



Access to Environmental Information: the first pillar of the Aarhus Convention

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Outline of presentation

I.	Background: Access to documents/ access to environmental information - Interpretation by EU courts - Effects
II.	Notions of environmental information, public authority
III.	Passive and active dissemination
IV.	Grounds for refusal - Notions of 'Emissions into the environment' and 'Information on emissions into the environment'
V.	Charges - the judgment of CJEU of 6 October 2015, case C-71/14

Self-explanatory

I- Background

- The European Community adopted a Directive on the Freedom of Access to Information on the Environment (90/313/EEC of 7 June 1990, in OJ L 158 of 23.06.1990, page 56);
- This Directive was an essential item in the negotiations of the convention of the UN-ECE, done at Aarhus on 25 June 1998; this convention (AC) is largely inspired by the Directive, ensuring at the same time further progress;
- To fully adapt the EU law to the AC (also to allow the European Community to become party to the AC), a new instrument was adopted: **Directive 2003/4/EC** of 28 January 2003 (OJ L41 of 14.02.03, page 26). Directives are addressed **to the Member States** and require implementation by them.

Self-explanatory



I-(2) Background: Access to documents/ access to environmental information

As the European Community (now EU) became party to the AC, it was necessary to adapt also the **legislation applicable to the EU institutions.**

In 2001 a legal instrument regarding public access to the European Parliament, Council and Commission documents was approved (Regulation (EC) n. 1049/2001 of 30 May 2001). However, the AC required a larger scope (EU institutions and bodies) and specific rules for the environment. This result was achieved through **Regulation (EC) n. 1367/2006 of 6 September 2006.**

Therefore, the following currently apply:

- **for environmental information** Regulation (EC) n. 1049/2001 as amended and complemented by Regulation (EC) n. 1367/2006, and
- **for information other than environmental one** Regulation (EC) n. 1049/2001.

To a certain extent, a similar situation exists in some Member States, which have a FOI (Freedom Information Act) and a specific act for environmental information.

Need for a piece of legislation applicable not only to MS but also to the EU institutions.

MS which have a FOI (Freedom Information Act) are indicatively UK and Ireland.



I-(3) Background: Interpretation by EU courts on access to documents/ access to environmental information law

Even if **not completely identical in wording** (due to the fact that Regulation (EC) n. 1049/2001 deals with access to documents and predates Directive 2003/4), **the substantive obligations** are considered **identical, so far as access to environmental information is concerned**. This is logical because the EU Regulations and Directive 2003/4 have the same objective, i.e. to give full effect to the first pillar of the Aarhus Convention (AC).

Several judgments of the CJEU on the interpretation of Directive (EC) 2003/4, in particular via preliminary rulings. However, there is **wider CJEU case-law on Regulation (EC) 1049/2001** as complemented by Regulation (EC) 1367/2006. Why?

Applicants brought cases directly before EU courts to appeal against negative decisions on access to documents or on environmental information taken by the EU institutions – in particular the Commission. In the first instance, these cases went to the General Court and on appeal, on points of law, to the CJEU.

Self-explanatory

I-(4) Background: Interpretation by EU courts (examples) - effects within EU legal order and within AC

In this way, the **CJEU has been able to clarify some concepts included in the Aarhus Convention** and in the EU instruments, for which the Convention itself does not provide interpretation and no indication has come from practice or decisions by the bodies of the Convention.

Example: **Emissions in the environment** (judgements of 23.11.16, cases C-673/13P and C-442/14); **confidentiality of the proceedings of public authorities** (judgements of 14.02.12 case C-204/09 and 13.07.17 case C-60/15P).

The CJEU interpretation is **binding on the EU Institutions and Member States**.

Authoritative effect in the framework of the Aarhus Convention: interpretation could be taken into account by the bodies of the Convention itself.

The contribution of the interpretation by the CJEU are significant, given that there is limited input by the Aarhus implementation Guide and the relevant case law of the Aarhus Compliance Committee as approved by the MoP (Meeting of the Parties)

II- Notion of environmental information

Notion of '*environmental information*'

- Article 2.3 AC: this paragraph does not attempt to define environmental information in an exhaustive manner but rather breaks down its scope into three categories and within each category provides an illustrative list
- Article 2.1 in Directive 2003/4: as allowed by the AC, more structured definition

The notion of “environmental information” is not defined exhaustively; The Aarhus Convention provides for some main categories with an illustrative list. However, note that the Aarhus Convention set the “floor” and not the “ceiling” relating this definition.

II - (1) Notion of public authority

Notion of '*public authority*'

- Article 2.2 AC (a) (b) (c) - the notion does not include bodies or institutions acting in a judicial or legislative capacity;

Article 2.2 in Directive 2003/4: more structured definition, for instance making explicit the reference to advisory bodies in (a); Member States may include bodies or institutions acting in a judicial or legislative capacity. (For clarification of acting in a legislative capacity: see CJEU preliminary rulings cases C-240/09 and C-515/11).

For the EU Institutions, access to documents/ to environmental information includes:

- Information from public authorities **acting in legislative capacity;**
- Access to the **written pleadings of EU institutions before the EU courts is ensured after the judgment is adopted** and published.

No precise clarifications in the Aarhus Convention implementation guide.

II - (2) Notion of public authority

(i) Judgment CJEU (Grand Chamber) of 19 December 2013, case C-279/12
Fish Legal/Shirley

In order to determine whether a legal person performs **'public administrative functions' under national law, within the meaning of Article 2(2)(b) of Directive 2003/4**, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

Undertakings which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be **classified as 'public authorities' by virtue of Article 2(2)(c)** of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field.

This case revolves around the question of whether a “water utility” is obliged to delivered the required information or not using as criterion the concept of “public administrative function” under domestic law.

Main message: The access to information right can be exerted towards public entities and not private entities which do not fall within the relevant scope.

II - (3) Notion of public authority

Article 2(2)(b) must be interpreted as meaning that a person falling within that provision constitutes a public authority **in respect of all the environmental information which it holds**. However, it is not required to provide environmental information if it is not disputed that the information does not relate to the provision of public services in the environmental field.

(ii) Judgment CJEU (Grand Chamber) of 10 October 2017, case C-413/15 Farrell and the related judgment of 12 July 1990 C-188/89, Foster

This judgment does not deal directly with the notion of public authority within the meaning of Directive 2003/4. However, it is important for the reasoning of the CJEU about this notion.

This case does not concern environment but it may be useful for understanding the concept of “public authority”

III- Passive and active dissemination

Distinction between **access upon request (Article 3 Directive 2003/4)** and **active dissemination (Article 7)**.

Active dissemination should be reached progressively taking into account the human, financial and technical resources involved. The Directive obliges Member States to ensure that public authorities make available at least the information mentioned in paragraph 2 of Article 7. For all other items each public authority has a margin of discretion in choosing the information to disclose and its timing.

AS regards the interpretation and implementation of the provision for “progressive approach” relating to active dissemination , it is necessary to be taken into consideration the fact that this Directive was adopted back in 2003 and the last 15 years many changes and developments have occurred.

IV- Grounds for refusal

Article 4 provides for an **exhaustive list of exceptions** that may be alleged by public authorities to refuse access to environmental information.

The grounds for refusal included therein must be interpreted in a restrictive way, weighing in every particular case the public interest served by disclosure against the interest served by the refusal.

However, when the request for information relates to emissions into the environment, some grounds can not justify the refusal of disclosure (see Article 4 (2) second subparagraph, last sentence).

In its judgments of 23 November 2016 (case C-673/13P and C-442/14) the CJEU clarified the **notions of 'emissions into the environment' and 'information on emissions into the environment'**, contained in Directive 2003/4/EC.

Self-explanatory

IV- (1) Grounds for refusal and the notions of 'Emissions into the environment' and 'Information on emissions into the environment'

'Emissions into the environment' within the meaning of the second subparagraph of Article 4 must be interpreted as including, *inter alia*, the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, **to the extent that that release is actual or foreseeable under normal or realistic conditions of use** (see points 77-80, case C-442/14).

'Information on emissions into the environment' within the meaning of the second subparagraph of Article 4 covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance's drift during that application, whether the data come from studies performed entirely or in part in the field, or from laboratory or translocation studies (see points 87-96, case C-442/14).

Self-explanatory



V Charges - the judgment of CJEU of 6 October 2015, case C-71/14

Article 5(2) of Directive 2003/4 must be interpreted as meaning that the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database used by the public authority to answer requests for environmental information, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, **provided that the total amount of the charge does not exceed a reasonable amount** (see judgment CJEU of 6 October 2015, case C-71/14, points 29-41).

The second part of this judgment deals with the intensity of judicial review, examined in the framework of access to justice*.

*Only for memory: The Court has held that the exercise of the rights conferred by EU law is not made impossible in practice or excessively difficult merely by the fact that a procedure for the judicial review of decisions of the administrative authorities does not allow complete review of those decisions. However, any national judicial review procedure must none the less enable the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision. Judicial review that is limited as regards the assessment of certain questions of fact is thus compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision.

Self-explanatory