. a so-called ‘excess of power’; improper use of the executive power.

b. Who has access and under which conditions?

Non-judicial: With regard to participation, only those who have a direct interest may be involved in the procedure. This principle often allows local communities and environmental organisations to participate in the proceedings. Everybody does have access to information without the need to show a specific interest.

Judicial: Everyone who has a lawful interest can appeal against permits issued by administrative agencies. In practice, the inhabitants of the area where the installation is located, local communities and environmental organisations are assumed to have such an interest. Some environmental organisations specifically have been appointed by law to have standing in cases where there is an environmental impact.

c. What can be challenged in the procedure?

Non-judicial/judicial: the granting or rejection of licences.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Non-judicial/judicial: annihilation or confirmation of the decision.

e. Practical aspects:
None reported

Other environmental decisions

a. What kind of procedure and where exactly?

Non-judicial: Although the remedy is rarely pursued with respect to environmental matters, a decision issued by a lower level authority may be appealed against to the higher authority belonging to the same administration. This decision may be appealed against before a regional administrative tribunal. There are regional ombudsman-like mediators who can be adressed by individual citizens: Difonso civico regionale.

Judicial: Appeal against administrative decisions is possible: the same procedure as decribed above applies. There is no distinction between decisions regarding licences and other decisions.

b. Who has access and under which conditions?
Non-judicial: With regard to participation, only those who have a direct interest may be involved in the procedure. This principle often allows local communities and environmental organisations to participate in the proceedings. Everybody does have access to information without the need to show a specific interest.

Judicial: Everyone who has a lawful interest can appeal against permits issued by administrative agencies. In practice, the inhabitants of the area where the installation is located, local communities and environmental organisations are assumed to have such an interest. Some environmental organisations specifically have been appointed by law to have standing in cases where there is an environmental impact.

c. What can be challenged in the procedure?

Judicial: the decisions and orders of administrative agencies, including the Government, the Ministries and local authorities.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Non-judicial: The authority has the power to reject the appeal, or grant it. In the latter case it may annul or revoke the appealed decision, or even reform it, thereby transforming it into a new decision based on the merits.

Judicial: The regional administrative tribunal can annul or confirm the appealed decision.

e. Practical aspects:
None reported

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

Judicial: Since both Supreme Courts (civil/administrative) held that the provisions of the Constitution entitle every individual to act before a court to enforce his or her right to a healthy environment, the role of civil courts in these matters began to develop. For many years, it was limited to private actions aimed at obtaining injunctions or damages awards against those who conducted polluting activities. In 1986 the concept of environmental damage was introduced into the Italian legal system and attributed to the state and local authorities the right to sue before civil courts in order to obtain compensation. The main features of the liability are:

there is no strict liability for harm to the environment; negligence or wilful misconduct is required,

the conduct of the responsible party must constitute a violation of a law or of an administrative order.

Because of the long duration of the cases, plaintiffs frequently try to obtain protection of their rights through temporary injunctions. In order to do so, plaintiffs must prove immediate and irreparable harm.

Specific liability rules apply to waste disposal, contaminated sites and water pollution.
b. Who has access and under which conditions?

Judicial: Anybody having a direct interest in the case has standing in civil actions. Case law tends to recognise standing in environmental matters to those who suffer a direct injury from the polluting conduct and especially to those who live in the area where the environmental contamination has occurred or is occurring. Since the Law No. 349 of 1986, the state and local authorities have the power to bring actions before a court with respect to general harm to the environment. Under the same statute, certain recognised environmental organisations may join the proceedings on environmental damages, although they may not initiate these ‘citizen suits’. They are, however, allowed to do so where they have suffered some form of direct injury, in accordance with the principles of general tort law.

c. What is the subject of the dispute?

Judicial: The act causing damage to persons or things (anybody) or to the environment (state or local authorities).

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: Injunction or compensation

e. Practical aspects:
1. How long can it take before a final decision is taken?
Although the civil procedure was reformed in order to try to expedite and improve proceedings, the result has far from been achieved. The procedure is mainly written and the duration of the cases is such as to discourage many actions. On average, a procedure going through the three instances of jurisdiction lasts seven/eight years at the minimum. Temporary injunctions may be obtained in two or three months.

3. Criminal/penal procedures:
a. What kind of procedure and where exactly?

Judicial: Criminal proceedings are commenced by the public prosecutor upon receipt of an accusatory instrument from a private party or a public official. After receiving this receipt, the public prosecutor will officially begin the preliminary investigations. Within six months he can either dismiss the case or request the arraignment of the defendant. The Judge can then issue either a judgement of acquittal or a decree by which he opens the criminal trial. The decision of the first instance court may be appealed against before the Courts of Appeal and then the Court of Cassation.

b. Who has access and under which conditions?

Judicial: Private or public parties may file a complaint or report that may result in criminal proceedings started by the prosecutor. The victims of the crime may intervene to seek compensation for damages. Non profit (environmental) organisations which have been officially recognised as having the purpose to further the interests affected by the crime may participate in
the proceedings with the same rights as the damaged party. The damaged party, however, does have to consent to their participation.

c. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** a possible conviction and compensation for damages.

d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

None reported
Luxembourg

I Characteristics of the country
Environmental law is the responsibility of the Ministry for Environment and the Ministry of Home affairs. The first has general powers concerning the implementation of government environmental policy, while the latter is responsible for general planning policy and for the integrated management of water resources. Two major authorities, environment, and water and forestry, report to the Ministry for Environment. Both authorities have legally defined roles, mainly with regard to documentary appraisal on government licence applications. The role to be played by the Ministry for Agriculture in environmental matters has recently been increased. As yet however it is impossible to give a definite appraisal on its attributes and powers.

The main source of environmental law is statutory law, which tends to follow EU legislation very closely. Administrative and judicial procedures are generally the same as provided for by general administrative law. Due to the small size of the country, the only decentralised bodies are the municipalities ("communes").

The Luxembourg Constitution so far makes no reference to environmental protection. However, the governmental declaration of August 1999 states that in the wake of constitutional reform, protection of the environment will be elevated to a constitutional principle. It may also be noted that environmental litigation has so far not been referred to the Constitutional Court.

II The procedures
1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: The licensing procedure is in fact a written formality. Virtually all industrial, non-industrial, commercial activities, either public or private, are subject to the legal provisions of the Classified Establishments Act (10 June 1999). Operations are divided into four categories and two sub-classes, according to the degree of nuisance they create. Applications have to be filed to the competent authority, either the Ministry for Environment, the Ministry of Labour or the municipality. A notice indicating the object of the licence application is displayed for 15 days in the relevant municipality where interested parties can inspect them and make written observations. After that, a specially appointed officer conducts an inquiry into the negative and positive aspects of the activity encompassing the views of all interested persons. The application together with the result of the inquiry is then transmitted to the competent authority to deliver the license. The applicants and the persons having submitted written observations during the inquiry are notified of the decision, and furthermore a notice will be displayed for 40 days at the local town hall. A copy of the licence will remain available for public inspection at the local town hall for the duration of the operating of the establishment.

Even though this is not expressly provided for by environmental laws, the decision to grant or refuse the licence is in principle subject to a non-judicial appeal’s procedure to the competent Minister ("recours gracieux").

The report has been reviewed and updated by Gilles Dauphin, a member of the Luxembourgish environmental association.
If an operation fails to fulfil the operating conditions the competent authority can:
1. require the operator to comply with the conditions within a specified period, the maximum being two years,
2. after, giving formal notice, suspend the activity or the works, in whole or in part, by way of interim measure, or partially or totally shut down and put the operation under seal.
An interested party may request the authority to take such measures. The measures and penalties may be lifted where the offence in question ceases.

Judicial: Appeals against decisions to refuse or grant a licence can be made to the Administrative Tribunal, which adjudicates on the main issue, given that these are appeals to reverse decisions made. Appeals against the decision of the Tribunal can be made to the Administrative Court. The legal proceedings are mainly in writing. The application is notified to or served on the other parties concerned who may assert their rights. After the written examination, the case is set down for pleading at a hearing. The response of the authority to an application to shut down a site is an administrative decision which can be submitted to the Administrative Tribunal for appeal on the main issue.

b. Who has access and under which conditions?

Non-judicial: When the inquiry is made into the positive and negative aspects of a proposed activity, all interested third parties, individuals and organisations, may express their views. The application of administrative measures and administrative penalties can be sought by any interested party, including approved organisations.

Judicial: Licence applicants and other interested parties can appeal against decisions to grant or refuse a licence. These include all interested citizens (including citizens from abroad), but only insofar their individual rights are infringed by the decision: they cannot act on behalf of the general interest. The same holds for environmental groups: as long as the interests benefit the community of all individual members of the group, environmental groups have standing. When the group asks for standing in a case where the general interest is at stake as falling under the scope of the Ministry’s policy, this will be denied by the courts.

c. What can be challenged in the procedure?

The decision granting or denying a permit, the conditions of the permit or decisions on enforcement of licences.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Non-judicial: The authority may in assessing the application take into consideration the views that have been expressed.

Judicial: The Administrative Tribunal and Court can reverse the appealed decisions. They have jurisdiction to examine the merits of the case, and they may either take a new decision, change a decision, or quash a decision (depending on what act is involved). Under the Classified Establishments Act 1999, the courts have the power to take a new decision, but in view of the
technical nature of the licences, they are inclined to rule that the authority has to take a new
decision based on the judgement.

Judicial appeals arc not of a suspensive nature, unless ruled otherwise following petition
to the court.

e. Practical aspects:

1. What are the fees and (possible) other costs of proceeding?
   See below, under actions against industries or citizens.

2. Are parties obliged to provide for financial security for procedural costs in case they lose?
   No. Luxembourg is a party to the 1954 Hague Convention on Civil Procedure which
   abolishes requirements as to security of costs in respect of plaintiffs who are both nationals of,
   and residents in the Contracting States. Although it is possible to obtain security from plaintiffs
   from other countries, this is rarely done in practice.

3. How long can it take before a final decision is taken?
   Under the 1999 Act on Procedure before the Administrative Courts, strict time-limits are
   set out for the exchange of written statements and supporting documents between the parties.
   Thus, unless the court on petition orders to shorten or to lengthen these periods, a case between
   two parties should be instructed and ready for the oral hearing after 5 months. On appeal, the law
   provides for a three month instruction.

4. Are parties obliged to obtain legal aid?
   During the non-judicial procedures, the intervention of a lawyer is not compulsory. The
   law provides however that any party may be assisted or represented by a lawyer or a technical
   expert. Before the administrative courts parties must be represented by a lawyer. Residents who
   are without means, may obtain legal aid. Legal advice on the protection or enforcement of the
   rights of individuals is freely available to persons of all nationalities through a public service
   administered by the “Service d’accueil et d’information juridique”.

5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
   As regards NGO’s the courts apply a rather rigorous test of compliance with the Non-
   profit Associations Act of 1928 (as amended). According to this act, in order to have a
   recognised legal personality and thus standing, associations have to comply with a range of
   publication requirements.
**Other environmental decisions**

The Classified Establishments Act is certainly the most important law on environmental licences. However, a whole range of other legislative acts provides for special licences and these contain either special inquiry proceedings or none at all. Judicial proceedings are mostly identical.

a. What kind of procedure and where exactly?

**Judicial**: Following reforms made in 1996 and 1999, regulatory measures by whatever authority are subject to a judicial review procedure on grounds of lack of competence, abuse of power, illegality or infringement of procedural requirements destined to protect private interests. The appeal must be introduced within three months of the publication of the regulation in the official journal, or in the absence of publication, from the notification or from the date the plaintiff received knowledge of the act.

The judgement of the Administrative Tribunal may be appealed to the Administrative Court.

It should also be noted that during a case before a civil court, any party may invoke the illegality of a regulation. If the court is of the opinion that the regulation is unlawful, it will not apply the act to the case at hand, but the civil court has no power to quash or reverse the regulation.

b. Who has access and under which conditions?

**Judicial**: An appeal can only be lodged by persons justifying a personnel, direct, present and serious interest.

Under the 1982 Nature Protection Act some non-profit associations can be appointed by the Minister for Environment to have access to justice on decisions regarding nature protection if they exercise their activities for at least three years. Other laws related to the protection of the environment contain similar provisions.

Under the 1996 Act organising the Administrative Courts specially appointed environmental organisations received the right to appeal against some regulations (i.e. only the regulations that are mentioned or based on the statute according to which the concerned associations have the right to appeal).

Following conditions have to be met in order to be able to lodge an appeal against a regulation mentioned in the act according to which the concerned associations have the right to appeal:
1. the procedure is only open to non-profit associations of national importance,
2. that have legal personality,
3. and that are specially appointed by the statute.

c. What can be challenged in the procedure?

Administrative measures of a regulatory character.

d. What can be the (positive) result for the complainant after a procedure has been concluded?
Annihilation of the regulation.

e. **Practical aspects:**

The same as under “licences”.

2. **Procedures against industries or other citizens that pose a threat to the environment**

a. **What kind of procedure and where exactly?**

**Judicial:** Any human act or deed which causes damage to others requires the person whose fault caused the damage to make reparation. Not only action, but also negligence or carelessness can lead to liability. The injured party has to prove three requirements before a defending party will be found liable: the existence of a fault, the existence of damage, and the relation of cause and effect between the fault and the damage. Damage can consist of capital loss, but also of loss of enjoyment. Fault on the part of the defendant may be mitigated or absolved when the injured party is also at fault.

Article 1384 (1) of the Luxembourg Civil Code establishes a presumption of liability in respect of the person with custody of the property which occasioned the damage. A person with custody is a person who exercises the powers of use, supervision and control over the property in question. This means that a person can be liable not only for the damage he causes by his own action, but also for damage caused by action of persons for whom he is responsible or property he has in custody. The injured party must establish the active involvement of the property in effecting the damage: this is presumed if the property entered into contact with the damaged asset and if it was in motion during such contact. These provisions also apply to substances which pollute or contaminate.

Liability can also be established on the basis of neighbourhood disruption. For liability to be incurred, two requirements must be met: detriment must be caused to the neighbour and such detriment must exceed normal neighbourhood inconveniences. This is an objective liability and therefore without fault. Case law asserts that the right for compensation is based on breach of the equal right of neighbours to enjoy their property.

b. **Who has access and under which conditions?**

Persons suffering damage, which includes legal persons. However, environmental organisations will find it difficult to prove a damage and will thus be denied access to justice.

c. **What is the subject of the dispute?**

Liability for damage.
d. What can be the (positive) result for the complainant after a procedure has been concluded?
The injured party should be put back into the position before the damage occurred. If restoration in kind is impossible, damages will be awarded.

e. Practical aspects:
1. What are the fees and (possible) other costs of proceeding?
   One has to distinguish between lawyer’s costs and legal costs.
   Legal costs include the bailiff’s cost for service, which are calculated according to a tariff; experts’ costs, if the court appoints an expert in order to obtain a neutral report over a technical question and fees of lawyers which are calculated according to a complicated tariff.
   In its final judgement, the court would make an order as to which party has to bear the legal costs of the procedure. Generally it is the loosing party, but the costs may also be shared.
   However each party usually bears its own lawyers’ costs, unless one party can establish, on grounds of equity, that it is unfair that all its costs should remain to its expense, in which case the court may award an order against the other party to reimburse part of the costs incurred by the other party.

2. Are parties obliged to provide for financial security for procedural costs in case they lose?
   No. Luxembourg is a party to the 1954 Hague Convention on Civil Procedure which abolishes requirements as to security of costs in respect of plaintiffs who are both nationals of, and residents in the Contracting States. Although it is possible to obtain security from plaintiffs from other countries, this is rarely done in practice.

3. How long can it take before a final decision is taken?
   Civil procedure has changed considerably with the coming into force of the New Code on Civil Procedure in 1998 instituting the system of “mise en état” based on the French model. Thus a specially appointed judge will see to the good and speedy course of the proceedings. It is only when the case is fully prepared that oral argument takes place. The judgement could be appealed, and the decision of the Court of Appeal might be the object of a further appeal, on a point of law only, to the Supreme Court. Proceedings at first instance would normally take approximately one year, proceedings on appeal might take a further year.

4. Are parties obliged to obtain legal aid?
   Depending on the value of the claim, the court of first instance will be either the magistrate of the peace (“juge de paix”) or the district court. Only lawyers have rights of audience before the district court and the court of appeal. Before the magistrate of the peace, parties may defend themselves.

5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
The same as under “licences”.

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3. **Criminal/penal procedures:**

   a. **What kind of procedure and where exactly?**
   
   Most environmental laws provide for criminal sanctions in case of an infringement on the law. It should be noted that Luxembourg criminal law does not recognise criminal liability of corporations.
   
   Prosecution may be started in following ways: by a complaint made at the police or the public prosecutor, by a charge with a civil action in the hands of the examining magistrate ("juge d’instruction"), or by a direct charge before the court (only admissible for minor offences).
   
   The public prosecutor has a discretion as to whether or not the offence should be pursued, unless ordered to prosecute by the Minister of Justice. The Minister may not under any circumstance order not to prosecute.
   
   On the other hand, the examining magistrate must investigate any cases that are brought to his attention, either by way of address of the public prosecutor or by a charge with a civil action. This does however not apply to police or minor offences. Most offences provided for by environmental legislation are more strict than police offences.
   
   In case the public prosecutor is of the opinion that a fine would be proportionate to the offence, he may, by written address, ask the court to pass a sentence without pleadings. The court may follow the proposed sanction or require a public hearing.

   b. **Who has access and under which conditions?**
   
   The victim of the offence.
   
   As seen above, specially appointed NGO's may intervene in the proceedings and exercise the rights of a party exercising a civil action for facts constituting a direct or indirect prejudice of the collective interest they defend, even without justifying a material interest. It appears however that they may not by themselves engage the pursuit.

   c. **What can be the (positive) result for the complainant after a procedure has been concluded?**
   
   Prosecution of the wrongdoer with the application of criminal sanctions: imprisonment and/or a fine. Some environmental laws provide especially that the judge may order the restoration of the premises to their original state and may seize the instruments of the offence.

   d. **Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?**
   
   None reported

III **Specific aspects**

Despite recent efforts, environmental law still lacks uniformity as regards the right of access to justice of NGO’s, criminal sanctions and the power of the administrative courts (either quash a decision or replace it).
The Netherlands

I Characteristics of the country

One of the main sources of Dutch law is statutory law. This does not only include formal legislation (legislation by government and parliament), but also regulation by decentralized bodies (provinces, municipalities) and delegated legislation at the level of the central government (ministerial ordinances). The law is largely influenced by EC law. Apart from this statutory law, self-regulation has become more important over the last decade. This means that instruments like covenants have become rather important as ‘sources of law’, while operations have gained more freedom and responsibility in obeying environmental rules when voluntary environmental management systems are in place. A great deal of environmental matters fall within the scope of administrative law, for which the General Administrative Law Act gives procedural rules. The General Administrative Law Act distinguishes three preparation procedures: the normal preparation procedure, the public preparation procedure and the extensive public preparation procedure. The relevant procedure determines who can participate in the decision-making process and who can address the courts. There are general administrative courts, with the possibility of appeal to the Council of State. However, in many environmental cases, legislation provides for immediate appeal with the Council of State (i.e. appeal in one instance).

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: Decision-making processes on applications for all environmental licences are regulated by the extensive public preparation procedure. According to Article 8.1 of the Environmental Protection Act (EPA) it is forbidden to set up, operate or change the set up or operation of an installation unless one has a permit to do so (IPPC-installations and all other installations that might have adverse impacts on the environment). A party has to apply for such a permit with the competent authority. The extensive public preparation procedure applies as well in these cases, as on several other decisions (e.g. licences to discharge waste into surfaces). After the application and the draft-decision have been published anyone, as well as advisers, can bring forward written objections. Besides that, anyone can ask the administrative authority to organise an ‘exchange of thoughts’ (hearing) at which oral objections may be put forward. If the extensive public preparation procedure has been attended, there is no need to object to the same administrative authority, but instead one can address an appeal to the administrative Court (i.e. the Council of State) directly.

After a licence has been granted, any person can request the competent authority to update of withdraw the licence, when this is necessary to protect the environment. The enforcement of environmental licences is considered to be mainly a task of the administration. However the EPA does give the right to any person to ask an administrative body to take enforcing measures when they feel the authority is in default of doing so. The decision upon such requests can be reviewed by the judiciary.

Judicial: In all of these cases a direct appeal to the judicial department of the Council of State is possible, while there is no higher appeal possibility afterwards.
b. Who has access and under which conditions?

**Non-judicial:** In case of participation in the extensive public preparation procedure: anyone. There is no need to show special interest in this procedure.

**Judicial:** Appeal can be made by those who raised objections against the draft decision (anyone), the advisors, anyone who has objections against alterations of the draft decision and interested parties who cannot reasonably be blamed for not making objections against the draft decision (*actio popularis*).

c. What can be challenged in the procedure?

**Non-judicial/judicial:** Licences given to installations.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Non-judicial:** During the participation procedure the only positive outcome can be that the final decision shows that the objections have been taken into consideration.

**Judicial:** The Council of State has very extensive powers, since it can, besides squashing a decision to grant a permit, also take a new decision if it decides the case is clear enough to do so. Otherwise it can rule that the administrative body has to take a new decision. It can also change some of the conditions attached to the licence, or draw up new ones. In some cases compensation for damages can be awarded.

Appeal does not suspend the decision. However, an applicant may ask for suspension in a special procedure before the president of the administrative court.

e. Practical aspects:

These procedures are characterised by low costs. Although parties can be held liable for procedural costs, they do not have to provide for financial security. The final decision, including judicial review, can take up to 1 or 1.5 years. Judicial assistance is not obligatory and there are no strict formal rules for the formulation of complaints or letters of appeal. There are government financed bureau’s of legal aid, some of which are specialised in environmental matters. They especially assist local and regional environmental organisations.

**Other environmental decisions**

a. What kind of procedure and where exactly?

**Non-judicial:** The normal preparation procedure mainly applies to environmental ordinances. Interested parties, such as environmental organisations and employers organisations, must in principle be given the opportunity to bring forward their views. The public preparation procedure only applies to environmental decisions if so explicitly stipulated in a legal regulation (e.g. local zoning plans) or by a decision of an administrative authority. Interested parties are allowed to express their views on the draft order.
After a decision has been taken, the interested party sometimes can complain about this decision (notice of objection), that is when the public participation procedure has been applied (e.g., in the case of local zoning plans). The objection has to be made to the same administrative authority that took the original decision. After the notice of objection is received, the issuer of the notice and possible other parties concerned get the opportunity to be heard. The administrative authority determines whether or not the complaints are well-founded.

The Dutch National Ombudsman has as its responsibility to investigate complaints that are forwarded to him concerning governmental bodies that allegedly have not acted properly towards a natural or legal person. The Ombudsman isn’t entitled to act if an other way of legal protection is available, or has been available but not been used. Before going to the Ombudsman, the plaintiff must have tried to get things settled with the administrative authority that is involved. If mediation between the Ombudsman and the authority fails, an inquiry will be started which will result in a written report. This report will be made public and available to all. Although only in a few environmental cases parties turned to the Ombudsman, this procedure has an important complementary role. The influence of the Ombudsman reaches even further than particular cases because his findings may be confirmed by the Minister him/herself.

**Judicial:** After an environmental decision has been taken, one has the right to lodge a notice of objection against this decision, at least when the public participation procedure was followed. An appeal against the decision on this objection must be addressed to the administrative Court. After appealing to the administrative Court, higher appeal -generally speaking- is possible. However, there are various decisions against which no appeal is possible. These include all forms of legislation, including orders in council, ministerial orders and also national environmental policy plans. Since in many cases environmental licences are now being replaced by general rules for certain categories of installations, laid down in orders in council, this can be criticised from the point of view of access to justice.

In the cases where an administrative Court or the Council of State has no legal jurisdiction, the civil Court can function as ‘a way out’. When factual acts, juridical acts under private law or from appeal excluded decisions (such as regulations from decentralised authorities) are in question, one can go to a civil Court if it is a matter of tort. An individual or an organisation has to prove that the administrative authority has committed a wrongful act against them by the action concerned.\(^{57}\)

\[b. \quad \text{Who has access and under which conditions?}\]

\(^{57}\) For further details on the procedure before a civil Court, who has access and what can be the (positive) result of the action see the second point below. We will not go into details here, because the procedure is exactly the same as against (other) civilians. It does not matter who commits a wrongful act, as long as the conditions are fulfilled, the same tort law applies.
**Non-judicial:**

**normal preparation procedure:** the applicant, if:
1. the denial is related to information on facts and interests that involve the applicant,
2. this information deviates from those that the applicant has submitted himself,
   any other interested party, if:
   1. the decision is based on facts and interests that involve this party,
   2. the information is forwarded by the interested party himself.

When the competent authority intends to apply administrative pressure or to impose a penalty, the permit holder concerned will be informed of this intention. He must be given the opportunity to express his views if:
1. the decision is based on information or facts and interests that involve this party,
2. the concerned information hasn’t been forwarded by the interested party himself.
This opportunity doesn’t have to be given if the party has failed to give information (although that was legally mandatory), if this would be in conflict with the urgency of the decision, if the interested party has been heard before, or if the object of the decision can only be obtained if the interested party isn’t aware of the content of the decision (in advance).

**public preparation procedure:** any interested party. That is any party whose interest is directly involved with the environmental decision, including environmental organisations.
Every interested party can bring forward a notice of objection when the normal or the public preparation procedures has been followed. An interested party is defined as anyone whose interest is directly involved in the decision.

Anyone has the right to request the *National Ombudsman* to investigate the way an administrative authority has acted towards a natural or legal person in a particular affair.

**Judicial:** An appeal -in general- can be lodged by parties that have a direct and personal interest. Legal personalities have an interest if they protect the interest concerned on the basis of their aims and actual activities. Again it must be noted that regulations, orders in council, ministerial orders and national environmental policy plans are not subject of judicial review.

**c. What can be challenged in the procedures?**

**Non-judicial/judicial:** The administrative decision that was at stake in the preparation procedure that was followed. These include also local zoning plans. No access to justice is possible for some plans, regulations, ordinances and for some concrete decisions, if so explicitly stipulated by law (e.g. no appeal against decision on request to issue a soil clean-up imperative). It has to be mentioned that when some administrative orders are being established, the public does have the right to hand in written objections that will be taken into consideration (no appeal possible).

*National Ombudsman:* mainly factual acts. In some cases the Ombudsman-procedure is subsidiary to judicial protection, for instance when an administrative body doesn’t take a decision on an application.

**d. What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial:** If the administrative body agrees with the raised objections, they can overrule the original decision and take a new decision which gives (partly) in to the objections.

The *national Ombudsman* shall at first try to mediate, which can lead to a new decision by the authorities. If this attempt fails, a written report will be published and made available for all: that’s the only sanction possibility.
Judicial: The administrative Courts and the Council of State can decide to annul the administrative decision and order the competent authority to take a new one. In some cases compensation for damages can be awarded. When the case is very clear, the judge can take a decision instead of referring the dispute back to the administrative body.

e. Practical aspects:

In both participation and objection procedures, no fee may be asked by the administration. And although judicial assistance is highly recommended, it is not compulsory. That means that in most cases the expected costs do not stand in the way of the participation in or the start of a procedure. See also above (under ‘licences’).

2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

Non-judicial: Several administrative authorities, but also the police and other bodies, have special disclosures offices for environmental complaints. Anyone can call there when they find an environmental violation, for instance extreme nuisance.

Judicial: Activities causing environmental harm can be unlawful under the general law of torts. The Dutch Civil Code contains two kinds of foundation for the requisition of environmental damage: personal liability on the basis of a wrongful act and qualitative liability. Whether or not there is a matter of personal liability is being determined by applying the general law of torts. The essential requirements for the successful application of the Article concerned are unlawfulness, accountability, damage and a causal connection between unlawful actions and the damage. There is unlawfulness in case of a breach of (subjective) rights, when the action or omission violates legal duties or when there is a violation of unwritten law or failure to take due care. The qualitative liabilities in the Dutch Civil Code are the liability for dangerous substances, the liability of the owner of a dump site and of the operator of a drill hole. In cases of environmental damage it is very often hard to point out exactly who caused the damage. In those cases the case law assumes the most likely to be the responsible party and it is up to him to prove someone else caused the damage. When there are more responsible parties, each of them is liable for a proportionate part of the damage and they may be held jointly and severally liable for the damage.

The enforcement of environmental legislation is considered to be mainly a task of the administration. However the EPA does give the right to any person to ask an administrative body to take enforcing measures when they feel the authority is in default of doing so. The decision upon such a request can be reviewed by the judiciary.

58 Beyond the Dutch Civil Code there are other specific laws that regulate qualitative liabilities, as for instance the Mine Act 1810.
b. **Who has access and under which conditions?**

**Judicial:** Any individual who claims to be the victim of a wrongful act: his or her specific interest is injured. The Dutch Civil Code contains an Article that deals with group actions. The legal requirements for admissibility of organisations in civil law proceedings are being a legal person, having relevant objectives under the articles of association and whose members have similarity of interests.

The State has access when a private party commits a wrongful act against the State, and if the civil action against that private party doesn’t violate the rules for compliance as laid down in basic public law. As mentioned above, any individual citizen as well as environmental organisations can request the competent authority to enforce environmental legislation.

c. **What is the subject of the dispute?**

**Judicial:** The subject is the act by the perpetrator that caused the -environmental- damage. Environmental damage consist in fact of two forms of damage: damage to the environment and damage through the environment. The second category is the most trouble-free, while this is mostly damage to persons or objects and thus ‘easy’ to establish. The first category doesn’t fit precisely in the ‘normal’ system of legal compensation because in most cases there is damage to *res nullius* or *res communes omnium*. The costs made to restore or to prevent damage can be eligible for compensation if the claimant can show an interest (this may be an environmental organisation as well). But in the situation where restoration in the old situation, or the creation of an equal situation isn’t possible, suchlike *pure ecological damage* won’t be eligible for legal compensation, at least it has not been awarded till this moment.
d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** Individuals and the State can ask for compensation of the damage they suffered, while organisations cannot ask for this form of compensation. They can ask for (and so can the State) compensation of the costs they actually made themselves to restore or prevent damage to the environment (e.g. clean-up costs).

Besides the compensation possibilities, all three can ask for a judicial injunction or prohibition. This is possible in the situation of an impending breach of right.

e. **Practical aspects:**
1. What are the fees and (possible) other costs of proceeding?
   The costs of proceeding before a civil court are rather high in the Netherlands. Moreover, the risk is that if a party loses the case, it also has to pay for the costs of the counter-party. This risk keeps a lot of people form proceeding in -rather insecure- environmental liability procedures, especially the not so rich environmental organisations will think twice before going to court.
   Are parties obliged to provide for financial security for procedural costs in case they lose? No.
   3. How long can it take before a final decision is taken?
   A procedure can take very long as it goes before three instances. So it can take from a few months up to a few years to get a final judgement.
   4. Are parties obliged to obtain legal aid?
   In civil procedures parties are obliged to get legal representation before the court: they cannot be their own attorney. These costs are usually rather high.
   5. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
   Apart form the costs, another practical obstacle is the fact that NOGs mostly do not have the necessary legal knowledge to start a procedure. Therefor a new project has been set up in the Netherlands. Legal Aid Service Centres are being armed with environmental lawyers to give people that cannot afford legal assistance and some environmental organisations legal advice. They can even represent them in court, if it should come to that.

3. **Criminal/penal procedures:**

a. What kind of procedure and where exactly?

**Non-judicial:** The Dutch legal system is fairly familiar with dealing with environmental matters by transaction, settlement and dismissal. In exchange for renounce from penal prosecution the public prosecutor can make several conditions, the fulfilment of which can prevent penal prosecution. These so-called transactions generally result in the offender paying a certain amount of money that the prosecutor fixes. Other important transaction conditions are the taking away of the unlawful obtained benefit, the payment of the costs of the damage as caused by the criminal offence, the repair in the old situation and the publication of the environmental offence.

A settlement has the objective to prevent the suspect or the convicted to become part of a legal procedure that deprives him of his unlawful obtained, or to prevent that a court ruling concerning that will be left out. A settlement does not terminate the prosecution in a possible law suit.

A dismissal is an official announcement by a legal authority to a suspect that he will no(t) (longer) be prosecuted. Once a case is dismissed prosecution is only possible if new facts occur.
The public prosecutor has the competence to decide whether to prosecute or to renounce from prosecution. There is in principle no control by any other authority whether or not this decision is right. An important legal right in this respect is given to directly interested parties. They have the possibility to provoke a prosecution if the public prosecutor decides to renounce from prosecution by complaining to the Court. If the Court considers the complaint to be reasonable, it can order the public prosecutor to start the prosecution. A reason to turn down the complaint is if the Court decides that the refusal is in the interest of the common interest.

b. Who has access and under which conditions?

Non-judicial: As stated above, the possibility to provoke a prosecution rests on directly interested entities. A directly interested party is defined as someone whose interest will be affected if a prosecution should be left out. An incorporation that according to its objectives and as appears from its factual activities looks after a certain interest, and that particular interest is directly affected by the decision not to prosecute, has that same right to complain to the Court. It needs to be stressed that nature and environmental organisations are considered to be promoters of the interest of victims of environmental crimes. ‘Victims’ needs to be read as those that experience disadvantage of the environmental degradation, but also the environment itself.

Judicial: None accessible for private parties.

c. What can be the (positive) result for the complainant after a procedure has been concluded?

Prosecution.

d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

None reported

III Specific aspects
No specific aspects with regard to the distinctions between several measures in the Netherlands. There used to be a rather limited access to justice for environmental organisations and individual citizens in cases concerning nature protection and pesticides, but in recent years these limitations were taken away by new legislation.
Portugal

I Characteristics of the country

The Portuguese Republic is a democratic state, based on the rule of law, the sovereignty of the people, the plurality of democratic expression and a democratic political organisation, as well as on respect for and safeguarding of the fundamental rights and freedoms of the people. The organs of supreme authority are the president of the republic, the Parliament, the government and the courts.

Article 9(e) of the Constitution states that one of the fundamental tasks of the state is ‘to protect and enhance the cultural heritage of the Portuguese people, to protect nature and the environment, to conserve natural resources and to ensure the proper planning of the national territory’. It further stipulates in article 66 that ‘Everyone has the right to a healthy and ecologically balanced human environment and the duty to defend it’. This duty might involve two aspects: the obligation not to harm the environment and the duty to prevent others from harming the environment.

The right of actio popularis is defined in article 52 of the Constitution. It grants citizens and associations the right to institute proceedings whenever there is an infringement against public health, environmental degradation threatening the quality of life or degradation of the cultural heritage; it also comprises the right to promote the prevention or cessation of the offence, and the right to prosecute and claim compensation. The plaintiff can represent all the other interested parties, if they are cited in advertisements published in the mass media or on public notes, so as to become a party in the lawsuit. The exercise of this right does not imply dues and the plaintiff is exempt from the payment of fees, as long as the request is considered to be at least partially valid.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

2. What kind of procedure and where exactly?

Non-judicial: There is no unique environmental licence that is required, but there are several specific licences, depending on the type of activities that the new company will develop. However, the industrial licence required under the Industrial Activity Regime, could be considered as a general licensing procedure that covers some environmental aspects of the industrial activities. Thus industrial licensing aims at preventing the risks and inconvenience resulting from the referred industrial activities, by protecting the public and workers health, the safety of persons and assets, the hygiene and safety of working places and the correct territory planning and environmental quality.

Before starting or expanding an operation, an industrial facility has to obtain a previous authorisation. Such authorisation shall be requested from the co-ordinating authority. Before this application can be filed, the applicant must inter alia already have authorisation for the facility location by the municipality (or the respective Commission of regional co-ordination), and a licence for the use of water in the public domain. The co-ordinating entity shall submit the application to the entities responsible for its approval (Ministry of Industry and Energy or Ministry of Agriculture). In licensing processes of class A and B industries, copies for
consideration will be sent to the following entities: 1. Institute for Protection of Food Production, if the industries use raw material of an animal origin (also when a class C industry is involved). 2. General Directorate on Health, 3. General Inspection of Labour, 4. Regional Directorate of Environment and Natural Resources of the respective area. Regarding class C installations, these institutes (2-4) will only be approached if the co-ordinating authority considers that the proposed industrial activity may involve risks to the environment, to public health and to workers.

The applicants shall also be presented to the local municipality, when the site in question is regulated by an urbanisation plan, detail plan, allotment licence or industrial park (or to the Commission for the regional co-ordination in any other case). Later on, the licence for the construction works shall be issued by the respective municipality, when the applicant demonstrates having presented the application for an industrial licence to the co-ordinating entity. The municipality shall only grant the final utilisation licence, when the industrial presents the approval of the industrial licence.

The industrial may present a hierarchic appeal to the Ministry with supervisory powers over the entity responsible for the decision. This appeal has a suspense effect (except as regards the decisions of a misdemeanour process), unless the appellate entity decides that not executing the appealed decision immediately will cause a serious damage to the public interest. Third parties, including environmental organisations, may present a claim against the installation, modification and operation of any industrial facility to the co-ordinating entity, the inspection entities of the Ministries or the entity that is at that time responsible for protecting the rights and interests in discussion. The co-ordinating authority shall take the necessary steps, notably through inspections for the analysis of and decisions on the claims, consulting when required the entities responsible for protecting the rights and interests in discussion. After taking the decision, the co-ordinating entity notifies the parties involved and the consulted entities.

**Judicial:** Like every administrative decision, licences can be appealed before Administrative Courts and the Supreme Administrative Court.

b. *Who has access and under which conditions?*

**Non-judicial:** Any citizen, without the need to show a specific interest may present claims in administrative procedures. This also goes for environmental organisations and organisations of local communities.

**Judicial:** After administrative proceedings have ended (this is a necessary precondition), any person, any environmental organisation or organisation of a local community has the right to lodge an appeal before the Administrative Court (*actio popularis*).

c. *What can be the (positive) result for the complainant after a procedure has been concluded?*

**Non-judicial:** The co-ordinating entity may establish certain conditions which will have to be fulfilled if the industrial establishment desires to maintain its operation licence.

**Judicial:** Annihilation of the decision to grant a permit.

d. *Practical aspects:*

1. What are the fees and (possible) other costs of proceeding?
Environmental organisations are exempted (by law) of the duty to pay costs of proceedings. Other citizens in environmental cases do not have to pay the costs when they win the case, or when they partially were declared to be in their right. When they lose a case entirely, they have to pay a small percentage of the actual costs.

2. Are parties obliged to provide for financial security for procedural costs in case they lose?
Cf. under 1.

3. Are parties obliged to obtain legal aid?
Yes.

Other environmental decisions

a. What kind of procedure and where exactly?

Judicial: The above law concerning access to justice applies to all administrative decisions, including more general forms of regulation like decrees and plans. Administrative law especially contains the possibility of contesting regulations that is contrary to the law. Nevertheless, a distinction must be made between whether these regulations can be directly enforced, or whether they need to be specifically applied. In the first case, insofar as their coming into force violates the rights or interests of individuals, they may be directly contested. In the second circumstance, direct contestation is only allowed if the court considers a regulation to be illegal in the specific case.

b. Who has access and under which conditions?

Judicial: Any person or person who feel that their right to a healthy and ecologically balanced environment has been violated may start an administrative embargo procedure. This also goes for environmental organisations and organisations of local communities.

c. What can be challenged in the procedure?

Administrative decisions

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Annulment of the decision.

e. Practical aspects:

1. What are the fees and (possible) other costs of proceeding?
Environmental organisations are exempted (by law) of the duty to pay costs of proceedings. Other citizens in environmental cases do not have to pay the costs when they win the case, or when they partially were declared to be in their right. When they loose a case entirely, they have to pay a small percentage of the actual costs.

2. Are parties obliged to provide for financial security for procedural costs in case they lose?
Cf. under 1.

3. Are parties obliged to obtain legal aid?
Yes.
2. Procedures against industries or other citizens that pose a threat to the environment:

a. What kind of procedure and where exactly?

Judicial: Article 40(4) of the Environmental Law in Principle (EL.P) states that ‘citizens directly threatened or deprived of their right to a healthy and ecologically balanced human environment may, under the general terms of law, request the cessation of the causes of the violation and respective compensation’. The victim of the offence thus sees claims of a prohibitory and compensatory nature recognised. These claims have to be submitted through civil procedures. Taking into account the general non-contractual civil liability system, a distinction needs to be made between (1) liability for unlawful acts (articles 483-498 Civil Code), (2) liability for risks (articles 499-510) and (3) liability for damaging lawful acts (no general provisions).

1. Before a duty to compensate resulting from liability for unlawful acts exists, a few conditions have to be fulfilled. These are: act, illegality (the violation of a juridical duty), guilt (imputation of the act to the agent), a causal link between the act and the damage, as well as damage or loss.

2. Liability for risk is an objective liability: regardless the malice or mere guilt of the person forced to pay compensation. If the activity in question is a hazardous one, it makes sense that the person carrying out this activity be held accountable for the damages. These activities are stipulated by law.

3. Liability resulting from the lawful conduct of the agent is possible in exceptional cases. The legislator has also other provisions in respect of civil liability created. At first the above mentioned article 40 of the EL.P. This article allows for the possibility of different pleadings being joined; the suspension of unlawful behaviour and the prohibition of the practice of these acts, and, besides that, compensation for the damages. Article 41 EL.P provides for an objective liability. Regardless of the guilt of the agent, compensation must be paid if the agent caused severe damage, and these damages are the result of an especially hazardous action. Particular cases of civil liability are also recognised in other legislation in the sector, for instance in case of a risk of exposure to ionising radiation.

b. Who has access and under which conditions?

Judicial: If anyone suffers the threat of damage or real damage to the values protected by the environmental regulations, the citizen may have recourse to one of several defences or reactions. Associations for environmental protection may, according to Law No. 85/98, enter lawsuits aiming at the prevention or cessation of acts or omissions of public or private institutions, that may be a factor in environmental degradation, They can also become a party to lawsuits protesting against damage to the environment. In these cases, they are exempt from dues, fees and stamp-duty.

c. What is the subject of the dispute?

Judicial: The act that caused the damage. The damage can be damage to property or persons, or moral damage. There is formal recognition of the reparation of ecological damage resulting from environmental infringements in the EL.P. An issue raised concerns the quantification of ecological damage. In case that is impossible, the court can fix an amount, by taking into consideration the degree of culpability of the agent, the economic profit acquired, and the estimated costs of restoring the previous situation.
d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** Compensation for the damages incurred, as well as the suspension of unlawful behaviour and the prohibition of the practice of these acts. A citizen starting an action based on violation of his right to an ecologically balanced human environment, may also ask for removal of the causes of the offence and restitution of the previous situation or its equivalent.

e. Practical aspects:

1. Are parties obliged to provide for financial security for procedural costs in case they lose?
   The EL.P does regulate obligatory insurance against civil liability for those that carry on activities which pose a serious threat to the environment and have been classified as such. It should only guarantee accidental and sudden pollution, and never gradual pollution.

2. Are parties obliged to obtain legal aid?
   In civil procedures parties are to be represented by a lawyer.

3. **Criminal/penal procedures:**

   a. **What kind of procedure and where exactly?**

   **Judicial:** The Portuguese Penal Code typified under ‘dangerous crimes’ the following crimes against the environment: damage against nature, pollution and dangerous pollution. Citizens and NGO’s may and should inform the public prosecutor of any acts that violate values protected by environmental laws, even if not directly damaged themselves. When the deeds communicated to the public prosecutor seem to be crimes against the environment, the public prosecutor sues and participates in the case. The plaintiff may ask the public prosecutor to represent him in his request for compensation. Besides that, parties can intervene in the inquiry and the instruction, present evidence and claim preventive measures. They can also appeal against decisions that affect them, notwithstanding any appeal by the public prosecutor. The powers of accusation of the party are subordinate to that of the public prosecutor. This accusation may be differently formulated as long as there is no substantial change in the accusation (i.e. accused of a different crime).
b. Who has access and under which conditions?

**Judicial:** The Code of Penal Process defines a rather wide concept of a ‘party’. Not only a plaintiff (citizen), but also associations for environmental protection may become parties by presenting a private accusation together with the public prosecutor.

c. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** A possible conviction of the perpetrator and compensation for damages.

d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?

(None reported)
Spain

I Characteristics of the country

With the adoption of the 1978 Constitution, the Spanish State has chosen a politically decentralized structure; political power is not concentrated in one authority for the whole territory, but distributed among various centres of powers. As a result, Spain has a system approximating a federal system, rather than a centralized system. The administrative structure for environmental protection in Spain is similar to the other countries with a highly decentralised regime. It has a system of powers throughout the state represented by the (Board of) Ministers. The Autonomous Communities, similar to the states or to regions in a federation, have similar powers in their own areas. Finally, municipalities have traditional powers with high environmental relevancy.

Article 45.1 of the Constitution states that ‘Everyone has the right to enjoy an adequate environment for the development of the person, as well as the duty to preserve it’. It is a subjective right if citizens and a mandate of the public authorities. The duty applies to both citizens and public authorities. The article does, however, not have a direct legal effect for citizens; it does not have the nature of a fundamental right. The Constitution refers in other chapters to environmental aspects concerning inland and sea water, mountains, hunting, fishing, in relation to the distribution of powers already mentioned.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial: There are different Spanish rules governing the various environmental aspects of different activities. Different licences will be required in different cases, and it is not possible to outline the procedure for each of the main licences. Therefore the procedure for obtaining the so-called activity licence under Decree 2414 of 1961, which is the most common licence for any annoying, unhealthy, harmful or hazardous activity, will be outlined.

The procedure starts with the filing of an application with a technical report. The municipal corporation may either admit or not admit the application into consideration. If rejected, the decision must state the reasons why, and if admitted, the municipal corporation must initiate the procedure. Then, there is a period in which those who feel they are affected by the activity can inform themselves of the application and in which the city council is informed. Any potentially affected person may put forward his observations. The file and these observations will be forwarded to the Health Municipal Council and other municipal technicians for their report. The administrative authority within the municipal corporation charged of granting licences, will issue a report stating whether or not the location and other circumstances of the project violate the local regulations and applicable legislation. The file is forwarded to the autonomous body that will appoint technicians that must prepare the reports on the activity. The autonomous body will assess the activity by checking the efficiency and guarantees of the proposed measures to prevent or control pollution. It will decide on the proposed activity as it deems appropriate, after hearing the applicant, and will return the file to the municipal corporation instructing it to grant or to deny the licence. Once the licence is granted, and before
the activity starts, a technical civil servant must verify that the activity is set up in accordance with the terms of the licence.

The authorities to which an appeal against a licence is made, depends on who issued the licence. If the issuing authority has another authority from which it hierarchically depends, it is the latter that will be deciding on the administrative appeal. After the decision of this authority, a reconsideration appeal may be filed before this authority prior to appealing before the courts. That is, however, not always the case, as the complainant may go directly to the administrative court.

After a licence has been granted any person may always, at any time, request for suspension of the activities when he or she thinks that the activity violates the constitutional right to a healthy environment and non-repairable damage is occurring.

**Judicial:** The decision of the higher authority may be appealed before ordinary administrative courts. Also in case the issuing authority does not hierarchically depend on any other authority, the appeal may be directly lodged to the competent administrative court, although a reconsideration appeal may also be filed to the issuing authority.

**b. Who has access and under which conditions?**

**Non-judicial:** Any potentially affected person may put forward observations. In certain cases specific persons (e.g. neighbours) will be personally notified of the proposed activity for their comments. Anyone with a reasonable interest and the licensee may file an administrative (or reconsideration) appeal.

**Judicial:** Legal standing is rather wide. In general terms, it may be stated that the licensee and any third party with a reasonable interest may appeal. This includes environmental organisations that act on behalf of the environment.

**c. What can be challenged in the procedure?**

**Non-judicial/judicial:** the granting or refusal of the licence

**d. What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial:** The comments of the potentially affected person will be taken into consideration.

**Judicial:** There are doubts as to what the powers of the appellate body are under Spanish law. In this respect, there are two main positions. According to the first one, the body can only decide whether or not the decision abides the applicable legislation, and if it does not, the whole file will be sent back to the issuing authority. According to the second opinion, the appellate body has full powers to grant, deny or amend a licence.

Appeal does not, as a general rule, affect the effectiveness and application of the decision.
e. **Practical aspects:**

1. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure? The environmental system, being common property, does not have an easy access to jurisdictional protection. The existing law protects the rights of private persons, or makes sure that private persons do not violate environmental law. In order to describe the speciality of environmental situations that go beyond those provided for by law, the *Ley Orgánica del Poder Judicial* (1985) was introduced, which expressly acknowledges the protection of collective legitimate interest, admitting its defence by associations and groups. However, there have not been implementations of this rule, and therefore there are no groups with express standing for intervening in the defence of the collective interest.

**Other environmental decisions**

a. **What kind of procedure and where exactly?**

**Non-judicial/judicial:** The above applies to all administrative decisions, except for statutes. Again it is a precondition that no administrative proceedings are left, before a person may go to court.

b. **Who has access and under which conditions?**

**Non-judicial/judicial:** Again the same applies here.

c. **What can be challenged in the procedure?**

**Non-judicial/judicial:** all administrative decisions.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

**Non-judicial/judicial:** see above (under licences), the same applies here

e. **Practical aspects:**

None reported

2. **Procedures against industries or other citizens that pose a threat to the environment:**

a. **What kind of procedure and where exactly?**

**Judicial:** Article 1902 of the Civil Code, concerning tort in general, and article 1908 of the Civil Code, that refers specifically to certain dangerous or harmful activities that pose a certain risk that may effect the environment, are based on a tort regime supported by the idea of negligence and causation. The provisions contain a system of objective liability. They pertain more to the violation of norms in the area of the law of neighbours than to the area of environmental law, although indirectly they could play a protective role in the latter field. Consequently, the usefulness of civil law norms to protect the environment is rather limited, because they are not intended to prevent damage, but solely to offer compensation. However, in view of changes that
have occurred in society and economy, the Supreme Court tends to include the principle of strict liability on the basis of the risk theory, that could be the basis of a future law on civil liability for environmental damages.

Partial rules include certain specifications on offenders and liability, such as the Law on Water of 1985 that makes reference to those who damage the hydraulic public domain; and the Law of the Coast of 1988 that refers to those who damage the terrestrial public domain. The Law on Toxic and Hazardous Waste of 1986 includes producers and managers among the possible responsible persons.

b. Who has access and under which conditions?

Judicial: Only the interested party (a contractual party, or a person that has suffered damage because of another’s action or omission) has standing to claim the enforcement by the courts of applicable rules. So environmental organisation are excluded from liability action when the organisation itself is not a victim of an unlawful act.

c. What is the subject of the dispute?

Judicial: The act causing the environmental damage. There are two definitions of damages under Spanish law. On one hand, if the environment that is damaged affects the health and goods of persons, the damage is subject to private law and to the exercise of civil actions. On the other hand, in the event of damage to the environment as such which has nothing to do with any personal or economical concept.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: Compensation of the suffered damages. The degree of abnormality necessary to deem that damages gives rise to compensation, is defined on the basis of certain environmental standards that have been exceeded; these standards will be established in accordance with certain quality environmental goals to be achieved. The definition of national standards is one of the main topics of environmental administrative law.

e. Practical aspects:
None reported

3. Criminal/penal procedures:

a. What kind of procedure and where exactly?

Judicial: Criminal sanctions can either directly be derived from those provisions of the Penal Code which punishes environmental (or ecological) offences, or, indirectly from the provisions which penalize actions against public health or public order, or from those repressing non-compliance with the mandates of public authorities. The criminal sanction for acts which are injurious to the environment is, however, a so-called ‘blank norm’. That means that there is no concrete norm in the Penal Code, but such a norm will exist in the law or protective regulations governing the environment. Therefor, it is absolutely necessary to revert to administrative law governing the same matter.
The law of criminal procedure allows the exercise of the right of citizens to bring an action. This is a right enabling all citizens, in the name of society, to institute proceedings and to lay a claim through which a certain situation is acknowledged to exist and a specific person is ordered to fulfil a particular obligation.

b. **Who has access and under which conditions?**

**Judicial:** All citizens, even if they are not entitled to the right that has been infringed or the interest that has been injured.

c. **What can be the (positive) result for the complainant after a procedure has been concluded?**

Not reported

d. **Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?**

None reported
Sweden

I Characteristics of the country

The main source of Swedish law is statutory law, i.e. acts, ordinances and regulations issued by authorities. The preparatory works to an act are also of importance when it comes to the interpretation of the wordings and the discussions proceeding the rule.

As from 1 January 1999, the Swedish Environmental Code entered into force. The former Swedish environmental legislation was difficult to comprehend and consisted of a multitude of statutes. Different procedures to appeal against decisions were applied for the different cases. The right to appeal and participate in procedures depended on a great deal of circumstances, as the statutory act applicable, the scale of the activity in question and whether or not the activity requires a prior permit or not.

The new Code consolidated provisions from 15 former acts, such as the Nature Conservation Act, the Environmental Protection Act, the Waste Collection and Disposal Act, the Act on Chemical Products, the Environmental Damages Act, etc., as well as parts of the Water Act.

The Code also introduced environmental courts. There are five regional environmental courts, designated by the Government within the district court-system. They may also serve as "ordinary" courts, dealing with criminal- and civil cases. Appeals against judgements and decisions delivered by environmental courts as a first instance may be made to the Superior Environmental Court, which compromises part of Svea Court of Appeal. The final court of appeal is the Supreme Court.

The Government, County Administrative Boards and other administrative authorities, municipalities and the environmental courts deal with cases and matters governed by the Environmental Code.

In addition to the Environmental Code, certain activities or operations which have effect on the environment, i.e. constructions of overhead electrical power lines are also governed by specific regulations.

Considering the complexity of the issues and the new national legislation, this paper can only aim to give an outline of the Swedish situation.

II The procedures

1. Procedures against administrative acts or governmental action/non-action: licences

a. What kind of procedure and where exactly?

Non-judicial (the appeal against a decision lies with an authority which is not in the nature of a court of law):

The administrative authorities are subject to the Administration Act. Administrative authorities include municipal committees that handle for example environmental matters, County Administrative Boards and central government authorities (such as the Environmental Protection Agency). The Administration Act contains provisions that apply generally but only to the extent there are no special provisions in other legislation.

Decisions by the municipalities under the Code can be appealed against to the County Administrative Boards and from there to a environmental court. In such cases the Supreme
Environmental Court is the final instance. Leave to appeal is required for an appeal to the Superior Environmental Court against a judgement or decision delivered by an environmental court. After a licence has been granted, any person may draw the competent authority’s attention to a case where, for example, there is non-compliance or where the environment is being threatened. Under the Administrative Act, the competent authority is obliged to deal with a request to take action towards a private individual or a company in this regard. The outcome could be that the authority does not take further action but the reason for this has to be motivated. The authority’s action or non-action may be subject to examination by the Judiciary Ombudsman. The Judiciary Ombudsman may carry out investigations as to whether administrative authorities etc. have acted correctly in their environmental decision-making. These decisions (reprimands), which are published regularly, seldom have any legal consequences. Still, courts and authorities follow the statements made by the Ombudsman. There is no right of appeal of the Ombudsman’s decisions.

Apart from this, a private individual may also bring action at the environmental court against a person who pursues or has pursued an environmentally hazardous activity without a permit. The court may then withdraw a permit, exemption or approval granted pursuant to the Environmental Code or to rules issued in pursuance thereof, wholly or in part, and prohibit further activity etc.

According to the Administrative Act, an authority finding that a decision issued by the authority as a first instance is obviously incorrect due to new circumstances or for another reason, shall change the decision. This presupposes that it can be changed rapidly and easily and without leading to a disadvantage for an individual party. This obligation is not applied where the authority has forwarded the matter to a higher instance or there are other special reasons not to change the decision.

According to the Environmental Code, the Government shall assess the permissibility of certain new activities or operations such as iron and steel works, metallurgical works, ferro-alloy plants, pulp plants and paper mills, plants for the manufacture of basic chemicals or fertilizers and nuclear installations. However, in special circumstances the Government may in individual cases decide not to examine such activities. In individual cases, the Government may also reserve the right to assess the permissibility of an activity or operation for which an assessment is not compulsory. This may be done where the scope of the activity is or is likely to be substantial or intrusive, the activity is likely to cause damage to the area’s natural assets that is not inconsiderable (outside areas designated as special protection areas or special areas of conservation) etc.

Judicial (the appeal against a decision lies with a court of law):

The Government has, in the Ordinance on Environmentally Hazardous Activities and Health Protection, laid down requirements for permits or notifications concerning environmentally hazardous activities. The installations are defined and classed in three categories (A, B and C). Installations that may entail a major environmental impact are A-activities and the licensing authority is the environmental court. Activities with less impact are B-activities and require a license from the County Administrative Board. C-activities do not need a licence but the municipality must be notified in due time before the action is taken. There are of course a lot of activities that do not require licensing or notification. Also quarrying is to be licensed by the County Administrative Board. An application for a permit under the Code (environmentally hazardous activities- not limited to the IPPC activities, water undertakings and quarrying) require
a mandatory EIS and the procedure is settled in the Code. There is a procedure of EIA, according to which persons who intend to pursue an activity or take a measure for which a permit or decision concerning permissibility is required pursuant to the Code shall consult the County Administrative Board at an early stage. They shall also consult private individuals who are likely to be affected in good time and to an appropriate extent before submitting an application for a permit and preparing the EIS. Following the consultation, the County Administrative Board shall decide whether the activity or measure is likely to have a significant environmental impact, and if so, an environmental impact statement procedure shall be held. The person who intends to undertake the activity or the measure shall consult the other government agencies, the municipalities, the citizens and the organisations that are likely to be affected. The outcome of these consultations shall be stated in the application for a permit. Besides that, the tradition has so far been that anyone has been allowed to speak and to present his views in writing at the permitting procedure for environmentally hazardous activities. In addition to this, decisions by County Administrative Boards can be appealed to the environmental courts.

As previously mentioned, certain environmentally hazardous activities require a permit from the environmental court ("A-activities"). This means that the license is issued and the conditions for the license are set by the court. Decisions and judgements by the environmental courts can be appealed before the Supreme Environmental Court; the same holds for judgements (in appeal) of the courts. Leave of appeal is required, except where cases have commenced in the environmental court. A judgement or a decision given by the Supreme Environmental Court as a second instance may be appealed to the Supreme Court but this requires a leave of appeal (thus a maximum of two instances of appeal).

Matters that have been tried by a County Administrative Board or another administrative authority as a first instance shall be subject to procedure rules according to the Administrative Court Procedure Act when they are appealed at the environmental courts or a higher instance. For matters that commence in an environmental court, the proceeding rules of the Environmental Code are to be applied and, in case the Code doesn’t regulate the matter, the Code of Judicial Procedure. Thus, there are three different sets of proceedings that can be applied in the environmental court, the Supreme Environmental Court and the Supreme Court.

b. Who has access and under which conditions?

**Non-judicial:** Anyone can participate in the process mentioned under a.

**Judicial:** Under the Code, appeals may be made against appealable judgements or decisions by any person who is concerned by a judgement or a decision against him. This means that the applicant and the claimants may appeal if the decision is negative for them. A claimant under the Code is any person who may suffer injury or damage or may be exposed to other inconveniences due to an activity. This concept is to be applied generously. Authorities, municipal committees or other bodies may also have a right of appeal according to specific provisions of the Code. In addition, appeals may be made against judgements or decisions concerning permits, approvals and exemptions by non-profit organisations. Prerequisites for a right of appeal for such an organisation are that the organisation’s purpose according to statutes is to promote nature conservation or environmental protection interests. The organisation shall have been operating in Sweden for at least three years and have not less than 2,000 members. A non-profit organisation may, however, not appeal against decisions related to the Armed Forces, the National
c. What can be challenged in the procedure?

Non-judicial/judicial: Not only the licence but also the conditions of the licence, if any, can be challenged in the procedure. In case of an appeal by the Environmental Protection Agency, the environmental courts may, in some cases, go beyond petitions brought forward in lower instances.

d. What can be the (positive) result for the complainant after a procedure has been concluded?

Non-judicial/judicial: During the EIA process which proceeds an application for a licence, the positive outcome may very well be that the comments/objections are taken into account in the decision/judgement.

A higher instance can revoke the permit, change the conditions, add new conditions or remit the matter to the lower instance for a re-examination.

e. Practical aspects:

In licence procedures for environmentally hazardous activities, there is no risk for covering the costs of a counter party. The applicant is however liable for the court’s costs in respect of notices, keepers of file, experts summoned by the court and premises where meetings are held. Where the court so requires, the applicant shall pay an advance on the compensation. Apart from this advance, parties do not have to provide any financial security.

In permit application cases relating to hydraulic operations, the applicant is basically liable for his own and the opposite parties’ costs in the environmental courts (first instance). In case of an appeal, the applicant is liable for his own costs in higher courts and for the costs incurred by the opposite parties as a result of the applicant’s appeal.

Judicial assistance is not a requirement but the creation of environmental courts changed the procedure into a more formal one, and it might be more important to have judicial assistance in the future. The cost for legal consultants and attorneys might thus add to the costs of proceedings. An appeal has to be lodged within three weeks after the decision. The decision states when and to what authority the appeal shall be handed in. Usually, it takes months, even up to a year, before a court reaches a decision. A final decision, including a court review, generally takes at least 18 months.

Basically, legal aid can be granted in environmental cases. There are, however, a number of conditions for the granting of legal aid. One is that the applicant doesn’t have an insurance covering the matter. Further, legal aid is only granted to someone for a matter occurring in his business if there are special reasons. Other conditions relate to i.e. limitations of costs being reimbursed by legal aid.

A NGO that wishes to appeal against a decision/judgement concerning permits must do so within the stipulated time for the parties or for other claimants with a right to appeal. This
means that a decision or a judgement doesn’t have to be communicated with the NGO which by itself must cover the outcome of the decisions. As regards citizens, not any citizen may appeal against a decision – he must be a claimant (see above). When a decision or a judgement is delivered, it shall be made public. At the same time, details on how the public can obtain access to information about the decision/judgement shall be made public.

**Other environmental decisions**

a. What kind of procedure and where exactly?

"Environmental decisions” is a vast concept and the definition should be thoroughly discussed within the project. Basically, other decisions than those requiring a licence under the Environmental Code or ordinances and regulations issued by virtue of the Could would be covered by the concept. But also decisions under other legislation such as the Electricity Act, the Act on Nuclear Activities, the Forestry Act, the Minerals Act, the Railway Traffic Act etc would be covered.

The decisions taken under the Code all follow the same procedure. Decisions by the local municipalities (for example exemptions from various regulations) may be appealed to the County Administrative Board. Decisions by the County Administrative Board (on appeal or as a first instance) and decisions from other governmental authorities may be appealed to the environmental court. Judgements or decisions by the environmental court may be appealed to the Supreme Environmental Court. If the environmental court was not the first instance, a leave of appeal is required. The Supreme Environmental Court’s judgement/decision in cases that were initiated in the municipalities or administrative authorities is final. Other judgements/decisions by the Supreme Environmental Court may be appealed against to the Supreme Court. A leave of appeal is then required.

Under the Code, the Government reviews decisions by government agencies relating to the establishment, alteration or withdrawal of national parks, nature reserves, culture reserves, natural monuments, shoreline buffer zones, environmental protection zones or water protection areas, excluding matters relating to compensation. The Government may also be the competent body for decisions under other Acts (such as the Electricity Act) The decisions of the Government can not be appealed but they may, in certain cases, be subject to examination by the Administrative Supreme Court.

According to the Planning and Building Act, detailed plans are to be adopted by the local municipalities. Detailed plans intend to regulate land use and the construction of buildings and facilities in greater detail. The detailed plan regulates where and how the property owner may build and is binding on private individuals and public authorities in connection with the review of permit applications. The public (besides intervention by the State) will also has some say with respect to the content of the plan. The municipality has to consult the County Administrative Board and others concerned by the plan. There is no restriction as to who may take part in these consultations. The local municipality has to put the plan on display, and anyone can give written objections. When the plan has been adopted, anyone who made a written complaint can appeal against the decision to the Country Administrative Board. This decision may, in turn, be appealed to the Government as a final instance, or may be reviewed by court.

b. Who has access and under which conditions?
**Judicial:** The Environmental Code has a uniform right of appeal. Under the Code, appeals may be made against appealable judgements or decisions by any person who is concerned by a judgement or a decision against him. This means that the applicant and the claimants may appeal if the decision is negative for them. A claimant is any person who may suffer injury or damage or may be exposed to other inconveniences due to an activity. This concept is to be applied generously. Authorities, municipal committees or other bodies may also have a right to appeal according to specific provisions of the Code. In addition, appeals may be made against judgements or decisions concerning permits, approvals and exemptions by non-profit organisations. Prerequisites for a right to appeal for such an organisation are that its purpose according to statutes is to promote nature conservation or environmental protection interests. The organisation shall have been operating in Sweden for at least three years and have not less than 2,000 members. A non-profit organisation may, however, not appeal against decisions related to the Armed Forces, the National Fortifications Administration, the Defence Materiel Administration or the National Defence Radio Centre.

Anyone has a right to appeal against a binding plan (detailed plan) if he has complained in writing during the display of the plan, and if the person in question is concerned by the decision.

The Judiciary Ombudsman may carry out investigations as to whether administrative authorities etc. have acted correctly in their environmental decision-making. These decisions (reprimands), which are published regularly, seldom have any legal consequences. Still, courts and authorities follow the statements made by the Ombudsman. There is no right of appeal of the Ombudsman’s decisions.

c. **What can be challenged in the procedures?**

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

The decision may be revoked or changed. Compensation may be granted. The matter may be redirected to the authority or to the court that issued the decision or the judgement if an error in the handling of the matter has been made.
e. Practical aspects:

There are no fees involved in the handling at the authority level. Cases that relate to environmentally hazardous activities (also other cases than licensing) have special provisions as to litigation costs and there is no obligation to cover the costs of a counter party. Also cases related to hydraulic operations have special rules regarding the costs and citizens appealing against a decision do not have to cover the costs of a counter party. The applicant is liable for the court’s costs in respect of notices, keepers of file, experts summoned by the court and premises where meetings are held. Where the court so requires, the applicant shall pay an advance on the compensation. Apart from this advance, parties do not have to provide for financial security.

Other matters at the environmental court and the courts of appeal are subject to the Code of Judicial Procedure when it comes to litigation costs. The main rule according to this latter Code is that the party who looses a case has to pay for the litigation costs of the winning party. In case of a claim of compensation for a smaller amount (appr. 18,500 SEK) each party will have to bear their own costs.

Usually, it takes months, even up to a year, before a court decision may have been reached. A final decision, including a court review, generally takes at least 18 months.

Basically, legal aid can be granted for environmental cases. There are, however, a number of conditions for the granting. One is that the applicant doesn’t have an insurance covering the matter. Further, legal aid is only granted to someone for a matter occurring in his business if there are special reasons. Other conditions relate to i.e. the limitations of cost being reimbursed by legal aid.

A NGO that wishes to appeal against a decision/judgement concerning permits must do so within the stipulated time for the parties or for other claimants with a right to appeal. This means that a decision or a judgement doesn’t have to be communicated with the NGO but the NGO must cover the information of the decisions itself. As regards citizens, not any citizen may appeal against a decision – he must be a claimant (see above). When a decision or a judgement is delivered, it shall be made public. At the same time, details on how the public can obtain access to information about the decision/judgement shall also be made public.

3. Criminal/penal procedures:

Under the Environmental Code, an environmental sanction fee must be paid by a business operator for various kinds of violations in situations where the Government, by regulation, has determined such fees. The Government has by an ordinance compiled a list of various violations with information of the charge for the respective violation. The charge may be at least 5,000 SEK and 1,000,000 SEK at the most. The fee shall be imposed even if the violation has not incurred intentionally or by carelessness. The supervisory authority (usually the local municipality or the County Administrative Board) decides on the environmental sanction fee. The decision may be appealed against to an environmental court. The decision may be enforced even if it has been appealed.

The Environmental Code contains penal provisions and forfeiture. The public prosecutor has the competence to decide whether to prosecute or not. A citizen could report a suspected crime to the police who would investigate the matter and decide whether to hand it over to the prosecutor or to dismiss the case. A prosecutor would decide if the case is strong enough to be taken to court. A negative decision by the prosecutor could not be challenged by a private individual other than as a notice to the Judiciary Ombudsman or to the State Prosecutor.
The United Kingdom

I  Characteristics of the country

In the United Kingdom, no distinction is drawn between what lawyers accustomed to continental European legal systems would refer to as matters of ‘public law’ and ‘private law’, although in general a distinction between statute law, which largely deals with the public interest and common law, which is largely concerned with private interest. It is necessary to distinguish statutory applications and appeals to the High Court on the one hand, and an application for judicial review on the other. Each are subject to different rules relating to standing, the grounds of a successful appeal, application and review are not synonymous, and the remedies available are often of contrasting scope and nature. Usually judicial review is collateral to alternative safeguards, and leave will normally only be granted once alternative remedies have been exhausted.

The term ‘United Kingdom’ refers to the whole territory of England and Wales, Scotland and Northern Ireland. However, recently governmental powers were devolved to Scotland and Wales. And also, Northern Ireland already usually had its own environmental legislation, and the Scots sometimes made separate environmental regulations.

A remarkable feature of the system of government and law which exists in the United Kingdom is that there is no written Constitution. There is no fundamental document ascribing functions to the different branches of government and imposing additional limitations or safeguards. Instead there is what is usually referred to as a ‘sovereign’ Parliament, and a unitary system of government. By the first is meant that the courts have no power to consider the legality (constitutionality) of any legislative measure which has been duly enacted by the Parliament, so there is no judicial review of legislative power. On 1st October 2000 a new Human Rights Act will come into force.

II  The procedures

1.  Procedures against administrative acts or governmental action/non-action: licences

a.  What kind of procedure and where exactly?

Non-judicial: An environmental licence can be required in a very wide rage of different circumstances and, therefor, there are a number of different licensing regimes. These regimes differ in terms of their procedural requirements, but the main features, however, remain essentially the same. The procedure starts with a written application, and after a period of consultation, the licence will be granted or refused. On receipt of an IPC licence application, and the same goes for local authority air pollution control (LAAPC) licences, the public is also involved, as the applicant is required to advertise in a local and national newspaper. Before granting the licence, the Environment Agency must consider any responses from the statutory bodies and the public.

If the application is refused or granted subject to conditions, the applicant may appeal to the Secretary of State for the Environment. The authority must inform anyone who was entitled to be consulted about the initial application and anyone else who made representations (third parties). They may make further representations and they also must be informed of a possible hearing.
Judicial: Judicial review of the decision of the Secretary of State is possible.

b. **Who has access and under which conditions?**

Non-judicial: Only the disappointed applicant for a particular licence is entitled to appeal to the Secretary of State. No third parties are granted a right to appeal, although they can be heard in a public hearing during the appeal.

Judicial: In judicial review anyone with sufficient interest may apply for a judicial review. Neither statute nor rules defines ‘sufficient interest’. This has meant that the courts have been able to interpret it flexibly depending on the circumstances of the case. The 1994 Greenpeace case, in which Greenpeace was granted standing, established that it was appropriate to take into account the nature of the interest, the extent of the applicant’s interest in the issues raised, the remedy and relief sought. The fact that there might not otherwise have been an effective means of bringing concerns before the court and the fact that the NGO had been involved in the consultation process were also considered relevant. In the 1995 Pergau Dam case there was an even more liberal approach to standing (including the merits of the challenge, the importance of the issues raised and the likely absence of another challenge).

c. **What can be challenged in the procedure?**

Non-judicial: The decision refusing a permit or the conditions attached to a permit which is granted.

Judicial: The manner in which the decision underlying an outcome was arrived at.

d. **What can be the (positive) result for the complainant after a procedure has been concluded?**

Non-judicial: The original decision can be upheld or quashed by the Secretary of State, or a delegated authority, but he can also issue a new decision to grant or amend conditions attached to a permit.

Judicial: The outcome of judicial review can be that the manner in which the decision underlying an outcome was arrived at, can be tested against: a. illegality, b. irrationality, c. procedural impropriety. After grounds for judicial review on either of these three grounds has been established, the court considers if it is in the public interest to award one of the remedies: certiorari (to quash a decision), prohibition/injunction (to prevent a decision to be taken), or mandamus (to require a decision to be taken). The court also has discretion to hold the unsuccessful applicant liable for the costs of the respondent. Furthermore, the court has the extensive powers to order interim relief pending the hearing. These powers will be exercised with regard to ‘the balance of the convenience’ between applicant and respondent (ordering such interim measures, the court always takes note of the wider public interest).

e. **Practical aspects:**

Judicial: Fees for judicial review are £ 150. The general rule for costs is that the losing party will be ordered to pay the winning party’s costs. Discretion to award costs lies with the courts.
and they have wide powers to say what, if any, will be paid by whom. They may even order costs to fall contrary to the general rule in an individual case. If costs are likely to be very high, then the client may be eligible for Support Funding from the Legal Services Commission.

Other environmental decisions

a. What kind of procedure and where exactly?

Non-judicial: In the shape of the Local Government Ombudsmen and the Parliamentary Commissioner for Administration, the UK offers a complaint investigation procedure. A number of features of this system makes it a promising instrument for addressing complaints (e.g. concerning the implementation of Community environmental law). Ombudsman investigations are generally recognised as thorough, and the comprehensive nature of the typical ombudsman report is recognised as one of the strongest features of the system. Besides that, the ombudsman possesses exceedingly broad powers of inspection in respect of relevant government documentation. The investigations are for instance not constrained by rules of parliamentary privilege. However, Parliamentary Commissioner for Administration and the Local Government Ombudsmen are statutorily limited to reporting on allegations of injustice to individuals caused by maladministration. They are able to pronounce on whether correct procedures were followed in reaching a decision, but not on whether the decision itself was right or wrong. Furthermore, an ombudsman may order payment of the complainant’s costs, without the complainant being under any obligation in respect of the costs of others.

Entitlements to participate in administrative decision-making are wide-ranging. With regard to participation, there is not much difference between decisions to grant a licence, and other environmental decisions. Planning decision-makers have to announce any intention to modify strategic planning policy documents, to invite representations when preparing proposals, and to consider any representations received in adopting policies in their final form. Where objections to the proposals are received, a public hearing on the proposals will normally be held. The authorities actively encourage participation in planning. This goes for all levels of government.

Usually appeal on planning decisions is possible with the Minister.

Judicial: Decisions on the basis of the Town and Country Planning Act 1990 (structure plans, unitary plans, local plans as well as individual planning permissions) are subject to either an ‘application’ to the High Court (no leave by the Court required), or to ‘appeal’ to the High Court (in which case leave is required). When there are no statutory provisions, there always remains the possibility to apply for judicial review.
b. Who has access and under which conditions?

**Non-judicial:** An ombudsman is not empowered to investigate matters in respect of which a statutory tribunal or ordinary court has jurisdiction, unless the ombudsman is 'satisfied' that 'in the particular circumstances it is not reasonable to expect' the complainant to resort or to have resorted the ordinary proceedings. Another limitation of the system is that practice has developed among ombudsmen to interpret 'injustice in consequences of maladministration', as a condition to lodge a complaint, as meaning personal injustice suffered by a person aggrieved, rather than injustice suffered by the community. NGOs are therefore systematically excluded from these proceedings.

**Judicial:** Under the Town and Country Planning Act 1990 applications and appeals to the High Court are open for 'persons aggrieved' in some cases, and for the more narrow group of the initial appellant, local planning authorities and persons with an interest in the land to which an enforcement notice relates in other cases. Again when there are no statutory provisions, there always remains the possibility to apply for judicial review. Here the same applies as already mentioned above under 'licences'.

c. What can be challenged in the procedure?

**Non-judicial:** A range of complaints under the umbrella 'maladministration' resulting in injustice.

**Judicial:** With regard to judicial review, cf. above (under licences).

d. What can be the (positive) result for the complainant after a procedure has been concluded?

**Judicial:** With regard to judicial review, cf. above (under licences).

e. Practical aspects:

1. How long can it take before a final decision is taken?
The length of time taken by an ombudsman to investigate a complaint and draft a report compares unfavourably with time taken in judicial review proceedings.

2. Procedures against industries or other citizens that pose a threat to the environment:

   a. What kind of procedure and where exactly?

**Judicial:** There are two ways in which ‘polluters’ or potential polluters can be held liable for their activities. Firstly, there are various statutory regimes such as the abatement notice procedure for statutory nuisance, the enforcement system for illegal deposits of waste, the forthcoming new regime on contaminated land, the works notices system for pollution of rivers and groundwaters etc., and the forthcoming site clean-up requirement for activities subject to integrated pollution control. In general under these systems, liability is imposed on the responsible industries or citizens via a notice served by the public authority which requires remediation. If need be the authorities can instead carry out the work themselves and then take steps to recover
the costs from those responsible. There is a right of appeal. A third party can ask the
authority to act in an individual case, and may well have sufficient standing (cf.
Greenpeace and Pergau Dam cases) to seek direct to the court for an abatement notice
to be served. These various regimes essentially address the public interest in the
environment.

Secondly, the common law system looks after private interests. ‘Traditional
damage’ (property damage, personal injury) may sometimes be involved when
environmental damage occurs. The route to compensation for private interests is
usually via an action under one of the three main heads of tort liability, that is
nuisance, negligence, or the rule established in the case of Rylands v. Fletcher. As
each has limitations, actions are often taken under more than one head. The plaintiff
must prove causations: that is, that the defendant caused the damage.

Actions under nuisance can include injunctions to prevent further nuisance, as
well as to obtain compensation for the nuisance already suffered. What is considered a
nuisance may depend on the locality (what is a nuisance in a residential area may be
accepted in a more mixed location). The plaintiff must have a proprietary interest in
the land affected. In actions under negligence, the plaintiff does not need an interest in
the land, but he must be owed a ‘duty of care’ by the defendant, the duty must have
been breached, and the damage must have been foreseeable. Actions under ‘Rylands’
deal with escapes of dangerous things from land which are not naturally there and
whose escape would be likely to do mischief (foreseeable damage). Negligence does
not have to be proved under ‘Rylands’, and defences are limited.

b. Who has access and under which conditions?

Judicial: In relation to private interests, anyone adversely affected may take action,
except in nuisance cases where plaintiffs must have a proprietary interest in the
property affected

c. What is the subject of the dispute?

Judicial: The act which damages the environment or which damages a private interest
(e.g. personal injury or property or loss). In the case of the environment, statute law
deals with liability for the costs of remediation, both for the owned and much of the
unowned environment such as surface waters, groundwaters and land. New legislation
is being introduced to improve liability arrangements for remediating damage to
certain protected habitat. There is a separate mechanism available for providing
compensation for personal injury, or property or economic loss, which can be used
where damage also involves damage to private interests.

d. What can be the (positive) result for the complainant after a procedure has been
concluded?

Judicial: Remediation of the environmental damage by the person held responsible,
or at his expense by the public authority, and damages awarded for private interests.

e. Practical aspects:
1. What are the fees and (possible) other costs of proceeding?
As a general rule, the winner of a case may recover his legal costs, in bringing or in
defending the action, from the losing party.
2. Are there any other practical obstacles for citizens and NGOs to start the relevant procedure?
The financial risk is an important obstacle for persons and NGOs to start proceedings. This general position is modified somewhat in a situation where a plaintiff may benefit from state-funded legal aid. This aid is however only available to a very small, financially disadvantaged, part of the community. It would therefore be the case that the majority of civil actions in environmental cases are brought by corporate plaintiffs or legally aided individuals. A relatively recent development may have a significant effect on the readiness of individuals to bring civil actions, as lawyers have been more willing to work on the basis of ‘no win no fee’ arrangements. Although there will be additional difficulties, this may significantly impact upon civil litigation in the environmental context.

3. Criminal/penal procedures:

a. What kind of procedure and where exactly?

Judicial: The environmental statutes have created a great number of criminal offences, encompassing both penalising those who have failed to comply with the specific requirements of permits or enforcement notices issued by the regulators and punishing those who are responsible. Also the failure to obtain the permits needed is a criminal offence (though in some cases like planning permission it is not a criminal offence to proceed without it, only to fail to stop/undo what has been started when told to). They exist in relation to the deposit of waste, the pollution of controlled waters, the contamination of land and the failure to abate any of the ‘statutory nuisances’ which local authorities have power to control. Prosecutions are usually brought by the relevant regulator, but in certain circumstances private individuals, associations or action groups may seek to prosecute offenders themselves, and these private prosecutions are becoming more prevalent.

b. Who has access and under which conditions?
Not reported

c. What can be the (positive) result for the complainant after a procedure has been concluded?

Judicial: A possible conviction (fine and/or imprisonment).

d. Are there any obstacles in practice for individual citizens and NGOs to start the relevant procedure?
None reported
Annex 2

Short report on the mid term meeting of the IMPEL-project on complaint procedures and access to justice for citizens and NGOs in the field of the environment.

1 February 2000

Hosted by DG XI of the European Commission,
Beaulieu Building Brussels

1. Welcome and introduction of the programme by chairman mr Jan Teekens

After a word of welcome, the chairman explained the intention of the midterm meeting: exploring the key-issues with regard to complaint procedures and access to justice on the basis of the draft discussion paper of the Tilburg University to prepare the workshop on 10 and 11 May 2000. The participants were invited to give their opinion on the selection and the content of the key-issues. On the basis of these comments and further research, the key-issues would be worked out in more detail by the research team to be included in the report for the May workshop.

The key-issues have been deduced from the national reports. Although the researchers already tried to get feedback from the countries, there still may be some gaps or errors in the national reports. Therefore, participants were invited to send in comments in February or the first half of March.

2. Introduction and background of the project by ms Annemarie van der Heijden

Ms. Annemarie van der Heijden introduced the project and gave a short overview of the background of this initiative. The terms of reference of this project were adopted during the IMPEL plenary in Vienna in 1998. The aim of the project is to discuss the development and actual improvement of complaint procedures and access to justice for citizens and NGOs on two levels: member state level and community level. This is to serve the general goal (link with IMPEL): an effective and efficient application and enforcement of European environmental law. Another important reason for this initiative was of course the signing of the ECE-Aarhus Convention in June 1998. In the meantime Prof. Prieur produced a report on the different legal systems of the member states concerning complaint procedures and access to justice.

After the instalment of a preparatory working group (Dutch Ministry of Environment) and a steering group (Ireland, Italy, Germany, Sweden and the Commission), the research team of Tilburg University was contracted.

The input of the mid-term meeting will be used to further prepare the workshop in The Hague which will be held the 10th and 11th of May 2000. Representatives of NGOs and industrial groups, and acceding countries will also be invited. It would also be very interesting to have the colleagues of the justice departments present at the May workshop.

3. Presentation by the representative of DG XI (Environment), ms Susan Hay

Ms. Susan Hay explained that, as far as access to complaint procedures at the community level is concerned, there is an enormous flood of complaints from citizens
The environment is the biggest issue of complaints. The Commission recognises that this flood will only increase over the years and that is has to be stemmed. The communication on the improvement of the implementation and enforcement of community environmental law (October 1996) recommended that national disputes should be dealt with at the national level. It is more easy to gather the relevant data and more easy to deal with the particular legal system. The communication also recommended that minimum criteria might be drawn up in determining the procedure in relation to complaint mechanisms.

What the Commission learned from the Prieur report is that there is a great diversity of procedures in the member states. With this project the Commission hopes to get a better picture of what goes on at the national level. How can it be made easier for citizens and NGOs to file complaints at the domestic level, also in view of unburdening the complaints possibilities at the European level. The Commission is in the process of drawing up selective criteria that have to be applied to reduce the number of complaints, however, this has not resulted in a final document yet.

As far as access to justice is concerned, there should be better and cheaper access to justice for citizens and NGOs in the member states. Environmental matters are different from other legal matters, since most legal procedures are more aimed at economic loss rather than environmental loss. This is one of the reasons why access to justice in the member states has been so difficult: the legal procedures are more suited for individual interests and economic complaints, rather than for the public interest and environmental complaints. The Commission’s communication also recommended that the Commission might draw up guidelines on access to justice. When the Commission was in the process of working on that, the Aarhus Convention was signed. The Commission assumes the same approach as before Aarhus with regard to access to justice in the member states, namely that it is primarily a concern of the member states. This means that if there are going to be any recommendation or guidelines, they will be in the form of soft law. However, the Commission has not taken a firm decision on this yet.

Another development in this area is the white paper on environmental liability (adopted one week after the mid-term meeting). It went through various drafts, and is now a much slimmer, simple document, and it actually comes out with a suggestion for a directive in due course. There are access to justice provisions in the proposal. Carla de Vries, the person who is responsible for the white paper, will attend this meeting in the afternoon.

Another development at community level is that there had been some thought that the latest IGC (Intergovernmental Conference) might look at access to justice at community level, but that will not be the case. It has decided that this IGC will focus on the preparation for enlargement and institutional reform (the voting system). So it is very unlikely that a change in the Treaty concerning access to justice will happen any time soon.

The Commission is also doing work under the Aarhus Convention to prepare for ratification. Before the ratification, the Commission will look at the consequences for the existing directives. The directive 90/313 on access to information will get a provision on access to justice. Last week, the Commission adopted a proposal regulation on access to documents from the three main institutions, it is still a proposal, so there might be some changes.

As far as public participation is concerned, at least the IPPC and EIA directives will have to be amended slightly because of the Aarhus provisions (public
participation, and probably access to justice as well). These proposals are now being drafted and it will probably become some sort of package proposal for the directives. Those are the main developments at community level. The outcome of this workshop will be very important for the Commission, particularly concerning the complaints.

4. **Short presentation of the White paper on Environmental Liability**

In the afternoon, Carla de Vries of DG XI of the Commission gave a short explanation on the development of a Whitepaper on Environmental Liability. She stated that the white paper would be adopted on a very short term (9 February). She stressed that access to justice is indeed one of the important issues in the white paper. The proposals are in line with the Aarhus Convention, and more specific since they are linked with environmental liability. The provisions aim at ensuring rights of access to justice for public interest groups and some individual citizens. Public authorities have the first responsibility for a clean environment, however, if they fail in this task in the eyes of the public, there should be public involvement. So, the Whitepaper follows a 'two tear approach'.

Three categories of action are identified:
- judicial administrative review,
- direct action by a public interest group against the polluter: it is firstly up to the state to claim restoration (costs), a public interest group can ask them to, if that does not happen, the group can address a claim itself,
- preventive action in urgent cases: the right for an interest group to ask for an injunction to stop polluting acts.

Possibly in June the drafting on a directive will start.

5. **Discussion on the selected “key-issues”**

After a brief introduction of the discussion paper and the key-issues by mr prof. Jonathan Verschuuren and mr Kees Bastmeijer (both working for the Tilburg University), the six key issues were discussed in an informal way. The key issues proved to be good basis for an active and lively discussion amongst the participants. The discussions on the key-issues will not be described in detail in this annex. In general, the selected issues were considered to be interesting issues for the May workshop. The participants assisted the research team in improving the report and the questions related to the key-issues.

One of the conclusions of the discussions seemed to be that an important issue is “finding the right balance”: a balance between opening procedures for the public on the one hand and the interest of legal security and an acceptable burden on complaint bodies and courts on the other hand.
Annex 3

Text of Section Article 9 of the Aarhus Convention:

Article 9

ACCESS TO JUSTICE

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.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

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.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.
The UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

(Aarhus, Denmark, 1998)

AN IMPLEMENTATION GUIDE

Prepared by

Stephen Stec and Susan Casey-Lefkowitz
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with the financial support of
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UNITED NATIONS
PILLAR III: ACCESS TO JUSTICE

Article 9 contains the provisions for the third “pillar” of the Convention, on access to justice. Under the Convention, “access to justice” means that members of the public have legal mechanisms that they can use to gain review of potential violations of the access-to-information and public participation provisions of the Convention as well as of domestic environmental law.

Purpose of access-to-information pillar

The rationale behind the access-to-justice pillar of the Convention is to strengthen access to environmental information, environmental decision-making, implementation and enforcement by enabling citizens to invoke the power of the law. Access to justice creates a level playing field and helps ensure consistent and effective implementation of the Convention’s access-to-information and public participation provisions. In addition, the public’s ability to help enforce environmental law adds important resources to government efforts.

There are, at present, numerous obstacles to access to justice in many signatory countries. For example, citizens and NGOs often lack legal standing to bring a legal challenge for violation of their rights or to enforce the law. In some countries, bodies with judicial functions lack authority to provide injunctive relief and to enforce their decisions. These and other barriers weaken the ability of members of the public to seek redress if the government or private sector does not comply with the Convention or with national environmental law. The access-to-justice provisions in article 9 are intended to address these issues.

What is access to justice under the Convention?

Access to justice under the Convention means that the public has the ability to go to court or another independent and impartial review body to ask for review of potential violations of the Convention. The Convention’s access-to-information and public participation provisions create certain rights and obligations. The access-to-justice provisions establish that not only Parties, but also individuals and NGOs as members of the public can enforce the Convention.

Access to justice under the Convention applies primarily to the access-to-information provisions of article 4 and the public participation in decision-making provisions of article 6. However, it may also apply to “other relevant provisions.” How the scope of the access-to-justice provisions can be interpreted beyond articles 4 and 6 is discussed below. The access-to-justice provisions also apply to members of the public seeking review of violations of domestic environmental law. Parties have flexibility in how they implement this requirement, but the general obligation allows the public to challenge “acts and omissions” by both private persons and public authorities.
The access-to-justice provisions provide a level of standing to go to court or another review body, to individuals and NGOs. The Convention provides slightly different guidance on standing depending on the type of review requested.

The Convention sets certain requirements for access-to-justice procedures. They must be fair, equitable, timely and not prohibitively expensive. They must also provide adequate and effective remedies and be carried out by independent and impartial bodies. The Convention further requires information on access-to-justice procedures to be disseminated and encourages the development of assistance mechanisms to remove or reduce financial and other barriers.

**Implementing access to justice**

The following table contains the main elements of article 9 on access to justice. It serves as an overview of the obligations that will be discussed in the following sections. The Convention imposes varying degrees of obligations on Parties and public authorities. In most cases, the Convention structures its obligations through a clear general principle combined with more flexible requirements, as well as implementation guidance with an even higher level of flexibility for the Party or public authority. These varying degrees of obligation will be discussed in more detail. The table covers the general obligations and provides some insight, beyond the requirements of the Convention, into how Parties may wish to implement them.

<table>
<thead>
<tr>
<th>Article 9</th>
<th>General requirements</th>
<th>Implementation guidance</th>
</tr>
</thead>
<tbody>
<tr>
<td>A system to provide review of public authority decisions based on articles 4 and 6 and other relevant provisions</td>
<td>A system to provide citizen access to review so as to challenge violations of domestic environmental law.</td>
<td>• Ensure availability of independent and impartial review bodies, including courts • Develop clear rules concerning standing of individuals and NGOs to access judicial and other review for violations of the Convention and for violations of domestic environmental law • Develop adequate remedies, such as injunctive relief • Establish mechanisms to provide public with information on access-to-justice procedures • Develop assistance mechanisms for public in accessing review procedures</td>
</tr>
</tbody>
</table>
Article 9

ACCESS TO JUSTICE

Article 9 requires an appropriate mechanism to safeguard the rights afforded in the other pillars of the Convention and under national environmental law. The following table provides an overview of the obligations under article 9, paragraph by paragraph. The implementation elements are taken from the requirements and guidance in the Convention itself.

<table>
<thead>
<tr>
<th>Provisio n</th>
<th>Obligation</th>
<th>Implementation elements</th>
</tr>
</thead>
</table>
| Article 9, paragraph 1 | Provides review procedures relating to information requests under article 4. | • Judicial or other independent and impartial review  
• Additional expeditious and inexpensive reconsideration or review procedure  
• Standing requirements  
• Binding final decisions  
• Reasons for decision in writing |
| Article 9, paragraph 2 | Provides review procedures relating to public participation under article 6 and other relevant provisions of the Convention. | • Judicial or other independent and impartial review  
• Possibility for preliminary administrative review procedure  
• Standing requirements |
| Article 9, paragraph 3 | Provides review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment. | • Administrative review procedures  
• Judicial review procedures |
| Article 9, paragraph 4 | Minimum standards applicable to access-to-justice procedures, decisions and remedies. | • Adequate and effective remedies, including injunctive relief  
• Fairness  
• Equity  
• Timeliness  
• Not prohibitively expensive  
• Record decisions in writing  
• Publicly accessible decisions |
| Article 9, paragraph 5 | Requires Parties to facilitate effective access to justice | • Information on access to administrative and judicial review procedures |
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.

What can be reviewed?

The provisions of paragraph 1 guarantee the public the opportunity for review of decisions made under article 4 on access to environmental information. Paragraph 1 requires Parties to ensure that any person has access to a review procedure when he or she believes that his or her information request has not been properly dealt with in accordance with article 4. Parties are to carry out this obligation “within the framework of national legislation.” Each Party has very different review systems and has the flexibility under the Convention to implement the Convention’s obligations under paragraph 1 within the framework of that system.

What triggers the review procedure?

Parties must make a review procedure available when a person contends that his or her request for information has been ignored or wrongfully refused. In addition, Parties must make a review procedure available when the applicant considers that the response is inadequate; or when he or she believes that the request was otherwise not dealt with in accordance with the provisions of article 4. It is clear that an applicant may have received a response to his or her request and may even have received information, but may still have a basis for review. Article 4 contains many specific procedural requirements and substantive criteria, such as the time permitted to respond to an information request (art. 4, para. 2), the form in which a response must be given (art. 4, para. 1 (b)), and the grounds upon which requests may be refused (art. 4, paras. 3 and 4). The review provided by article 9, paragraph 1, may address
these provisions and any other aspects of an information request and response under article 4.

Who can ask for review? – The issue of standing

Under article 9, paragraph 1, “any person” who has requested information is entitled to use the review procedures and has “standing” to challenge decisions made under article 4.

This is consistent with the wording of article 4, which allows any member of the public to request information, and of article 2, paragraph 4, which defines the “public” as natural or legal persons, and their associations, organizations or groups. In addition, article 3, paragraph 9, requires public authorities to allow access to information and access to justice even to citizens or residents of other countries and requires organizations to be provided with this access even if their centre of activities is in another country.

Who carries out the review?

Article 9, paragraph 1, specifies that the review procedure must be before a court of law or another “independent and impartial body established by law.” The concept of “independent and impartial body” has been well developed under the Convention for the Protection of Human Rights and Fundamental Freedoms. “Independent and impartial” bodies do not have to be courts, but must be quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.

Some countries have chosen to create a special, independent and impartial body to review access-to-information cases. For example, in 1978 France established the Commission for Access to Administrative Documents (CADA). CADA is an independent administrative authority whose members are drawn from the executive, the judiciary, and the legislature. A person whose request for information has been denied may refer the matter to CADA. Submission of a case to CADA is required before an appeal to the administrative court is possible. CADA decisions are advisory and can be appealed to a court for a final, binding decision – another requirement of article 9, paragraph 1. To meet the requirements of the Convention, such bodies must have been established by law.

Where does the ombudsman fit under the Convention?

In many countries, some type of “ombudsman” functions as an independent and impartial review body for violations of administrative law against citizens. Depending on how the ombudsman office is structured and on how it fits within the national review system, it may or may not fully meet the criteria under article 9.

The office of ombudsman originated in the Nordic countries as an institution to ensure that public authorities did not commit injustices against individuals. It has since spread widely both in western and in eastern Europe. In the Nordic countries, the ombudsman acts on behalf of parliament, although it is not part of any branch of government. The ombudsman has jurisdiction to review all aspects of public administration to ensure the “proper exercise of administrative powers.” Many of the complaints handled by the ombudsman deal with access to information. During the Convention’s negotiations, Denmark, Finland, Norway and Sweden made an interpretative statement about the institution of ombudsman in the context of article 9, contending that it corresponded with the requirements of the Convention in practical terms, although it did not imply a legal right to any review procedures, did not supply binding decisions, and did not provide injunctive relief. Moreover, the ombudsman does not have strict standing rules for bringing a complaint. Where a person does not achieve the intended results through the ombudsman, however, he or she may still have opportunities to seek review in the courts in some countries, in a manner consistent with the Convention.

Alternative to court review

Article 9, paragraph 1, also requires Parties to ensure that the public has access to faster and less expensive review procedures than court review. Appeal to a court can be time-consuming and expensive and access to information is often needed quickly. Many applicants will not have the financial resources to cover litigation costs, and delays and expenses in court procedures can be a barrier to effective access to information.

The Convention requires Parties whose courts have jurisdiction over access to information disputes to make an “expeditious” and “inexpensive” alternative review mechanism available. “Expeditious” means “efficient and speedy.” The requirement that the process should be free of charge or inexpensive is meant to ensure that any member of the public will be able to afford it.

Such a review process can take several forms, including reconsideration by a public authority or review by an independent and impartial body other than a court of law. “Reconsideration” indicates that the same body goes over the decision once again to ensure its accuracy.

60 CEP/AC.3/18, para.15.
Alternatives: reconsideration and administrative review

Most UN/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, such a process could satisfy the requirements of the Convention.

For example, in Poland a free and expeditious review can be carried out by a higher administrative body than the public authority that made the original decision. In Poland, the law requires the higher administrative body to handle the appeal within one month. After the higher administrative review, the applicant still has the opportunity to take the case to an administrative court. The latter is inexpensive, but can take up to one year to reach a final decision.

Countries that do not have an administrative appeals process for information requests must provide an expeditious and inexpensive process for reconsideration by the public authority. For example, in the Netherlands, appealing against a decision denying access to information requires the applicant to file a notice of objection with the same administrative authority that made the decision. If the administrative authority confirms its refusal to supply the requested information, appeal is directly to the courts.

Final decisions must be binding

Under the Convention, final decisions under article 9, paragraph 1, shall be binding on the public authority. The Convention does not require every decision under paragraph 1 to be binding, only final ones. So, the various mechanisms and opportunities for appeal can work in combination to reach a final binding decision. Typically, if there is a possibility of further appeal, a decision is not considered to be final until such time as the period for lodging an appeal has passed. Final judicial and quasi-judicial decisions are usually binding, while in many countries, decisions of independent bodies, such as commissions and ombudsmen, are advisory. Thus, in addition to any advisory processes, Parties must ensure that a final, binding decision is still possible.

For example, in France the decisions of CADA, discussed above, are advisory. However, if after receiving its opinion, the authorities expressly or tacitly confirm their refusal to provide the requested information, the aggrieved person may appeal to the administrative court. The administrative court then has six months to issue a final and binding decision.


Finally, at least where access to justice is refused under this paragraph, reasons for the decision shall be stated in writing. The formulation chosen does appear to encourage Parties to establish a general rule that all decisions should be in writing.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

What can be reviewed?

Paragraph 2 provides for access to justice through formal review of matters relating to public participation under article 6. It also expressly applies to “other relevant provisions” of the Convention as provided for under national law. This means that Parties may apply the review procedures to other provisions in the Convention by providing for review in those cases in national law. Parties might view the general provisions of article 3 and the provisions concerning the collection and dissemination of information in article 5 as examples of provisions that would qualify as “other relevant provisions.” These provisions lay the groundwork for many of the obligations set out in article 6 and are relevant to its implementation. Similarly, the provisions of article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) and the provisions of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments, describe additional processes that require public participation. Implementation of these procedures also could be reviewable under article 9, paragraph 2. It must be noted, however, that these provisions do not generally refer to the “public concerned.” In applying article 9, paragraph 2, to other provisions of the Convention, therefore, Parties must find a way to determine the scope of the public concerned in those cases. Finally, the reviewability of any provisions of the
Convention under this paragraph would not affect the possibility that article 9, paragraph 3, might also apply.

What can trigger the review procedure?

Members of the public have the right to challenge decisions based on substantive or procedural legality. The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered.

Under this article, Parties must ensure that members of the public concerned within the meaning of this paragraph can obtain review of “decisions, acts or omissions.” First, a governmental decision or act, such as a decision to limit the participants at a public hearing, or holding a public hearing very late in the process, may be subject to review. Moreover, if the government fails to take an action or make a decision required by the Convention, for example by not holding a public hearing at all, or by failing to notify certain persons, review may also be sought. The decisions do not need to be final. However, this must be considered in the context of the final sentence of article 9, paragraph 1, concerning exhaustion of administrative remedies.

Who can ask for a review? – The issue of standing

The Convention sets out – as a minimum – that members of the “public concerned” have standing to pursue review in public participation cases. The public concerned is defined in article 2, paragraph 5, as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making.” (See commentary to art. 2, para. 5.) However, article 6 has provisions applying to the “public” as well as the “public concerned” (paras. 7 and 9). It is consistent with the objectives of the Convention to hold that a member of the public who actually participates in a hearing under article 6, paragraph 7, would thereby gain the status of a member of the public concerned. This is logically supported by the fact that the full results of public participation must be taken into account by the public authority under article 6, paragraph 8.

Under article 9, paragraph 2, the public concerned must have a “sufficient interest” in the matter under review or maintain an impairment of a right. These two obligations in article 9, paragraph 2 (a) and (b), are two ways of trying to reach the same result, given the differing legal systems to be accommodated among the Parties. The two requirements can be considered together with later provisions that further explain “sufficient interest” and impairment of a right.

Under paragraph 2 (a), the Convention raises the question of which members of the public concerned have a sufficient interest. With respect to NGOs meeting the definition of “public concerned,” the Convention answers this question itself. The Convention states clearly that NGOs meeting the requirements of article 2, paragraph 5, automatically have “sufficient interest.” However, for other persons, including individuals, the Convention allows sufficiency of interest to be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice. In this case the term “in accordance with the requirements of national law” indicates that Parties will most likely find different ways of determining “sufficient interest,” depending on
constraints that may exist in their national administrative or environmental laws. However, the added requirement that “sufficient interest” should be determined “consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention” indicates that Parties should interpret the application of their national law requirements within the light of the general obligations of the Convention as found in articles 1, 3 and 9.

Paragraph 2 (b) was devised for those countries with legal systems that require a person’s rights to be impaired before he or she can gain standing. Considering the clause’s purpose, it is not an invitation for Parties to introduce such a fundamental legal requirement where it does not already exist, and to do so would in any case run foul of article 3, paragraph 6. Where this is already a requirement under a Party’s legal system, both individuals and NGOs may be held to this standard. However, Parties must provide, at a minimum, that NGOs have rights that can be impaired. Meeting the Convention’s objective of giving the public concerned wide access to justice, moreover, will require a significant shift of thinking in those countries where NGOs have previously lacked standing in cases because they were held not to have maintained impairment of a right.

Understanding “sufficient interest”

When national law has used the concept of “sufficient interest,” it has tended to be a commonsense test, rather than a legal or economic interest test. For example, the United Kingdom’s Supreme Court Act of 1981 modified standing requirements to allow any person with a “sufficient interest” to bring a case. In a 1994 decision involving a suit by an NGO challenging a licence to construct a nuclear power plant, the British High Court confirmed the standing of the organization according to the Supreme Court Act. The Court found that due to its long-standing environmental activism, the organization had a “genuine interest” in the issues raised by the proposed licence, and that this genuine interest was sufficient to challenge the licence. This reasoning has been applied to individuals as well as organizations, thus extending standing to public-spirited individuals.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Under paragraph 2, a Party may provide for a preliminary review procedure before an administrative authority. The administrative appeal system is not intended to replace the opportunity of appeal to a court, but it may in many cases resolve the matter expeditiously and avoid the need to go to court.

63 David Robinson and John Dunkley (eds.), Public Interest Perspectives in Environmental Law (Wiley Chancery, 1995).
In addition, many countries require plaintiffs to “exhaust administrative remedies,” that is, to try all available administrative review procedures, before going to court. A person may need first to request a review by the public authority in charge of the public participation process, then appeal against that decision to a higher administrative authority, before being able to appeal against the decision to a court. Such a requirement to exhaust administrative review procedures is allowed under the Convention, when it exists in national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Paragraph 3 creates a further class of cases where citizens can appeal to administrative or judicial bodies. It follows on the eighteenth preambular paragraph and the Sofia Guidelines to provide standing to certain members of the public to enforce environmental law directly or indirectly. In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm. Indirect citizen enforcement means that citizens can participate in the enforcement process through, for example, citizen complaints. However, for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures. Public enforcement of the law, besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries. In some countries, moreover, the citizen enforcer can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules on behalf of the appropriate government agency.

What can be reviewed?

Under the Convention, members of the public have the right to challenge violations of national law relating to the environment, whether or not these are related to the information and public participation rights guaranteed by the Convention. The provision potentially covers a wide range of administrative and judicial procedures, including the “citizen enforcement” concept, in which members of the public are given standing to directly enforce environmental law in court. The obligation can also be met, for example, by providing for the opportunity to initiate an administrative procedure. Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but that the public also has a role to play.

What can trigger the review procedure?

Under the Convention, Parties must ensure that members of the public can directly enforce the law in the case of acts and omissions by either private persons or
public authorities. For example, a local environmental organization that meets the criteria set out by a particular Party may challenge a violation by a facility of waste-water discharge limitations in its permit. The environmental organization might have the right to take the owner or operator of the facility to court, claiming a violation of the law, and receive a remedy such as a court order to stop the illegal waste-water discharges. (See also commentary to art. 9, para. 4, below, concerning injunctive relief.)

In addition, members of the public may challenge acts or omissions of public authorities that transgress national environmental law. “Omissions” in this case includes the failure to implement or enforce environmental law with respect to other public authorities or private entities.

**Who can ask for review? – The issue of standing**

The Convention requires Parties to ensure standing to enforce environmental law for members of the public meeting criteria that may exist in national law. The Convention does not affect the right of Parties to set criteria by which members of the public can have access to environmental enforcement proceedings. Paragraph 26 of the Sofia Guidelines promotes the notion of broad standing in proceedings on environmental issues.

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**Public standing to enforce national law**

Most UN/ECE countries already grant some level of standing to individuals and organizations to go to court to challenge violations of national law by both private persons and public authorities. For example, in Poland NGOs may bring both civil and administrative cases, based purely on the statutory goals of the organization. Thus, an organization with the statutory goal of protecting the environment automatically has standing to bring an administrative case to enforce environmental law. In Hungary, any citizen can file a suit in the Constitutional Court against the government, if it has failed to fulfil legislative responsibilities.

**Who carries out the review?**

Article 9, paragraph 3, gives the public access to administrative or judicial procedures. This provision can potentially cover a wide range of procedures.

In most countries, criminal enforcement remains in the hands of the government. However, there are a few exceptions. For example, in Poland, the Petty Offences Code of 1971 authorizes some associations, including ecological ones like the Nature Protection Guard and the Animal Protection Association, to act as public prosecutors in the prosecution of petty criminal offences under the Nature Conservation Act of 1991. The associations enjoy the rights of a public prosecutor, including the right to appeal to the criminal court.
Standing requirements under article 9

Paragraph 1 Standing to review access to information:
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.

Paragraph 2 Standing to review public participation and other relevant provisions:
Members of the public concerned, having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.

Paragraph 3 Standing to review contraventions of national environmental law:
Members of the public, where they meet the criteria, if any, laid down in national law.

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.

Paragraphs 1, 2, and 3 of article 9 each describe particular grounds for the public to pursue a review procedure. Paragraph 4 describes the minimum qualitative standards that must be met in all such procedures, as well as the type of remedies that must be provided.

“Adequate and effective remedies”

The ultimate objective of any administrative or judicial review process is to obtain a remedy for a transgression of law. Under paragraph 4, Parties must ensure that the review bodies provide “adequate and effective” remedies. These remedies are to include injunctive relief when appropriate. When irreversible damage from a violation has already occurred, a remedy often takes the form of monetary compensation. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies also may issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is called “injunctive relief.” In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases the resulting damage to health or the environment would be irreversible. Compensation in such cases is often inadequate.
What is injunctive relief?

_Injunctive relief:_ Injunctive relief is a remedy designed to prevent or remedy injury. It allows a person to secure an order against another person requiring him or her to do something, for example, to provide access to information or access to a site, to hold a hearing, or to cease an unlawful activity. The order issued by the tribunal is enforceable through other proceedings. In environmental cases, injunctions, which allow the tribunal to cause a person to cease a violation or undertake some act, are therefore often more flexible and responsive to the underlying environmental or other problem than other remedies such as monetary damages or criminal sanctions.

_Preliminary injunctive relief:_ In cases where harm is occurring or is threatened, or where a statute designed to protect public health and welfare is being or may be violated, a tribunal may have the power to grant injunctive relief to maintain the status quo or restore the situation to an earlier condition pending resolution of the case. Generally, tribunals require the party seeking preliminary injunctive relief to show that: (i) irreparable injury is immediately threatened or may occur before the case can be heard in full and (ii) the remedy sought is likely to be awarded in the final hearing on the merits. In environmental cases, it may be sufficient to show that a statute or regulation is being or may be violated. In emergency or other serious cases, the tribunal sometimes will award preliminary relief _ex parte_, without a hearing, on the basis of the pleadings and evidence.

The Convention requires injunctive relief and other remedies to be “adequate and effective.” Adequacy requires the relief to fully compensate past damage, prevent future damage, and may require it to provide for restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.

Option for when to use injunctive relief

In Hungary, preliminary injunctive relief may be ordered:

(i) If it is “indispensable” to avert damage;
(ii) To avoid a change in the factual basis of the legal proceedings; or
(iii) If necessary in other instances deserving special attention.

If the court finds that any one of these conditions is satisfied, it must further find that the harm caused by the injunction will not exceed the advantage gained by its issuance.\(^{64}\) This legal test allows the court to decide whether an injunction is appropriate in a given case.

\(^{64}\) Hungary, Act. III [1952] on Civil Procedure, Article 156.
As mentioned above, injunctive relief is not the only effective remedy. In some countries, for example, the citizen enforcer in a proceeding similar to those contemplated under article 9, paragraph 3, can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules on behalf of the appropriate government agency.

“Fair, equitable, timely and not prohibitively expensive”

In addition to specifying kinds of remedies, article 9, paragraph 4, requires Parties to ensure that review procedures under paragraphs 1, 2 and 3 are “fair, equitable, timely and not prohibitively expensive.” Fair procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest. Fair procedures must also apply equally to all persons, regardless of position, race, nationality or other suspect criteria. (See also commentary to art. 3, para. 9, although fairness in justice may require non-discrimination with respect to other classifications than those laid out there, such as age, gender, religious affiliation, etc.) Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.

Timeliness is also very important to review procedures under article 9. This requirement reinforces the requirement of paragraph 1 that Parties ensure an “expeditious” review process. Under the Convention, Parties must adhere to this standard of timeliness in providing any review process, whether by court or other review body. Many countries have already recognized the importance of timeliness to the administration of justice. For example, in Belarus, appeals and complaints regarding environmental administrative decisions must be considered within one month, with a possible extension of an additional two months. In Ireland, courts have the discretion to pull certain cases from the docket queue and deal with them immediately when the case involves issues of an urgent and time-sensitive nature.65

Finally, the Convention requires Parties to provide review procedures that are “not prohibitively expensive.” The cost of bringing a challenge under the Convention or to enforce national environmental law may not be so expensive that it prevents the public, whether individuals or NGOs, from seeking review in appropriate cases. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation.

65 Ireland, DTD, p. 106.
**Keeping costs down**

Costs associated with going to court can include:

- Court fees,
- Attorney’s fees,
- Witness transport costs, and
- Expert fees.

These types of costs represent a substantial financial barrier for the public. Some countries have taken steps to control them:

- In Slovakia, NGOs are exempt from paying court fees.\(^{66}\)
- In Austria, an appeal of a refusal of access to information is free of charge and the plaintiff does not need a lawyer to launch the appeal.
- In many countries attorneys’ fees are awarded to the prevailing party in a case. In the United States, in addition, members of the public bringing a case to enforce the law in the public interest may not be required to pay the defendant’s costs, even if the case is unsuccessful or dismissed.

**“In writing and publicly accessible”**

The Convention requires all decisions of any of the review bodies under article 9 to be in writing. This includes interim decisions as well as binding, final decisions. Court decisions must, in addition, be publicly accessible. Decisions by other bodies must be publicly accessible whenever possible.

5. **In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.**

First, paragraph 5 requires Parties to provide information to the public on access-to-justice procedures. This reinforces the requirement of article 3, paragraph 3, that each Party shall promote environmental education and awareness on how to obtain access to justice. Such information can be provided in a variety of ways. One example is found in the Convention itself. Article 4, paragraph 7, provides that refusals of access to information requests must include information on access to review procedures provided for in accordance with article 9. A similar mechanism could be used in the issuance of decisions under articles 6, 7 and 8. Article 5, paragraph 7 (b), also requires Parties to publicize matters within the scope of the Convention, which would include matters relating to access to justice.

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\(^{66}\) Slovakia, Act on Court Fees, No. 71/1992, Article 4.
Article 9, paragraph 5, also requires Parties to consider the establishment of “appropriate assistance mechanisms” to overcome barriers to access to justice. This builds on the provision in article 3, paragraph 2, that public authorities should assist and provide guidance to the public in seeking access to justice.

**Potential barriers to access to justice**

The barriers under article 9, paragraph 5, can include, *inter alia*:

- Financial barriers,
- Limitations on standing,
- Difficulty in obtaining legal counsel,
- Unclear review procedures,
- Corruption,
- A lack of awareness within the review bodies,
- Weak enforcement of judgements.

In addition, violations of environmental laws are usually difficult to prove without clear environmental standards, clear emissions requirements in permits, and regular monitoring and reporting of emissions data.

The Convention already requires or encourages many of the strategies that will increase opportunities for access to justice. For example, article 9 encourages a broad interpretation of who may bring a review under national law. A broad interpretation, allowing, in general, any interested individual or organization to bring a challenge, would substantially reduce a fundamental barrier to access to justice, and practice in some countries suggests that it would not be overly burdensome on the work of the courts or other tribunals. Article 9 also requires reviews to be conducted by impartial and independent bodies. When countries ensure that judicial, administrative and other review bodies are independent and impartial, institutional barriers to access to justice are reduced.

Article 9 requires access to justice to be affordable for members of the public. The earlier discussion under article 9, paragraph 4, gives examples of how to overcome some of the financial barriers to access to justice such as no-cost alternatives to courts, shifting fees for court expenses to the violator, reducing court costs, and finding alternatives to bond requirements. In addition, some countries establish and support legal assistance offices that provide free or low-cost legal advice to individuals and citizens’ organizations. In Poland, individuals or associations that cannot pay the costs associated with going to court may be entitled to a court-appointed lawyer. Other countries, such as Armenia, Canada, the Czech Republic, Hungary, the Netherlands, the Republic of Moldova, the Russian Federation, Slovakia, Ukraine, the United Kingdom and the United States have privately funded or university-based legal assistance centres. In these cases, elimination by the government of technical obstacles to the creation, operation and funding of a not-for-profit organization is crucial to ensuring that such privately funded legal assistance centres continue to exist.
Article 9 also requires remedies to be available. In addition, if courts and other review bodies have the power to enforce their decisions, one further potential barrier to access to justice will be removed. In many countries, administrative or court judgements have effectively been negated by delay in or lack of enforcement. To remedy this, many countries give the review body powers to enforce its own judgements. For example, in the Russian Federation, both civil and arbitration procedures are supported by special institutions of court executors to enforce court decisions through a system of fines. In the United Kingdom, the United States and other common law jurisdictions, failure to comply with a court order may constitute contempt of court ultimately punishable by fine or imprisonment. Awards of compensation can be enforced through a variety of means, ranging from seizure of goods and property, and impoundment of bank accounts, to attachment of wages.

Finally, countries have many options to reduce the burden of proof in a case. Clear environmental laws, rules and standards are important in this regard. For example, clear emissions levels set out in permits and clear standards of conduct to which actual emissions and actions can be compared can improve the chances that a person may enforce the law. When a person obtains information concerning required emissions levels, deadlines for compliance or other enforceable substantive requirements in statutes, rules or permits, it is easier to identify and prove violations. Under article 9, paragraph 3, a law that simply prohibits “harmful” or “dangerous” pollution is more difficult to enforce consistently and requires citizen enforcers to tackle complicated questions of science and policy. With clear standards of conduct, the only question at issue is whether the defendant violated the legal standard, order or permit.

**Elements of access to justice**

**Who can bring a challenge?** The Convention encourages a broad interpretation of who has “standing” to bring a challenge.

**What can be challenged?** The Convention allows decisions, acts and omissions to be challenged. It allows both access to justice in terms of its own provisions and in terms of enforcing national environmental law.

**Who can hear a challenge?** An appropriate court or impartial and independent review body as established under national law may hear a challenge under the Convention.

**What are the remedies once a challenge is brought?** The Convention requires Parties to provide effective remedies, including injunctions.

**How can barriers to access to justice be overcome?** Parties can assist the public to obtain access to justice by removing financial and other barriers.
Annex 5

Executive summary and paragraph 4.7 of the White of the European Commission on environmental liability

EXECUTIVE SUMMARY

This White Paper explores various ways to shape an EC-wide environmental liability regime, in order to improve application of the environmental principles in the EC Treaty and implementation of EC environmental law, and to ensure adequate restoration of the environment. The background includes a Commission Green Paper in 1993, a Joint Hearing with the European Parliament that year, a Parliament Resolution asking for an EC directive and an Opinion of the Economic and Social Committee in 1994, and a Commission decision in January 1997 to produce a White Paper. Several Member States have expressed support for Community action in this field, including some recent comments on the need to address liability relating to genetically modified organisms (GMOs). Interested parties have been consulted throughout the White Paper's preparation.

Environmental liability makes the causer of environmental damage (the polluter) pay for remedying the damage that he has caused. Liability is only effective where polluters can be identified, damage is quantifiable and a causal connection can be shown. It is therefore not suitable for diffuse pollution from numerous sources.

Reasons for introducing an EC liability regime include improved implementation of key environmental principles (polluter pays, prevention and precaution) and of existing EC environmental laws, the need to ensure decontamination and restoration of the environment, better integration of environment into other policy areas and improved functioning of the internal market. Liability should enhance incentives for more responsible behaviour by firms and thus exert a preventive effect, although much will depend on the context and details of the regime.

Possible main features of a Community regime are outlined, including: no retroactivity (application to future damage only); coverage of both environmental damage (site contamination and damage to biodiversity) and traditional damage (harm to health and property); a closed scope of application linked with EC environmental legislation: contaminated sites and traditional damage to be covered only if caused by an EC regulated hazardous or potentially hazardous activity; damage to biodiversity only if protected under the Natura 2000 network; strict liability for damage caused by inherently dangerous activities, fault-based liability for damage to biodiversity caused by a non-dangerous activity; commonly accepted defences, some alleviation of the plaintiffs' burden of proof and some equitable relief for defendants; liability focused on the operator in control of the activity which caused the damage; criteria for assessing and dealing with the different types of damage; an obligation to spend compensation paid by the polluter on environmental restoration; an approach to enhanced access to justice in environmental damage cases; co-ordination with international conventions; financial security for potential liabilities, working with the markets.

Different options for Community action are presented and assessed: Community accession to the Council of Europe's Lugano Convention; a regime covering only

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67 See a schematic view of the possible scope of the regime in the annex to this summary.
transboundary damage; a Community recommendation to guide Member State action; a Community directive; and a sectoral regime focusing on biotechnology. Arguments for and against each option are given, with a Community directive seen as the most coherent. A Community initiative in this field is justified in terms of subsidiarity and proportionality, on grounds including the insufficiency of separate Member State regimes to address all aspects of environmental damage, the integrating effect of common enforcement through EC law and the flexibility of an EC framework regime which fixes objectives and results, while leaving to Member States the ways and instruments to achieve these. The impact of an EC liability regime on the EU industry’s external competitiveness is likely to be limited. Evidence on existing liability regimes was reviewed and does suggest that their impact on national industry’s competitiveness has not been disproportionate. The effects on SMEs and financial services and the important question of insurability of core elements of the regime are dealt with. Effectiveness of any legal liability regime requires a workable financial security system based on transparency and legal certainty with respect to liability. The regime should be shaped in such a way as to minimise transaction costs. The White Paper concludes that the most appropriate option would be a framework directive providing for strict liability for damage caused by EC regulated dangerous activities, with defences, covering both traditional and environmental damage, and fault-based liability for damage to biodiversity caused by non-dangerous activities. The details of such a directive should be further elaborated in the light of consultations. The EU institutions and interested parties are invited to discuss the White Paper and to submit comments by 1 July 2000.
4.7. Access to justice

The case of damage to the environment is different from the case of traditional damage, where victims have the right to raise a claim with competent administrative or judicial bodies to safeguard their private interests. Since the protection of the environment is a public interest, the State (including other parts of the polity) has the first responsibility to act if the environment is or threatens to be damaged. However, there are limits to the availability of public resources for this, and there is a growing acknowledgement that the public at large should feel responsible for the environment and should under circumstances be able to act on its behalf. The Commission has referred to the need for such an enhanced access to justice in its Communication to the Council and Parliament on ‘Implementing Community Environmental Law’\(^{68}\). An important legal instrument in this field is the Århus Convention.\(^{69}\) It includes specific provisions on access to justice that form a basis for different actions by individuals and public interest groups. These actions include: to challenge a decision of a public authority before a court of law or another independent and impartial body established by law (the right of administrative and judicial review), to ask for adequate and effective remedies, including injunctions, and to challenge acts and omissions by private persons and public authorities which contravene environmental law\(^{70}\). An EC environmental liability regime could contribute to the implementation of the Convention in Community law, along the following lines.

4.7.1. “Two tier approach”: the State should be responsible in the first place

Member States should be under a duty to ensure restoration of biodiversity damage and decontamination in the first place (first tier), by using the compensation or damages paid by the polluter. Public interest groups promoting environmental protection (and meeting relevant requirements under national law) shall be deemed to have an interest in environmental decision-making\(^{71}\). In general, public interest groups should get the right to act on a subsidiary basis, i.e. only if the State does not act at all or does not act properly (second tier). This approach should apply to administrative and judicial review and to claims against the polluter.

4.7.2. Urgent cases (injunctions, costs of preventive action)

In urgent cases, interest groups should have the right to ask the court for an injunction directly in order to make the (potential) polluter act or abstain from action, to prevent significant damage or avoid further damage to the environment. They should be allowed, for this purpose, to sue the alleged polluter, without going to the State first. Injunctive relief could aim at the prohibition of a damaging activity or at ordering the

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\(^{68}\) COM(96)500 final. "Better access to courts for non-governmental organisations and individuals would have a number of helpful effects in relation to the implementation of Community environmental law. First, it will make it more likely that, where necessary, individual cases concerning problems of implementation of Community law are resolved in accordance with the requirements of Community law. Second, and probably more important, it will have a general effect of improving practical application and enforcement of Community environmental law, since potentially liable actors will tend to comply with its requirements in order to avoid the greater likelihood of litigation." (p. 12).

\(^{69}\) UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, that has been adopted and signed, also by the Community, at the Fourth Ministerial Conference in Århus (Denmark), 23-25 June 1998.

\(^{70}\) Article 9 Århus Convention.

\(^{71}\) Article 2(5) Århus Convention.
operator to prevent damage before or after an incident, or at making him take
measures of reinstatement. It is up to the court to decide if an injunction is justified.
The possibility to bring claims for reimbursement of reasonable costs incurred in
taking urgent preventive measures (i.e. to avoid damage or further damage) should be
granted, in a first instance, to interest groups, without them having to request action
by a public authority first.

4.7.3. Ensuring sufficient expertise and avoiding unnecessary costs

Only interest groups complying with objective qualitative criteria should be able to
take action against the State or the polluter. Restoration of the environment should be
carried out in co-operation with public authorities and in an optimal and cost-effective
way. The availability of specific expertise and the involvement of independent and
recognised experts and scientists can play a fundamental role.
Since costs will inevitably be involved in making use of rights of access to justice, it
would be worthwhile to explore how out-of-court solutions, such as arbitration or
mediation, could be used in this context. Such solutions aim at saving time and costs.
Annex 6

Conclusions of the IMPEL Workshop on
Complaints procedures and access to justice for citizens and/or NGOs in the field of the environment within the European Union

10 and 11 May 2000, The Hague, the Netherlands.

General observations

1. Throughout the IMPEL workshop, organised by the Netherlands ministry of Housing, Spatial Planning and the Environment, the importance of the involvement of the public in environmental matters was stressed. It was noted that at both Community and international level, the issue of public involvement in the field of the environment has gained broad recognition, especially in more recent years. In particular, the Commission’s Communication on ‘Implementing Community environmental law’ and the Council Resolution on the drafting, implementation and enforcement of Community environmental law were important milestones in this respect. The signing of the “UN/ECE Convention on access to information, public participation in decision making and access to justice in environmental matters” (hereinafter referred to as the Aarhus Convention) in June 1998 was a further major step in improving the role of the public in environmental matters.

2. The workshop recognised that access to justice (third pillar of the Convention) is worked out in less detail in Community legislation and in the Aarhus Convention than the other two pillars of the Convention (access to information and public participation). In particular the wording of some elements of Article 9 of the Aarhus Convention is not specific and includes references to the existing national legal systems. Although this flexibility is important because of the complex character of the issue and the need to respect national legal systems, important questions will arise during the implementation process. Therefore, the workshop stressed the importance of a good dialogue between the signatory parties that are in the process of implementing the Aarhus Convention, in order to learn from each other and to see whether certain questions could get answers and good practices could be identified.

3. In addition to the discussion on access to justice at the level of the Member States, the participants found it useful to discuss the issue of development and further improvement of access to justice for citizens and NGOs in the field of the environment at Community level. The ECJ-case Greenpeace v. Commission and other relevant cases were considered.

4. At the workshop, in addition to the represented EU-Member States and the European Commission, representatives of a number of CEE Countries, NGOs and the Regional Environmental Centre for Central and Eastern Europe (REC) were especially welcomed.

5. Whilst recognising that IMPEL is a network that enables an informal discussion on this complex issue without fixing national positions, the conclusions of this document were adopted by the participants of the workshop. These conclusions do not necessarily reflect the view of Member States. The participants of the
workshop hope that these conclusions may contribute to a fruitful international
discussion on the issue in general and on the implementation process of the Aarhus
Convention in particular.
Access to Complaint procedures and Access to Justice at the level of the Member States

a) Who has access to procedures to challenge authorisations of activities that may harm the environment?

1. It was noted that in cases in which the obligations under the first two pillars of the Aarhus Convention were violated, every actor whose rights under the Convention have been affected, should have access to justice to challenge this.

2. The discussion made clear that in certain cases in which environmental pollution is or may be caused, no individual and concrete interests of persons (like property) are involved. It was recognised that also in these cases the public or representatives of the public should have access to procedures to protect the more diffuse interests of the environment (including biodiversity). It was clear from the discussion that environmental law differs from other areas of law because it relates to general interests in which there is often not a proprietary stake. However, it was stressed that one should take note of possible undesirable consequences of a very wide access to legal procedures in view of administrative difficulties that may arise.

3. It was noted that certain ‘filters’ may have to be introduced in the system. Reasons for this include not placing too high a burden on the administrative review bodies and the courts, as well as balancing all the interests involved, such as social and economic interests. Recognising the goal of the right of every person to a clean environment (Article 1 Aarhus Convention), some countries appear to lay the accent on the procedural filters, like for example the requirement to have participated in the preparatory phase of the decision making process. Other countries appear to build in a ‘filter’ by limiting the group of actors.

4. As far as the group of actors that has access is concerned, some countries stated that providing access to justice for any person (actio popularis) might create problems given their existing legal systems. However, some other Member States stated they had had positive experiences with an actio popularis, for example by establishing certain procedural requirements to make the system manageable. Notwithstanding the possibility that individual citizens, according to national law, may have a right to access to justice, it was recognised that as a minimum requirement laid down in the Aarhus Convention, NGOs have the possibility to protect the general interest of the environment.

b) Access to complaint procedures and access to justice to challenge plans, programmes and general regulations

1. It was noted that in cases in which the obligations under the first two pillars of the Aarhus Convention were violated, every actor whose rights under the Convention had been affected, should have access to justice to challenge this.

2. It was proposed that a distinction should be made between challenging general instruments on the basis of procedural grounds on the one hand and on substantive grounds on the other hand. When substantial procedural failures are identified, access to justice should not be limited. Contesting substantive issues should be restricted to legally binding instruments. In these cases NGOs that fulfil certain national requirements, should at the very least have the possibility to challenge these instruments.
3. With regard to legal binding instruments that are not of a purely environmental nature, but which may have an effect on the environment (e.g. energy, transport, agriculture), these too should be capable of being challenged in so far as the environmental consequences are concerned, taking into account what was stated under 1) and 2) above.

c) Possibilities for the public to ensure compliance with environmental law, in particular by forcing administrative enforcement or initiating criminal prosecution in case of violations of national (environmental) law

1. It was emphasised that the public has an important role in signalling violations of environmental law in practice. Therefore, in all Member States the public has the possibility to bring cases of violations to the attention of the competent authority. Furthermore, members of the public may request the competent authority to undertake enforcement action.

2. In some Member States members of the public and/or NGOs do not have the possibility to challenge the decision not to enforce before a court. One of the reasons for this is that in several Member States, enforcement of (environmental) law, beyond the impairment of individual rights, is considered an exclusive responsibility of the state authorities. In other Member States however there is the possibility to challenge the decision of the competent authority not to enforce, but these may be subject to procedural restrictions (e.g. the applicant may have to show sufficient interest or the court has a discretion to grant leave). Additionally it was noted that in a few countries a member of the public or an NGO could initiate criminal proceedings themselves or request the public prosecutor to act. Furthermore it usually is possible to hold the polluter liable for damages, which may be strengthened by the forthcoming Framework directive on environmental liability. It was recognised that despite the extensive provisions relating to public participation in the decision-making process, these were of little value if it were not possible to ask for a review of a failure to enforce.

3. As to whether the public may challenge decisions of the authority not to enforce, in the existing systems in all Member States it is irrelevant whether the violation is a breach of European or international obligations (as transposed into national law).

4. In several Member States, it is possible to complain about the lack of enforcement action to an independent body. This may for example be an Ombudsman, Inspectorate or Environmental Agency. In some Member States agencies appear to have the power to force the competent authority to undertake action, however an Ombudsman is generally not in this position.

5. It was recognised that the public could however effectively put pressure on the authorities to enforce by bringing cases to the attention of the media.

d) Adequate and effective remedies

1. If a decision is taken to allow a certain activity, in most countries the public has the possibility to object and request a suspension of the coming into effect of the decision. However, it was explained that the use of this possibility may be very difficult because in some Member States the plaintiff has to provide considerable financial security to cover the cost of the cessation of the activity in the event that he should lose the case. A speedy conclusion of the case could avoid the necessity to provide financial security.
2. Where an installation has been legally operated for some time in accordance with a permit issued several years ago (but which is technically outdated), and members of the public think that this ongoing activity is causing unacceptable adverse impacts on the environment, in most Member States, the public has the possibility to request the competent authority to update the permit. However, in cases in which there is a direct risk for the environment, this is not considered as an ‘effective’ remedy. In some Member States there is the possibility to bring an action against the polluter under civil law, which could include requiring the activity to cease to operate, while in other countries members of the public can ask the authorities to withdraw the permit.

3. In the case where an installation is causing adverse impacts on the environment by violating the permit and direct action is necessary, the public authority has the possibility to cancel the activity in most Member States. Members of the public may request the authorities to do this, but as discussed under key-issue c), it is not always easy to force the competent authority to undertake enforcement action. However, in some Member States the public can ask the Court to direct the public authority to take action.

e) Establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice

1. It was stressed that practical barriers often reduced the value of procedures that are available for the public. Important examples that were mentioned include the lack of the financial and human resources on the side of citizens and NGOs, the duration and costs of proceedings, the duty of legal representation and the lack of environmental awareness and specific technical expertise on the part of the courts. Some good practices in Member States were exchanged, but because of the limited time available during the workshop, it was suggested that the issue should be the subject of further study and dialogue.

2. Examples of good practices may include good means of providing information on available procedures to the public, the possibility of having special environmental courts (or divisions of Courts), assistance to judges from environmental experts and funding of legal aid or technical assistance to be able to undertake action.

Access to complaints procedures and access to justice at the Community level

1. As far as the complaints procedures are concerned, it was stated that 27% of all the complaints sent to the European Commission relate to the environment. Furthermore, it was explained that from the making of the complaint to a final decision of the Court takes approximately 5 years. However, the general policy within the Commission on complaints handling is that within 1 year the complaint should be solved or closed or the case should become a formal infringement procedure. Ways of speeding up and improving these procedures were discussed. One possibility might be to increase resources within the Commission, or by using selective criteria in deciding which cases should be pursued. Another might be to improve procedures at national level (as was mentioned as one of the possibilities in the 1996 Communication). However, a delicate balance has to be struck between speeding up and improving the procedure and still maintaining the right of the citizen to complain to the Commission. Bearing in mind the discussion on access
to justice at the national level and the possible gaps at that level, it was acknowledged that it may be desirable to have some possibilities to make complaints to the Commission.

2. Some doubts were expressed as to whether the improvement of the possibilities at the national level would in fact significantly reduce the number of complaints sent to the Commission. Members of the public but also other actors may just wish to have the opinion of the Commission, regardless of the available procedures at the domestic level.

3. As far as the access to the European Court for the public/NGOs is concerned to challenge acts and decisions of the EU institutions, many participants felt that it was too soon to give an opinion on this issue. However, some participants stressed that with regard to the third pillar of Aarhus the Convention does not provide for different criteria for having access at the national level on the one hand and having access to the Community level at the other hand, especially in the light of the fact that the European Community is a signatory to the Aarhus Convention.

4. As a consequence, it was recognised that as a minimum requirement laid down in the Aarhus Convention, NGOs have the possibility to protect the general interest of the environment, also at the Community level.

5. There appeared to be general agreement that broadening access to the European Court would require an amendment of the Treaty at an IGC. That would depend on the political will, in particular in the Member States.

Suggestions for future action in the field of complaints procedures and access to justice

1. Stimulate the co-operation and the need for a continued dialogue between and within existing networks and other bodies (within the UN/ECE region) to promote the implementation of all three pillars of the Aarhus Convention. With regard to the IMPEL-network, the project on public participation in environmental decision-making can be mentioned as a concrete example. In the framework of the UN/ECE the “Implementation Guide” can be mentioned as a useful tool for signatory states which are in the process of ratification and implementation.

2. Further exploration of possible objective criteria for NGO’s as well as procedural requirements in order to keep the systems of access to complaints procedures and access to justice manageable.

3. Further exploration of possible solutions to remove practical barriers to access to justice.

4. Communicate the report for discussion and the results of the workshop to, for instance:
   - the 2nd Meeting of Signatories to the Aarhus Convention which will be held in Dubrovnik, Croatia from 3-5 July 2000,
   - interested parties via the IMPEL-website,
   - the people involved in the IGC-negotiations, with regard to access to justice on the Community level.
Annex 7

Report of the IMPEL Workshop on Complaint procedures and access to justice for citizens and/or NGOs in the field of the environment within the European Union

10 and 11 May 2000, The Hague, the Netherlands.

Opening of the workshop
After the opening of the workshop by ms. Annelie Kohl, national coordinator of the IMPEL network for the Netherlands, the chair of the workshop, ms. Mary Sancy, Professor at the University of Arlon, Belgium, explained the reasons for the Netherlands Ministry of Environment to organise this workshop and gave an overview of the programme. The purpose of the workshop was to stimulate a discussion on the development and improvement of access to justice at the level of Member States and the Community and to define good practices concerning the access to procedures for citizens and NGO’s on the basis of experiences in the Member States.

I. Access to procedures at the level of the Member States

Introduction by Mr. George Kremlis
Mr. Kremlis gave an overview of the relevant developments in the field of the issue of access to complaints procedures and access to justice since 1996. The Commission’s Communication on Implementing Community Environmental Law (1996) as well as the Resolution of the Council thereon (1997) were mentioned as two fundamental documents. Mr. Kremlis also noted the importance of the Aarhus Convention, signed in June 1998, Aarhus, Denmark. After this sketch of the historical background of the workshop, mr. Kremlis described the initiatives that had been or will be taken by the Commission to implement the three pillars of the Aarhus Convention. Attention was paid to the revision of the 90/313/EG directive on access to information (adoption of the proposal by the Commission mid 2000), the work on access to information held by the EU-institutions, the initiative to undertake legislative action to ensure public participation in a number of existing EC-directive in the field of the environment (proposal for a horizontal instrument to be adopted by the Commission in September/October 2000), the initiatives described in the Commission’s White Paper on Environmental Liability of 9 February 2000 (proposal to be adopted in 2001) and additional initiatives to improve access to complaint procedures and access to justice (e.g. by the instrument of a Recommendation). As far as the issue of access to justice at the Community level is concerned, mr. Kremlis stated that an improvement would probably require an amendment of the Treaty. At the moment the issue is however not part of the agenda of the IGC of 2000. In this respect, mr. Kremlis noted that there is a good possibility that the right to a clean and healthy environment will be adopted in a EU-Charter on fundamental rights. This development may have a positive effect on the discussion on the three pillars of public involvement.
Introduction of the research report by Prof. Jonathan Verschuuren

Prof. Jonathan Verschuuren gave a presentation on the report that forms the basis of this workshop. Both, preparatory steps and the most important elements of the content of the report were shortly explained.

In the light of this introduction, it was stated that when discussing the issue of access to justice, attention should not only be focused on the issue of standing, but also on other aspects that are relevant for the possibility of the public to challenge decisions and acts, for example the way in which the court handles a case (marginal or in depth assessment). It was accepted that for the workshop this broad approach would be followed. Furthermore, it was accepted that attention would not only be focused on the access to courts, but also to access to complaint procedures.

Introduction Mr.Stephen Stec

Mr. Stec, legal expert working for the Regional Environmental Centre for Central and East Europe (REC), gave a short overview of the work that is conducted by the ECE-secretariat and the REC in order to assist signatory Parties in the process of implementation and ratification of the Aarhus Convention. Particular attention was paid to the implementation guide that has been developed by the ECE-secretariat and the REC, assisted by a group of about 30 legal experts in many different countries. This guide is recently finalised and aims to give signatory Parties guidance in interpreting the Aarhus Convention and the measures that may be taken at the domestic level to promote the spirit and provisions of the Convention as effective as possible. The implementation guide will on a short term be available in English, Russian and French. (The part of the guide that relates to Article 9 of the Convention has been attached to the report of the Tilburg University that formed the basis of the workshop. The full text of the guide is available on the ECE-website: see the report of the Tilburg University for more details).

Mr. Stec explained that the guide has already successfully been used during a workshop in Turkmenistan, Central Asia. The ECE-secretariat and the REC have planned to organise a number of workshops in the CEEC-region in order to provide for assistance in the implementation process. At the second meeting of Signatory Parties to the Aarhus Convention in Juni, Dubrovnik, Croatia, the ECE-secretariat and the REC will give an overview of their activities.

Discussion on the key issues regarding access to procedures at the level of the Member States

In 2 separate working sessions (second half morning and afternoon), five key issues regarding the access to procedures at the Member States level were discussed. Basis for discussion formed the research report, in particular the questions that had been formulated. The discussions were informal and lively and although the issues are strongly related to the national legal systems, it proved to be possible to have a good exchange of views. With regard to several aspects it was even possible to reach consensus. The outcome of the discussions in the working sessions were reported in the plenary. Finally, on the basis of drafting proposals prepared by a drafting group the workshop included the most important findings on the key issues in the conclusions of the workshop.
II. Access to procedures at the Community level

During the morning of the second day of the workshop, attention was focused on the issue of access to procedures at the community level. This issue was also introduced by Prof. Verschuuren and mr. Ralph Hallo gave a presentation of his views on this item.

Introduction by mr. Ralph Hallo

Mr. Hallo, working for the Foundation for Nature and Environment in the Netherlands and involved during the negotiating process of the Aarhus Convention on behalf of European NGOs, stated that the important distinction between the issue of access to justice at the domestic level on the one hand and the access to justice at the community level is that at the Community level there is no access to justice at the moment. To illustrate this, he referred to the Greenpeace decision of the European Court of Justice.

When the EEC was established at the end of the fifties, environmental issues were not discussed yet, so it is logical that access to justice for the public for environmental affairs was not included in the Treaty at that time. It makes clear that, on certain points, the treaty is out of date. However, there have been opportunities to correct this gap during the ICG-conferences. Because this has not been achieved at the occasion of the first two ICG, the European NGOs drafted a document ‘Greening the Treaty III’ to provide for ideas for the ICG 2000.

In most EU-Member States it has been recognised that for the environment special measures are required because of the special character of this policy field. Mr. Hallo wondered why is it taking so long before this recognition is translated at the Community level in a good access to the European Court? The proposal of NGOs is simple: change article 230(4) of the EC-Treaty by adding the following sentence: ‘A natural or legal person may be considered to have a direct and individual concern where the person’s interest is in a matter of an inherently shared nature, such as the environment.’ Mr. Hallo stated that this text may be improved, however, the baseline is that the Court has to open up for environmental disputes and that members of the public have legal standing at the Community level.

After this introduction, the issue of access to procedures at the Community level was discussed. On the basis of the questions formulated in the research Report of the Tilburg University, presented by Prof. Jonathan Verschuuren, the attention was focused on two important issues: firstly, the access to the possibility for the public to send a complaint to the Commission and secondly, the access for the public/NGOs to the European Court to challenge acts and decisions of the EU-institutions. For the most important findings, this short report refers to the conclusions of the workshop.

III. Closure of the workshop

On the afternoon of the second workshop-day the draft-conclusions were discussed and finally adopted. After the adoption of the conclusions, it was explained that the research report and the conclusions of the workshop will be on the agenda of the next plenary meeting of IMPEL (24-26 May, Porto, Portugal), in order to present the work done and to request for adoption by the meeting of the report and the conclusions.