



COMMISSION OF THE EUROPEAN COMMUNITIES

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2003/0246 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on access to justice in environmental matters**

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

### **1. JUSTIFICATION OF THE PROPOSAL**

#### **1.1. General considerations**

This proposal for a directive on access to justice in environmental matters covers a double objective. Firstly, it will contribute to the implementation of the *UN/ECE Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (hereinafter named Århus Convention). Secondly, it will fulfil some shortcomings in controlling the application of environmental law.

The Århus Convention, signed by the European Community and its Member States in 25 June 1998, consists of three pillars. The first pillar grants the public the right of access to environmental information. The second grants the right to take part in decision-making processes. Finally, the third pillar grants the public access to justice, i.e. the right to recourse to administrative or judicial procedures to dispute acts and omissions of private persons and public authorities violating the provisions of environmental law. Contributing to the implementation of the Århus Convention, two directives have been adopted: Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC<sup>1</sup> and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC<sup>2</sup>.

Furthermore, the objective of this proposal for a directive is to eliminate shortcomings in the enforcement of environmental law. These shortcomings have been demonstrated for numerous years<sup>3</sup>. At European Union level, the importance of public participation in enforcing environmental law was stressed on several occasions<sup>4</sup>. These shortcomings are due to, among other things, the lack of a financial private interest in enforcing environmental law, in contrast to other areas of Community law where economic operators require the correct application of legislation, such as internal market and competition. Moreover, the failure to fully enforce environmental laws can distort the functioning of the internal market by creating unequal terms of economic competition for the economic operators. Thus, depending on the Member State concerned, the economic operators in non-compliance with their environmental obligations may receive an economic advantage over those that respect environmental law.

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<sup>1</sup> OJ L 41, 14. 2.2003, p.26

<sup>2</sup> OJ L 156, 25.6.2003, p.17

<sup>3</sup> See European Commission, Implementation of Community law – Communication to the Council and the European Parliament, COM (96) 500. First annual survey on the implementation and enforcement of Community environmental law, SEC (1999) 592 of 27.04.1999. Second annual survey on the implementation of Community environmental law, SEC (2000) 1219 of 13.07.2000. Third annual survey on the implementation Community environmental law, SEC (2002) 1041 of 01.10.2002.

<sup>4</sup> See Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002, laying down the Sixth Community Environment Action Programme, OJ L 242, 10.9.2002, p. 1.

Consequently, the enforcement of environmental law primarily falls on public authorities and depends on numerous factors such as the resources at their disposal, or the political importance attached to the enforcement of environmental protection. Resulting differences create considerable disparities between the systems of Member States and consequently result in different levels of environmental protection being applied. Notably, these disparities frequently cause conflicts between Member States, especially when considering the protection of international water-courses, air quality, or cross-border emissions of polluting substances.

In addition, the lack of enforcement of environmental law is too frequently due to the fact that legal standing is limited to persons directly affected by the infringement. A way of improving enforcement is hence to ensure that representative associations seeking to protect the environment have access to administrative or judicial procedures in environmental matters. Practical experience gained from granting legal standing to environmental non-governmental organisations indicates that this can enhance the implementation of environmental law.

## **1.2. Environmental objectives to be achieved**

Article 2 of the EC Treaty provides that the Commission's mission, inter alia, is to promote a high level of environmental protection and quality improvement. Therefore, the Community, under Article 3(1) of the EC Treaty, must implement an environmental legal policy that contributes to the pursuit of the following objectives emphasised by Article 174 of the EC Treaty:

preserving, protecting and improving the quality of the environment,

protecting human health,

prudent and rational utilisation of natural resources,

promoting measures at international level to deal with regional or world-wide environmental problems.

The purpose of this proposal is to strengthen the enforcement of environmental law, and therefore, environmental protection. Effective enforcement is crucial if environmental law is not to be a question of theory, but a matter of practice. Moreover, environmental law will only produce the desired effects if its enforcement is possible throughout the European Union. Hence, by ensuring the conformity of Community law with the provisions of the Århus Convention, the proposal facilitates ratification of this Convention by the Community.

## **2. CHOICE AND JUSTIFICATION OF THE LEGAL BASIS**

As highlighted above, the proposal facilitates the Community environmental policy objectives defined in Article 174 of the EC Treaty. Therefore, the proposal is founded on Article 175(1) of the Treaty.

### **3. SUBSIDIARITY AND PROPORTIONALITY**

#### **3.1. Objectives of the action proposed in relation to the obligations of the Community**

By signing the Århus Convention, the Community demonstrated its commitment to improving the effectiveness of its environmental policy primarily increasing public awareness and participation in the decision making process. As a result of the signature and in order to ratify the Convention, the Community is obliged to align its legislation to the requirements of that Convention. In line with this, the ratification of the Århus Convention is a political priority for the Commission.

The obligations imposed on the European Community by the signature of the Århus Convention justify by themselves a legally binding instrument on the issue "access to justice in environmental matters". The Community will only be able to fulfil these obligations if it is able to ensure that citizens and non-governmental organisations have the required access to justice as far as the Community law is concerned. To be able to grant these rights in a uniform way throughout the European Union, the Community has to set out a common minimum framework that applies to all Member States.

Furthermore, under Article 2 of the EC Treaty, a Community task is the promotion of a high level of environmental protection and quality improvement. According to Article 175(1) of the EC Treaty, the European Community is competent to act as is necessary to ensure the achievement of the objectives of Article 174 of the EC Treaty. Thus, the Community has developed a considerable *acquis* in the environmental field. It is also the Community task to create the conditions to ensure that this *acquis* is being applied, and hence to enact the necessary procedural provisions.

This proposed directive aims at a better enforcement of environmental law in order to fulfil the existing shortcomings. Better access to justice in environmental matters for representative groups advocating environmental protection will have numerous positive effects, the most significant being a general improvement of the *practical application* of environmental law. In practice, access to justice is likely to be sought only as a last resort, hence contributing to the enforcement of environmental law. Given that, environmental law will have its desired effects only if its enforcement is guaranteed throughout the whole Union, it is absolutely crucial to ensure that the observance of environmental law can be reviewed in court.

With the enlargement of the European Union these aspects gain even greater importance. Thus, instruments aiming at the enforcement of environmental law will no doubt also lead to a better implementation of the *aquis communautaire* in the accession countries.

#### **3.2. What is the Community dimension of the problem?**

The proposal follows the process of restructuring the approach of public authorities to openness and transparency that started with the Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment<sup>5</sup>, and was further developed by other instruments. The most recent development is Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes concerning the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC.

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<sup>5</sup> OJ L 158, 23.6.1990, p.56.

Essentially, this process comes from the European Community's obligation to align Community environmental law with the provisions of the Århus Convention. Improving conditions for access to environmental justice in environmental matters satisfies the third pillar of the Convention, and will facilitate ratification of the Århus Convention by the European Community.

Moreover, the proposed directive aims to compensate for existing shortcomings in the application of environmental law. While the Community legislative efforts have mainly focussed on a change of substantive environmental law, procedural provisions and mechanisms to ensure effective application of environmental law differ considerably between Member States. This, together with other factors, has led to considerable differences in the practical application of environmental law.

### **3.3. What is the most effective solution, comparing the means available to the Member States and the Community?**

A Community legal instrument that will set out a common framework of procedural provisions to be applied in a uniform way to all Member States is necessary for the following reasons:

The signature of the Århus Convention imposes on the European Union the obligation to ensure that access to justice in environmental matters is granted. In the light of the very uneven situation in Member States as concerns compliance with environmental law and the disparate state of enforcement, the need for action at Community level to guarantee the objectives of the Århus Convention becomes evident.

An action at Community level is also required because of the transboundary dimension of environmental problems. Only Community action can guarantee the uniform application of environmental law. These aspects will increase in importance with the enlargement of the European Union.

The proposed directive establishes a general framework for access to justice in environmental matters, and, in order to respect the principle of subsidiarity, requires the Member States to develop the details of the framework. The framework focuses in particular on access to justice concerning acts or omissions by public authorities, given that this is an area where harmonised approach at Community level has most added value. In relation to possible action against private persons, which is also aimed at Article 9(3) of the Århus Convention, the proposed directive stipulates the objective, leaving it to Member States to set up appropriate criteria for related access to justice under their national law.

### **3.4. What will be the Community's inaction cost?**

Community inaction in relation to the implementation of the "access to justice" pillar means that it will not be able to comply with its international obligations. It would prevent the Community from ratifying the Århus Convention, with a resulting lack of credibility at international level. In this way, the credibility of the Community with respect to good governance would also be at stake.

As the proposal aims at setting out a common framework for Member States to ensure the respect of environmental law, Community inaction will result in different levels of environmental protection and different standards of environmental law enforcement at Member State level.

### **3.5. Which instruments are at the disposal of the Community in order to meet the objective?**

The Sixth Community Environmental Action Programme calls for the development of new Community legislation and a more effective implementation in order to achieve its goals. Hence, the Action Programme recognises the need to strengthen measures to improve compliance with Community rules on environmental protection, and to fight against the violation of environmental law.

To achieve these goals, the Commission services has discussed and weighed up different options:

- No Community action: No obvious arguments have been found in favour of such course of action, since the lack of a common instrument on this issue has shown the existing shortcomings in controlling the application of environmental law. There are evident arguments against Community inaction. Firstly, the inaction would not enable the Community to ratify the Århus Convention and consequently the overall impact of the Convention would be weakened. Secondly, the lack of a common framework has involved different levels of environmental protection and different standards of environmental law enforcement at Member States level that distort the functioning of the internal market by creating unequal conditions for economic competition in Member States. Finally, disparities in the application of environmental law can also cause conflicts between Member States, especially when considering the protection of international watercourse, air quality, or cross border emissions of polluting substances.
- Recommendation on review procedures in environmental matters. A non-binding instrument would have the same consequences as the lack of any Community action since it would not enable the Community to ensure the correct observance of environmental law throughout its territory.
- Directive on review procedures in environmental matters. Only a legally binding instrument will enable full ratification of the Århus Convention by the European Community and at the same time guarantee the correct application of environmental law. In accordance with Article 249 of the EC Treaty a directive shall be binding as to the result to be achieved by each Member State. From this point of view a directive will promote a high level of environmental protection; and a better enforcement and practical application of Community environmental law in the EU and the accession countries alike.

### **3.6. Proportionality**

The proposed directive establishes the minimum conditions of access to administrative or judicial proceedings in environmental matters. Moreover, the proposal explicitly sets up the criteria capable of ensuring improved implementation of environmental law with the minimum impact possible.

The common framework proposed is based on the need both to implement the Århus Convention's provisions on access to justice, and to respect the administrative and judicial structures in the Member States. To do so, the proposal defines the following issues:

- In relation to access to justice regarding acts and omissions by private persons contravening environmental law, the proposal calls upon Member States to establish the appropriate criteria to meet the obligations under Article 9(3) of the Convention.
- In relation to acts and omissions by public authorities and in accordance with the Århus Convention, the proposal aims at the enforcement of Community environmental law by granting review proceedings. Such proceedings shall meet the following characteristics:
  - Acts and omissions by a public authority shall be subject to a procedural and substantive review. These acts shall be submitted to review where they have legally binding and external effect, excluding acts which have been adopted as a legislative instrument.
  - The review of acts and omissions shall be based on a two tiered approach. Prior to starting environmental proceedings, entities and members of the public having legal standing shall first have to give notice to the public authority designated in accordance with national law, to allow for the administrative act or omission being reconsidered. .
  - Members of the public and qualified entities shall have access to administrative or judicial review proceedings to challenge acts and omissions which contravene provisions of environmental law. The proposed directive sets out a framework of minimum standards on legal standing that allows maintaining national systems providing for a broader legal standing.

#### **4. COSTS OF IMPLEMENTING THE PROPOSAL FOR THE MEMBER STATES**

First, it must be recalled that the proposal aims to put Community law in line with the Århus Convention. At present, certain Member States have either ratified the Convention or announced their intention to ratify it as soon as possible. Under the terms laid down in the Convention all Member States have therefore committed themselves to take the necessary measures to grant access to justice in environmental matters.

Likewise, all Member States have in their constitutional systems, judicial and administrative structures to ensure the correct application of their legal systems. Hence, the structures as such already exist in the Member States. To a minor extent Member States may incur additional costs because the recognition of environmental NGOs foreseen by the present proposal places some administrative burden on them. Minor additional costs may also be incurred by the judiciary due to a potential increase of legal proceedings in environmental matters. However, given past experience only a small increase of proceedings in environmental matters in relation to the total number of legal proceedings is to be expected and any additional case load can be handled within the framework of existing judicial systems.

Another reason why no heavier burden will be placed on the judiciary is that the proposal provides for preliminary review by the competent public authorities. In this regard the public body may be burdened with additional expenses but it will be possible to handle these within the framework of existing administrative structures.

On the other hand, substantial benefits for the public will be reaped from the new instrument. It is to be expected that because of broader possibilities for filing a complaint the operators and the public authorities will comply with environmental provisions in order to avert enforcement orders that would create additional costs for them. It is to be assumed that by this preventive effect, expenditures for public authorities in the field of environmental protection will be substantially reduced. Prevention of environmentally harmful activities creates positive budgetary repercussions associated with distributing the economic burden of repairing and compensating for environmental damage among the taxpayers of a Member State.

Finally, successes in enforcing environmental law will also reduce social costs, as less environmental damage will have to be repaired or compensated for *post the fact*. This positively affects the expenditure side of the state budget since so far reparation and compensation of environmental damage frequently have to be financed by the public at large.

## **5. RESULTS OF THE CONSULTATIONS WITH THE INTERESTED PARTIES**

On 11 April and 22 July 2002 the Directorate-General "Environment" released, respectively, two working documents that established the core principles of the proposal for a Directive, and stated the objectives and the contents of the future directive. To maximise the effectiveness of the consultation process, these documents were distributed to Member States, non-governmental associations, associations of companies, regional and local authorities, and to the candidate countries. During spring and autumn 2002, stakeholder meetings were organised for the purpose of finalising a draft proposal for a Directive on access to justice in environmental matters.

### **5.1. Member States**

Two meetings were held on May and September 2002 with experts from Member States. At these meetings and also subsequently in writing, Member States made numerous comments and remarks regarding the proportional application of the proposed measure based on the principle of subsidiarity. Member States' opinions varied from the opposition to the text to its support.

Their main concerns made reference to the subsidiarity principle, to different degrees. Some of them felt that different issues of the proposal on access to justice directly affects their capacities and should be left to their own legislation. Among these issues the following can be noted:

- Legal standing: Groups without legal personality have no legal structure, their objectives are not established in a public, transparent document and they have no financial ways of answering for their acts. Based on these arguments, the experts felt that those groups should not be allowed to act in courts and administrative bodies of review.
- Qualified entities: The working documents stipulated that certain groups, previously recognised as such by means of a special procedure, could have access to review proceedings without having to claim the impairment of a right or having a sufficient interest. For some of the experts these provisions go beyond Article 9 of the Århus Convention.

- Interim relief measures: Some of the experts observed that there were no provisions at this respect in the Århus Convention. With a view to this fact, the possibility of laying down this sort of measure should be left to Member States' legislation
- Additional provisions: The second working document foresaw an obligation on Member States of sending periodical reports to the Commission services about the proceedings submitted to administrative and judicial bodies. The experts have stressed that this obligation would overburden their national administrations.

The text of the proposal takes into account these comments and observations. Hence, most of the controversial aspects were removed or adapted. The response to the Member States' observations can be summarised as follows:

- The general remarks on subsidiarity were not accepted. The signature of the Århus Convention imposes on the Community the obligation of aligning its legislation as a condition to adhere to the Convention. The Community will only be able to fulfil these obligations if it is able to grant the required access to justice in a harmonised way throughout the European Community.
- As far as the provisions of a privileged legal standing are concerned, most of the controversial items have not been taken up. Thus, the privileged legal standing for groups without legal personality and the privileged legal standing for local and regional authorities have been removed from the text.
- Some Member States were opposed to the provision that recognised that non-governmental organisations have privileged access to justice to review proceedings without having to prove the impairment of a right or to have a sufficient interest. The Commission considers that this provision which takes over a provision from the Århus Convention, is crucial for the proposal.
- The proposal considerably softens the provisions concerning national reports and only contains provisions referring to general reporting. This modification will allow an easier transposition of the directive into Member States' legislation.

## **5.2. Non-governmental organisations**

Two meetings took place with non-governmental organisations in May and September 2002. These meetings allowed to examine the ideas contained in the working documents that concern the directive and written comments were also sought for.

Non-governmental organisations maintained a totally opposite position from the one stated by Member States during the consultation procedure. Thus, non-governmental organisations wanted a more forward-looking proposal since from their point of view it constrains the field of application of the Århus Convention, mainly as far as the legal standing issue is concerned. They expected a much broader provision and asked for a general legal standing without restrictions, known as "actio popularis". The Commission does not share this point of view since the "actio popularis" is not explicitly required by the Århus Convention and must be therefore left to Member States.

These organisations also disagreed with the fact that the second working document only took up acts and omissions by public authorities and not by private persons. They also regretted that acts and omissions to be challenged do not include criminal matters.

Further comments touched upon the point referred to the "qualified entities". For most of them, these groups will have to fulfil very severe conditions to be recognised under the future proposal, as one of these entities.

### **5.3. Industry**

Remarks from industrial operators were collected at two meetings held in May and September 2002, and they were also invited to submit written comments on the ideas advanced by the working documents.

Their main concerns appeared to have been met by the fact that the possibility of review of acts and omissions coming from private parties was removed from the second working document. Further comments touched upon the legal standing of groups without legal personality. In the opinion of economic operators, access to courts or administrative bodies should be limited to the associations with legal personality, given that only those have objectives established in a legal form and a patrimony that can answer for their acts.

### **5.4. Regional and local authorities**

Two meetings were held with representatives of the local and regional authorities in May and September 2002, and regional and local authorities were invited to submit written comments. Most of the representatives of local and regional authorities attending the meeting made similar comments to those made in consultations of Member States.

Concerns mainly referred to the principle of subsidiarity. They insisted that many of the rules set up in the working documents interfered with their capacities, therefore only Member States may establish this sort of legislation.

With the same arguments held by the experts from Member States, the points of the working documents that have raised the opposition of regional and local authorities made reference to provisions on legal standing, qualified entities, interim relief measures and reporting provisions.

### **5.5. Accession countries**

Finally, two meetings with representatives of the accession countries were held in May and September 2002. The candidate countries have expressed certain concerns about the scope and contents included in the working documents.

Their comments made reference to the approach of the future proposal in relation to the Århus Convention. As a general remark, they pointed out that the majority of them have already ratified the Convention, meanwhile neither the Community nor the majority of the Member States had done so yet. They wondered whether they should have to modify the provisions they had already adopted in order to fully implement the Århus Convention within their national legislation.

On the other hand, they felt that certain provisions of the working documents, especially those that concern the legal standing provisions, exceed those of the Århus Convention.

## **6. DETAILED EXPLANATION OF THE PROPOSAL**

### **Subject matter and scope (Article 1)**

The proposal aims at establishing a framework of minimum requirements for access to the judicial and administrative proceedings in environmental matters in order to achieve a better implementation and application of environmental law in the European Union, and to implement the third pillar of the Århus Convention.

The proposed directive grants legal standing to certain members of the public, enabling them to have access to judicial or administrative proceedings against the actions and omissions of public authorities which contravene environmental law. This approach incorporates the Århus Convention and is based on the administrative and judicial proceedings existing in Member States.

The directive shall not prejudice other Community provisions regarding access to justice. Such provisions are at present established under Directive 2003/4/EC on access to environmental information and under Directive 2003/35/EC on public participation.

### **Definitions (Article 2)**

The Article establishes definitions that are crucial for the interpretation of the Directive, among them, definitions that refer to "environmental proceedings" or "environmental law" can be emphasised. All other definitions refer to the access to review proceedings or determine the subject of these procedures.

#### **Environmental proceedings**

"Environmental proceedings" means administrative or judicial proceedings, other than criminal proceedings, before a judicial authority or another independent and impartial body established by law to review acts and omissions of public authorities.

The instrument does not differentiate between access to a judicial authority or to another independent and impartial body as it aims at the legally binding effect of decisions emanating from the authority in question. Thus, Member States may decide before which body these proceedings may be brought.

#### **Administrative acts and omissions**

Administrative acts and omissions may be the object of recourse if they contravene environmental law. Administrative act shall mean any measure taken under environmental law by a public authority having a legally binding and external effect. Administrative omission means a failure to act by a public authority, if there was an obligation under environmental law for the public authority to act.

#### **Member of the public**

"Member of the public" means one or more natural or legal persons, and their associations, organisations or groups.

## **Qualified entity**

"Qualified entity" means any association, organisation or group whose objective is protecting the environment and which is recognised according to the procedure fixed in Article 9. To be recognised, the qualified entities have to meet certain conditions established in Article 8.

## **Environmental law**

"Environmental law" is defined in general terms to make it possible to include relevant legislation on the environment. As environmental law is constantly developing, drawing up an exhaustive list would be problematic, as a procedure for regular updating would have to be provided. Thus, the proposal takes account of the following aspects:

- The legislative objective must be one of the objectives taken up in Article 174 of the EC Treaty.
- The definition must be consistent with the Århus Convention, taking up the main aspects of the environment. It seems inappropriate to draft an exhaustive list of what must be understood as "environmental law", as this concept is not defined in the Århus Convention. The constant evolution of environmental law requires an indicative list.

## **Acts and omissions by private persons (Article 3)**

Article 9(3) of the Århus Convention provides for access to administrative or judicial proceedings against acts and omissions by private persons as well as by public authorities that contravene environmental law. On grounds of subsidiarity, the proposed directive is limited to setting out in more detail the rules concerning judicial and administrative review proceedings to challenge acts and omissions by public authorities. Setting out provisions in relation to private persons would impinge upon the very core of Member States systems since it means that a community law might address an issue as close to Member States competence as the possibility for private persons to challenge in courts acts by private persons. Thus, the proposal reflects the obligation of the Århus Convention without prejudging the detailed provisions to be laid down by Member States.

## **Legal standing of members of the public (Article 4)**

Article 4 establishes the criteria for determining which members of the public have legal standing to have access to administrative or judicial proceedings, including interim relief measures, against acts and omissions of public authorities aimed at by the Directive. Members of the public must have a sufficient interest in the related administrative act or omission or maintain the impairment of a right, where the administrative procedural law of the Member State concerned requires this as a precondition to have access to review procedures. With the establishment of these criteria the Commission decided not to opt for the possibility of a general right of legal standing for every natural persons because the generalised requirement of "actio popularis" is incompatible with the principle of subsidiarity, in the light of the fact that the Århus Convention leaves the possibility of laying down criteria under national law.

Under the terms of the proposal, members of the public meeting the criteria above have access to review proceedings challenging both the procedural and substantive legality of administrative acts or omissions in breach of environmental law.

### **Legal standing of qualified entities (Article 5)**

By granting legal standing to "qualified entities" the proposed directive expands beyond Article 4. While it does not follow the concept of allowing an "actio popularis" the proposal confers legal standing by definition to certain groups, which will not be required to have a sufficient interest or to maintain the impairment of a right. The Århus Convention does not address this issue, but allows each Contracting Party the possibility to determine the breadth of legal standing in its national legislation.

The privileged legal standing of qualified entities requires a clear definition of the qualifying characteristics. The proposal applies an evaluation procedure on the activity of these entities. The legal standing is conditioned upon the subject of the procedure being a statutory and geographically relevant activity of the entity concerned. The proposal also incorporates the possibility of having access to environmental proceedings in transboundary cases. Thus, an entity recognised in one Member State may have recourse to environmental proceedings in another Member State to challenge a breach of environmental law provided it falls within its statutory and geographical area of activities.

### **Request for internal review (Article 6)**

The "request for internal review" is a preliminary procedure that allows submitting a request to resolve the matter to the public authority designated in accordance with national law, prior to having access to environmental proceedings. The proposal does not prejudge which is the public authority competent to receive a request for internal review, in order not to interfere with the administrative organisation in Member States at this respect.

Moreover, this "request for internal review" was deliberately drafted so as not to interfere with the exercise of the right of access to justice. Competent authorities shall consider any such request, unless it is clearly unsubstantiated. Furthermore, competent authorities shall issue a decision to the member of the public filing the request, no later than twelve weeks after the request was filed, or to refuse the request for internal review. Finally, competent authorities are required to state the reasons for their decision.

The proposal takes account of the possibility that the public authority in question may not be, despite its efforts, in a position to take a decision within the above-mentioned time limit. In this case, the authority is obliged to notify as quickly as possible the reasons for the delay in a decision being reached to those that have submitted the request for internal review and to inform the people concerned when a final decision is likely to be reached. The competent authority will make this decision within a reasonable time, in view of the nature, extent and gravity of the breach of the environmental law involved.

### **Environmental proceedings (Article 7)**

Where the public authority does not reach a decision within the time limit given under Article 6 or its decision is considered as insufficient to ensure compliance with environmental law, those who have submitted the request for internal review may, "a posteriori", have access to environmental proceedings.

### **Criteria for recognition of qualified entities (Article 8)**

This Article defines which criteria these entities have to meet in order to have legal standing without having a sufficient interest or maintaining the impairment of a right. To give such a privileged right of access to justice to these entities is justified by the increasingly important

role in national and international environmental protection played by them. Consequently, these organisations have to grant that their first statutory objective is to protect the environment. On this purpose, they have to meet further criteria, such as:

- Operate on a non-profit basis and in the general interest of the environment; i.e. not to follow economic activities other than those which relate to the principal objective of the organisation.
- Have legal personality and an organisational structure sufficient to ensure the adequate pursuit of their statutory purpose to protect the environment.
- Active pursuit of environmental protection in accordance with their statutes since a period that is to be fixed by the Member States and shall be no longer than three years.

### **Procedure for recognition of qualified entities (Article 9)**

Regarding the process of recognising the qualified entities, the proposal provides for a mixed approach combining the possibility of a preliminary procedure and (ad hoc) case by case recognition. The possibility of these two procedures has the advantage of providing effectiveness and flexibility. Certain environmental organisations may choose advance recognition, whereas others may prefer to choose “ad hoc” recognition. Member States may decide at their discretion to provide for an advance or an “ad hoc” recognition procedure. Should a Member State decide for advance recognition, it shall also ensure that access to an expeditious “ad hoc” recognition is available.

### **Requirements for environmental proceedings (Article 10)**

To overcome obstacles that prevent access to justice and in line with Article 9(4) of the Århus Convention this provision foresees the establishment of effective and adequate proceedings that must be fair, equitable, timely and not prohibitively expensive. These obstacles may consist of financial constraints, difficulties in obtaining legal advice, a lack of ecological knowledge within the administrative or judicial bodies, shortcomings in the application of the administrative or legal decisions, or a lack of public information on environmental proceedings. In order to give appropriate legal certainty and transparency, decisions under the terms of the proposal shall be given in writing to the public, and whenever possible, shall be publicly accessible.

### **Reports (Article 11)**

This provision foresees that Member States periodically report to the Commission on the application of the future directive. The Commission is to publish reports on the implementation of the directive.

### **Other provisions (Articles 12 to 14)**

The proposal requires Member States to take all necessary measures eighteen months after the entry into force of the directive. The final provisions fix the date of entry into force for the 1 January 2005.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on access to justice in environmental matters**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission<sup>6</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>7</sup>,

Having regard to the opinion of the Committee of the Regions<sup>8</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>9</sup>,

Whereas:

- (1) Increased public access to justice in environmental matters contributes to achieving the objectives of Community policy on the protection of the environment by overcoming current shortcomings in the enforcement of environmental law and, eventually, to a better environment.
- (2) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters ("the Århus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the Community.
- (3) The Århus Convention consists of three pillars, namely access to information, public participation in decision-making and access to justice in environmental matters. Two directives have already been adopted to develop the first and second pillars of the Convention; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC<sup>10</sup> and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives

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<sup>6</sup> OJ C , , p. .

<sup>7</sup> OJ C , , p. .

<sup>8</sup> OJ C , , p. .

<sup>9</sup> OJ C , , p. .

<sup>10</sup> OJ L 41, 14.2.2003, p. 26

85/337/EEC and 96/61/EC<sup>11</sup>. It is now necessary to develop the third pillar of the Convention.

- (4) Article 9(3) of the Århus Convention provides for access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene environmental law. In accordance with the principle of subsidiarity, acts and omissions by private persons should be challenged in accordance with the criteria laid down in Member States legislation.
- (5) To take fully account of Article 9(3) of the Århus Convention and in order to improve environmental protection, provision should be made for administrative or judicial proceedings for challenging administrative acts and omissions by public authorities which contravene environmental law. Proceedings should be fair and should not be excessively long or expensive. Provision should also be made for interim relief measures to ensure the intervention of courts and review bodies.
- (6) Provision should likewise be made concerning acts and omissions to be challenged in review bodies. Administrative acts should be subject to review where they have legally binding and external effect as long as those acts are not adopted by bodies or institutions acting in a legislative or judicial capacity. In the same way, omissions should be covered where there is an obligation to act under environmental law.
- (7) In view of the fact that environmental law is in a constant state of development, the definition of environmental law should refer to objectives of Community policy on the environment, notably to the protection or improvement of the environment, including human health and the protection of natural resources. Member States should be able to extend this definition to include environmental law of exclusively national origin.
- (8) Where they have a sufficient interest or maintain the impairment of a right, members of the public should have access to environmental proceedings in order to challenge in courts or other review bodies, the procedural and substantive legality of administrative acts or omissions which contravene environmental law.
- (9) Entities active in the field of environmental protection which meet certain conditions should have access to environmental proceedings in order to challenge the procedural and substantive legality of administrative acts and omissions which contravene environmental law. The object of the review procedures brought by these entities must fall within the field of their statutory activities.
- (10) Provision should be made for the administrative act or omission to be reviewed by the public authority designated in accordance with national law, to either reconsider the administrative act or, in the case of an omission, to provide for the action required to be taken.
- (11) Where a previous request for internal review did not meet with approval, the applicant should be able to seek an administrative or judicial review of the act or omission of a public authority.

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<sup>11</sup> OJ L 156, 25.6.2003, p. 17

- (12) This Directive should be evaluated regularly in the light of experience and after submission of the relevant reports by the Member States. It should be subject to revision on that basis. The Commission should submit an evaluation report to the European Parliament and the Council.
- (13) The provisions of this Directive should not affect the right of a Member State to maintain or introduce measures providing for wider access to justice than required by this Directive.
- (14) Since the objectives of the proposed action cannot be sufficiently achieved by the Member States, given that the right of access to justice is to be granted in a way to ensure consistent application of Community law on the environment, and can therefore, by reasons of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (15) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this directive seeks to ensure full respect for the protection of the environment and to promote the application of Article 37 of the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*  
*Subject matter and scope*

This Directive establishes provisions aiming to ensure access to justice in environmental proceedings for members of the public and for qualified entities.

The Directive shall apply without prejudice to other Community provisions concerning access to justice in environmental matters.

*Article 2*  
*Definitions*

1. For the purposes of this Directive the following definitions shall apply:
  - (a) "public authority" means the public administration of Member States, including administration at national, regional or local level but excluding public prosecutors and bodies, administrations or institutions acting in a judicial or legislative capacity;
  - (b) "member of the public" means one or more natural or legal persons and in accordance with national law, associations, organisations or groups made up by these persons;

- (c) "qualified entity" means any association, organisation or group, which has the objective to protect the environment and is recognised according to the procedure laid down in Article 9;
- (d) "administrative act" means any administrative measure taken by a public authority under environmental law, which has a legally binding and external effect;
- (e) "administrative omission" means any failure of a public authority to take administrative action under environmental law, where it is legally required to do so;
- (f) "environmental proceedings" means the administrative or judicial review proceedings in environmental matters, other than proceedings in criminal matters, before a court or other independent body established by law, which is concluded by a binding decision;
- (g) "environmental law" means Community legislation and legislation adopted to implement Community legislation which have as their objective the protection or the improvement of the environment, including human health and the protection or the rational use of natural resources, in areas such as:
  - i) water protection
  - ii) noise protection
  - iii) soil protection
  - iv) atmospheric pollution
  - v) town and country planning and land use
  - vi) nature conservation and biological diversity
  - vii) waste management
  - viii) chemicals including biocides and pesticides
  - ix) biotechnology
  - x) other emissions, discharges and releases in the environment.
  - xi) environmental impact assessment
  - xii) access to environmental information and public participation in decision-making.

2. Member States may include environmental law of exclusively national origin in the definition set out in paragraph 1(g).

*Article 3*  
*Acts and omissions by private persons*

Member States shall ensure that members of the public, where they meet the criteria laid down in national law, have access to environmental proceedings in order to challenge acts and omissions by private persons which are in breach of environmental law.

*Article 4*  
*Legal standing of members of the public*

1. Member States shall ensure that members of the public have access to environmental proceedings, including interim relief, in order to challenge the procedural and substantive legality of administrative acts and administrative omissions in breach of environmental law where:
  - (a) they have a sufficient interest, or
  - (b) they maintain the impairment of a right, where the administrative procedural law requires this as a precondition.

Applications for interim relief shall not be subject to compliance with the procedure laid down in Article 6.

2. Member States shall determine, in accordance with the requirements of their law and with the objective of granting broad access to justice, what constitutes a sufficient interest and an impairment of a right for the purposes of paragraph 1.

*Article 5*  
*Legal standing of qualified entities*

1. Member States shall ensure that qualified entities recognised in accordance with Article 9 have access to environmental proceedings, including interim relief, without having a sufficient interest or maintaining the impairment of a right, if the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the qualified entity and the review falls within the specific geographical area of activities of that entity.
2. A qualified entity recognised in accordance with Article 9 in one Member State shall be entitled to submit a request for internal review in another Member State under the conditions of paragraph 1.
3. Applications for interim relief measures shall not be subject to compliance with the procedure laid down in Article 6.

*Article 6*  
*Request for internal review*

1. Member States shall ensure that members of the public and qualified entities who have legal standing according to Articles 4 and 5, and who consider that an administrative act or administrative omission is in breach of environmental law, are entitled to make a request for internal review to the public authority that has been designated in accordance with national law.

Member States shall establish in which time limit and in which form such a request is submitted. This time limit shall not be shorter than four weeks following the date at which the administrative act being taken, or, in the case of alleged omission, after the date when the administrative act was required by law.

2. The public authority referred to in paragraph 1 shall consider any such request, unless the request is clearly unsubstantiated. It shall issue as soon as possible, but no later than twelve weeks after receipt of the request, a decision in writing on the measure to be taken to ensure compliance with the environmental law, or on its refusal with regard to the request. The decision shall be addressed to the member of the public or the qualified entity that has made the request; it shall explain the reasons for the decision.
3. Where the public authority is unable, despite due diligence, to take a decision on a request for internal review within the period mentioned in paragraph 2, it shall inform the applicant as soon as possible, and at the latest within the period mentioned in that paragraph, of the reasons for not being able to take the decision and of the time when it intends to decide on the request.
4. The public authority shall take a decision on the request for internal review, considering the nature, extent and gravity of the breach of the environmental law within a reasonable time frame but no later than eighteen weeks from the receipt of the request for internal review. It shall immediately inform the applicant of its decision on the request.

*Article 7*  
*Environmental proceedings*

Where a decision on a request for internal review has not been taken by the public authority within the time limits referred to in Article 6, paragraphs 2, 3 and 4, or where the applicant considers that the decision is insufficient to ensure compliance with environmental law, the applicant shall be entitled to institute environmental proceedings.

*Article 8*  
*Criteria for recognition of qualified entities*

In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group shall comply with the following criteria:

- (a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment;

- (b) it must have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives;
- (c) it must have been legally constituted and worked actively for environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which is constituted, but not exceeding three years;
- (d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c).

#### *Article 9*

##### *Procedure for recognition of qualified entities*

1. Member States shall adopt a procedure to ensure an expeditious recognition of qualified entities where they meet the criteria set out in Article 8, either on a case by case basis ("ad hoc"), or under an advance recognition procedure.

Where a Member State opts for an advance recognition procedure it shall ensure that there is also a possibility for an expeditious "ad hoc" recognition.

2. Member States shall determine the competent authority or authorities responsible for recognition.
3. Member States shall ensure that where a request for recognition has been rejected this decision can be reviewed in courts or another independent and impartial body established by law.
4. Member States shall lay down the detailed provisions of the recognition procedure.

#### *Article 10*

##### *Requirements for environmental proceedings.*

Member States shall provide for adequate and effective proceedings that are objective, equitable, expeditious and not prohibitively expensive.

Decisions under this Directive shall be given or recorded in writing, and whenever possible shall be publicly accessible.

#### *Article 11*

##### *Reports*

Member States shall report on the experience gained in the application of this Directive by [...] at the latest. They shall communicate the report to the Commission by [...] at the latest.

The Commission shall publish a Community report about the implementation of this Directive to the European Parliament and the Council and may propose the necessary amendments, on the basis of the national reports.

*Article 12*  
*Transposition*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [...]. They shall forthwith inform the Commission thereof.

When Member States adopt the measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

*Article 13*  
*Entry into force*

This Directive shall enter into force on 1 January 2005.

*Article 14*  
*Addresses*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*