

The European Union  
Aarhus Centre

# Access to documents and environmental information held by EU institutions and bodies

A guide for citizens and NGOs



Furthering transparency,  
public participation and  
access to justice in the EU.



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# Introduction

## Transparency, participation and justice for people and the environment

In July 2011, ClientEarth opened the European Union (EU) Aarhus Centre in Brussels. Our vision is to create a dedicated centre of expertise combining thought-leadership, capacity-building and debate with strategic legal actions. We are meeting a need to drive forward the five principles of openness, transparency, participation, accountability and effectiveness within EU institutions' activities and policies to protect, preserve and improve the state of the environment.

Our centre takes its name from the flagship 'Aarhus Convention', the most progressive international agreement for environmental justice. In particular our centre will work to ensure that citizens and NGOs are able to exercise the three fundamental rights granted them by the Aarhus Convention; of access to information, public participation in decision-making and access to justice in environmental matters.

## A guide on access to information

Openness, participation and accountability: these are foundational principles for good governance that were recognised and (in theory) adopted by the EU when it signed the Aarhus Convention. In reality, however, civil society and the NGO community face significant barriers when seeking to exercise their rights. The EU's institutions and bodies frequently act in a non-transparent manner, exclude the public from decision-making processes and bar civil society from taking cases to the European courts.

This guide is intended as a toolkit, setting down the processes, principles and justifications essential to breaking through the first of these barriers; gaining access to information, including environmental information. We have designed it to help citizens and NGOs get a clear understanding of the rights to information held by EU institutions and bodies, which are not widely understood or effectively exercised. As the EU is not a State, the procedure and the conditions of gaining access to information is different from similar procedures at national level. It may also be the case that EU citizens may not be aware of the different interpretative guides issued by the EU institutions or of the jurisprudence of the General Court and the Court of Justice of the EU on access to information.

Over the 15 years that access to information has been a concern for the EU a considerable wealth of experience has accumulated that may further help users of this guide understand and interpret the legal provisions of each of the 27 EU Member States or of EU candidate countries.

This guide was developed in English, and all quotations and references are also in English. It has to be remembered, however, that under EU law all official languages have the same legal value.

It is unfortunate that there is much progress to be made in fostering transparency within the EU institutions. Documents and other information which should be publicly accessible are routinely withheld without good reason and in violation of the law. Crucial information is still being kept confidential, denying the public the opportunity to participate in the decision-making processes, including legislative processes, and presenting them with the *faits accomplis* of adopted decisions. Such documents include scientific and economic studies on which the institutions and other EU bodies base their decisions which affect our everyday life, the identities and findings of scientific experts advising the institutions, negotiations between the institutions and Member States and advice from the institutions' legal services. This information is critical for understanding the way the institutions make their decisions and for assessing their scientific and legal soundness.

There is also a knowledge deficit among citizens' groups and NGOs about the rights and remedies to those unjustly withheld documents. When access to information is denied, very few cases are brought before the court; in the past 50 years only five cases were filed by NGOs. Now is a critical time to act for freedom of information in the EU, in environmental matters and beyond. This guide provides the tools for citizens to exercise their rights in full. It is published at a time when EU legislators are considering further restrictions to the existing regulation on access to documents, and strongly advocates for a reversal of this trend. The EU Aarhus Centre will work to combat moves towards such secrecy, the undue influence it can allow to persist and the mental or material corruption that can result. It will also provide NGOs, citizens and civil society with the legal expertise they need to assert their rights when negotiating with the EU institutions and bodies and challenging decisions to withhold requested information.

### Access to environmental information

Within the EU there are specific provisions on access to information concerning the environment. These provisions differ to some extent from the general rules on access. When there are such differences, this guide includes sub-sections to explain them. It is hoped that this will help to locate relevant information more quickly.

1. The official EU languages (see Article 55 Treaty on the European Union (TEU)) are Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish

# Access to information: getting started



## Who can make a request?

Regulation 1049/2001 details the rights of public access to European Parliament, Council and Commission documents. Article 2(1) of this regulation gives a right of access to documents to any citizen of the Union and any natural or legal person residing or having its registered office in a Member State. The EU institutions **may** grant access to any other natural or legal persons, though these persons do not have a **right** of access.<sup>2</sup> In practice, the EU institutions do not appear to discriminate between these different categories.

## The definition of 'environmental information'

Under EU law<sup>4</sup> there is a right to access a wide range of **environmental information**. This is classified as "any information in written, visual, aural, electronic or any other form on:

- (i) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (ii) Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
- (iii) Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
- (iv) Reports on the implementation of environmental legislation;
- (v) Cost-benefit and other economic analyses and assumptions used within the framework of

### Access to environmental information

As opposed to Regulation 1049/2001, in environmental matters, Regulation 1367/2006 which applies the provisions of the Aarhus Convention to EU institutions and bodies provides access not only to documents but to information. The right of access is therefore broader.

Access to environmental information is provided as a fundamental right: it is given to any citizen (defined in legal terms as a **natural person**) or legal person in the world, "without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities."<sup>3</sup>

the measures and activities referred to in point (iii);

- (vi) The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii)."

This definition corresponds word-for-word with that of Article 2(1.a) of Directive 2003/4 on access to environmental information,<sup>5</sup> and is broader than the provisions of the Aarhus Convention. For example, the Aarhus Convention<sup>6</sup> does not include the words "emissions, discharges and other releases into the environment", "waste, including radioactive waste", or "the contamination of the food chain."<sup>7</sup> Under EU law, this kind of information is considered **environmental information**.

## Which definition of environmental information under EU law should be used?

The definition of **environmental information** under EU law should come from Regulation 1367/2006, rather than the Aarhus Convention.<sup>8</sup> The Convention explicitly allows the parties of the Convention to maintain or introduce measures providing for broader access to environmental information than provided for in the Convention. To understand the meaning of **environmental information** under Regulation 1367/2006, judgments issued by national courts may be used, as the definition of Regulation 1367/2006 is the same as that of Directive 2003/4.

However, EU law is autonomous with regard to the national law of the EU Member States. Therefore, any interpretation given to environmental information by a national administration or a national court is non-binding on the EU institutions, and in particular not on the EU Court of Justice. At best, one could use national interpretations as guidance when interpreting Article 2(1.d) of Regulation 1367/2006.

The words **any information** in the beginning of Article 2(1.d) of Regulation 1367/2006 mean that all parts of the definition must be interpreted broadly. The broad definition also includes studies on environmental legislation and its implementation, on control measures and their results, working plans by the administration with regard to environmental measures, or reports from committees or advisory bodies on environmental issues.

2. Regulation 1049/2001, OJ 2001, L 208 p.1, Article 2(2).

3. Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006, L 264 p.13, Article 3.

4. Regulation 1367/2006 (n.3), Article 2(1)(d).

5. Directive 2003/4 on public access to environmental information, OJ 2003, L 41, p.26.

6. Convention on access to information, participation in decision-making and access to justice in environmental matters, Aarhus 25 June 1998, (hereafter: Aarhus Convention), Article 2 no.3.

7. Aarhus Convention, Article 2(3).

8. Aarhus Convention, Article 3(5).

The wider access to environmental information that is available under Regulation 1367/2006 would not be affected by a future amendment of Regulation 1049/2001. As is demonstrated in Annex 1 (page 57), Article 2(6) of Regulation 1049/2001 states that the rights of citizens derived from other international agreements, and the EU implementation measures of such agreements, remain untouched by Regulation 1049/2001; and the Aarhus Convention and Regulation 1367/2006 are such “other international agreements” and implementing measures. Equally, the Aarhus Convention prevails over Regulation 1049/2001; an amendment of Regulation 1049/2001 cannot reduce or take away the rights which are granted to citizens under the Aarhus Convention.

## The institutions and bodies that are subject to access to information

Regulation 1049/2001 grants access to documents held by the European Parliament, Council or Commission. Other bodies, offices or agencies are not explicitly covered by the regulation. However, Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) gives a right of access to documents “of the Union institutions, bodies, offices and agencies.” The provisions of the EU Treaties prevail over secondary EU law, so the right of access is available to information held by:

- EU institutions
- EU bodies, e.g. the Committee of the Regions
- Offices, e.g. the Office of the European Ombudsman or the Publications Office
- Agencies, e.g. the European Chemicals Agency or the European Food Safety Authority.

An EU body, office or agency is not allowed to refuse access to information on the grounds that Regulation 1049/2001 is limited to the institutions of the European Parliament, the Council and the Commission.<sup>10</sup>

For environmental matters, Article 1(1) of Regulation 1367/2006, on the application of the provisions of the Aarhus Convention, details citizens’ rights to access information held by EU **institutions and bodies**. The term **bodies** refers to all administrations set up by the EU institutions, and in particular to agencies and offices. However, the exception to such obligations for the Court of Justice, the European Investment Bank and the European Central Bank under Article 15(3) TFEU also applies to environmental information.

The Aarhus Convention established citizens’ rights of access to environmental information held by a **public authority** (defined as “institutions of any regional economic integration organisation which is a party to the convention”).<sup>9</sup> As the EU is a party to the Aarhus Convention, its institutions – including its bodies, offices or agencies – are each considered to be a **public authority**. This also applies where an institution concludes a private contract or otherwise acts under private law, for example when hiring staff, purchasing or renting spaces, as neither the Aarhus Convention nor Regulations 1049/2001 or 1367/2006 differentiate between civil law and public law – or indeed criminal law – information.

Access to documents held by the Court of Justice of the EU, the European Investment Bank or the European Central Bank is granted only when these institutions exercise their **administrative tasks**.<sup>11</sup>

## The definition of ‘a document’

Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents grants access to documents. The definition of a document is very broad.<sup>12</sup> It is not equivalent to information, as before a disclosure request can be made, information must first have materialised in a document. Therefore an applicant cannot also request access to information, other than environmental information, that is only orally available (see ‘The form of information to be disclosed’, below), though the General Court has stated that the EU institutions “must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities”, in order that citizens can exercise their right of access to documents effectively.<sup>13</sup>

## The form of information to be disclosed

The EU institutions must grant access to any medium available. An applicant has a right of access to written documents, sound recordings, tapes and e-mails, amongst others.

In order to be accessible, the information must be available in a material form.

Where access to documents and information is possible most institutions have created online registers (see ‘The content of the application’, page 17, for examples). Anybody can consult these registers without prior request, although it is possible that access to a specific document is refused if the institution decides that one of the exceptions of Regulation 1049/2001 (regulation on public access to European Parliament, Council and Commission documents) applies. The applicant then has to submit a specific request to access that document.

When a request is made for a document, the institution may inform that the document is available on the internet or was published in an official journal or otherwise, where it is easily accessible.<sup>14</sup> Where the applicant cannot easily access the document in question, he can insist on obtaining a hard copy.

11. See Article 15(3) TFEU, subparagraph 4.

12. Regulation 1049/2001, Article 3(a): “document” shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility.”

13. General Court, case T-264/04, WWF v. Council, ECR 2007, p.II-907, paragraph 61.

14. Regulation 1049/2001, Article 10(2).

9. Aarhus Convention, Article 2(2)(d).

10. For brevity, this guide will refer only to institutions, but institutions, bodies, offices and agencies is inferred.

# Making an application for information

A request for information and documents can be made in any written form, including electronically. In this section some of the key actions for making a request are highlighted.



All applications should be addressed to the Secretary General or the director of the institution. If a document is managed by a specific administrative unit within an institution, the request can be addressed directly to that unit. In both cases, the applicant is entitled to receive an acknowledgment of receipt.<sup>15</sup>

When making an application it is important to refer to Regulation 1049/2001. If the request is to an institution or body other than the European Parliament, the Council and the Commission, Article 15(3) TEU should also be mentioned.

## The details of the application

The application should be in a “sufficiently precise manner to enable the institution to identify the document”.

Regulation 1367/2006 on the application of the provisions of the Aarhus Convention does not contain any definition of access. In many cases this may be difficult, as the applicant may not know exactly how many documents exist.<sup>16</sup> The document may be an exchange between the Commission and a third, possibly unknown, person or it may refer to multiple documents. In such cases, the period of time during which the documents may have been produced, the name of the file, the author(s), or the types of exchange between the bodies concerned should be indicated. The applicant should do all that he/she can to allow the institution’s officials to identify the document(s) requested.

An imprecise application that does not allow the institution to identify the requested document is still classified as an application, and EU institutions may not ignore it. Instead they must ask the applicant to clarify the application and assist him/her in doing so.<sup>17</sup> EU institutions are obligated to “provide information and assistance to citizens on how and where applications”<sup>18</sup> for access to documents can be made.

All applications for access to environmental information should be addressed to the EU institution that holds it, and they will handle it.

If the application concerns an environmental matter, for example access to data on air pollution in an urban agglomeration, it should also make reference to Regulation 1367/2006 and – as the Aarhus Convention grants larger access to environmental information than Regulations 1049/2001 and 1367/2006 – to the Aarhus Convention and its ratification by Decision 2005/370.

## The language of the application

Applications must be made in one of the official EU languages, as identified in Article 55 of the Treaty of the European Union (TEU).<sup>19</sup> This means that the EU institutions are not obliged to address applications in non-official languages, such as in Basque, Frisian or Laponian. In practice however, any such request is likely to be treated in a pragmatic way.<sup>20</sup>

## The content of the application

There is no obligation to state the reasons why access to a document is requested,<sup>21</sup> and the EU institution is not entitled to ask why. In practice however, it may help to indicate why you want to have access as the institution has to assess whether the application is sufficiently precise, is considered to concern an unreasonably large number of documents, or is considered to be unreasonable. For example, in the case of a very long document or a large number of documents, a compromise (or **fair solution**) could be found - so the reasons why access to the documents is requested, will inevitably influence whether access is granted.<sup>22</sup> An applicant’s reasons for requesting documents may also be relevant when questions of privacy are at stake (see ‘The protection of privacy’, page 42).

Applications should not mention or discuss the exceptions to right of access listed in Article 4 of Regulation 1049/2001, but leave it to the institution to invoke one or several of them. See ‘Exceptions to the right of access’ on page 33 for more information.

Applications should indicate the form in which the applicant wishes to have access to the requested document, for example stating whether he would like to receive a paper or an electronic copy, or to consult a document in situ. The institutions are obliged to transmit the information “with full regard to the applicant’s preference”, but are only required to give access to documents in their existing format or version.<sup>23</sup> They are not obliged to provide a translation of a document or to make it electronically available. If the preference is not indicated, the institution can decide in which form it will grant access.

Some EU institutions, offices and bodies have their own application processes. It is therefore worth establishing if there is a different system before starting the application. Overleaf, those institutions with different application processes are listed.

19. The official EU languages (see Article 55 Treaty on the European Union (TEU)) are Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish

20. For example, the applicant could be asked to add a translation, a Member State could, officially or unofficially, be asked to help out, officials of the institution could assist, etc.

21. Regulation 1049/2001, Article 6(1).

22. See as an example General Court, case T-42/05 (n.16, above), paragraphs 85 and 86. The applicant in this case was a doctoral research fellow.

23. Regulation 1049/2001, Article 10(3).

15. Regulation 1049/2001, Article 7(1).

16. See as an example General Court, case T-42/05 Williams v. Commission, ECR 2008, II-156, paragraphs 85 and 86.

17. Regulation 1049/2001, Article 6(2).

18. Regulation 1049/2001, Article 6(4).

**The European Commission** has an electronic register where its agenda, minutes of meetings, COM-documents, SEC-documents and C-documents are listed.<sup>24</sup> The Commission has also published a guide<sup>25</sup> that indicates that further information on access to documents may be obtained from “Secretariat-General of the European Commission, Unit SG/b/2 Openness, access to documents, relation with civil society” and an application form.<sup>26</sup>

**The Council** provides explanation on its website of how you can make an application for access to Council documents.<sup>27</sup>

**The European Parliament** has adopted “Rules governing public application to European Parliament documents.”<sup>28</sup> These rules differentiate between documents that are directly accessible and other documents. Most documents drawn up during a legislative procedure are put on a register and subsequently on the Parliament’s website, and may be consulted by everybody. Other documents are accessible upon request, using the Parliament’s request form.<sup>29</sup>

All comments on “access to documents” made in the previous section also apply with regard to environmental information. Beyond these general rules on access, the Aarhus Convention (which is part of EU law) provides that any request (thus also an oral or telephone request) for access to environmental information is effective and must be answered. The Convention does not in fact require a written form of request. For reasons of proof however, you are strongly recommended to make requests for access to environmental information in writing.

24. Commission, <http://ec.europa.eu/transparency/regdoc/recherche.cfm?CL=en>

25. *Access to European Commission documents. A citizens’ guide*, available under: [http://ec.europa.eu/transparency/access\\_documents/docs/guide\\_citoyens/en.pdf](http://ec.europa.eu/transparency/access_documents/docs/guide_citoyens/en.pdf); last updated on 15 July 2010.

26. The European Commission application form is available under: <https://ec.europa.eu/transparency/regdoc/fmb/formulaire.cfm?CL=en>

27. <http://www.consilium.europa.eu/showpage.aspx?id=306&lang=EN>

28. OJ 2005, C 289 p.6.

29. <https://www.secure.europarl.europa.eu/RegWeb/application/registre/secured/requestDoc.faces> [visit of 11 April 2011].

# The response from the institution



The institution has 15 working days from the registration of the request to give an answer. If the applicant does not receive access to all the documents that he has requested within this timeframe, the institution may;

- a. **prolong granting access by a further 15 working days** citing exceptional circumstances. The institution then must inform the applicant and state detailed reasons as to why there is a delay. In practice, these detailed reasons are formulated in a standardised way by the institution.
- b. **not give an answer within the 15 working days** or within the agreed extended time limit. This is considered as a refusal to grant access.<sup>30</sup>
- c. **declare that it was not possible to give an answer within the prescribed time-limit**, but that the answer will be provided as soon as possible. This answer is, in effect, a refusal to give an answer and the applicant is entitled to ask the institution (by making a “**confirmatory application**”) to reconsider its position. This is discussed later in this guide, in ‘Reapplying for information: the confirmatory application’, page 25.
- d. **refuse access to the documents, in total or in part**. In this case, the institution has to state the reasons for its refusal and inform the applicant of his right to make a confirmatory application. The reasons given must refer to one or several of the exceptions of Article 4 of Regulation 1049/2001 discussed in ‘Exceptions to the right of access’, page 33.

The institution must justify its refusal to grant access for each individual document. “In order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation 1049/2001. The institution must also supply information as to how access to that document could specifically and effectively undermine the interest protected”.<sup>31</sup> The institution must explain why the protected interests for which exceptions were laid down in the Regulation

would no longer be protected if access were granted. General references, such as that the disclosure would undermine international relations or the protection of privacy, are not allowed.

These provisions also apply where access to a large number of documents is requested. The institution may normally not rely on the amount of work which a concrete, individual assessment of each document would entail. Only after having explored all other possible options, including that of trying to find, together with the applicant, **a fair solution**,<sup>32</sup> might the institution exceptionally be allowed not to make such a concrete, individual assessment, because of the workload involved.<sup>33</sup> The Court of Justice has accepted, however, that documents of the same nature may be grouped in certain categories and that an explanation for refusal be given to such categories, provided that the grounds for refusal are similar to all documents in that category.<sup>34</sup> For example, where an applicant requests access to five letters of formal notice which the Commission has sent to a Member State, the institution may omit to examine for each of the five letters, whether the exception applies, and justify its grounds of refusal in one declaration.

When an EU institution declares that it does not hold a requested document, or that the document does not exist, it is presumed (in the case of litigation) that such a statement is correct.<sup>36</sup> The applicant may of course prove this to be untrue if he can.

The General Court has held that EU institutions are obliged to draw up and retain documentation relating to their activities, insofar as this is possible and reasonable.<sup>37</sup> This may one day be interpreted to mean that citizens’ right of access to documents is impaired when the EU institution does not draw up a report or document, such as minutes of a meeting. However, no such case has yet been decided by the EU Courts.

For requests concerning environmental information, the same options are available to the institution. However, where the Aarhus Convention provides for more restricted exceptions, the institution’s answer must, of course, refer to these exceptions. This is because, in the case of conflicting provisions, the provisions of the Aarhus Convention prevail.<sup>35</sup>

32. See on that Regulation 1049/2001, Article 6(3).

33. General Court, Case T-2/03, *Verein für Konsumenteninformation v. Commission*, ECR 2005, p.II-1121, paragraphs 94 ss. In that concrete case, the file contained more than 13.000 documents. In that case, the General Court rejected the Commission’s argument that a concrete, individual assessment of each document constituted an excessive workload, also because the Commission had not examined all possible alternative options.

34. *Ibidem*, paragraph 75.

35. General Court, case T-264/04, *WWF v. Council*, ECR 2007, p.II-907, paragraph 61.

36. General Court, joined cases T-355/04 and T-446/04 *Co-Frutta v. Commission*, ECR 2010, II-1, paragraph 155.

37. General Court, case T-264/04, *WWF v. Council*, ECR 2007, p.II-907, paragraph 61.

30. Regulation 1049/2001, Article 7(4).

31. General Court, case T-355/04, *Co-Frutta v. Commission*, ECR 2010, p.II-1.

# Re-applying for information: the confirmatory application



## When an EU institution refuses access to documents in full or in part you may ask the institution to reconsider its position within 15 working days.<sup>38</sup>

This is called making a confirmatory application. Often confirmatory applications encourage the institution to attach greater care to the request and the requests are therefore more successful.

If the applicant does not meet the 15 day timeframe the institution's decision becomes final.

In the confirmatory application the applicant should contest the refusal from the institution by stating why the exceptions invoked do not apply to his specific case. Often institutions will provide a generic response in the first instance justifying the total or partial refusal of access to a document. To further support the application, both the provisions of the EU Treaties (TEU and TFEU) and the jurisprudence of the EU courts should be quoted.

There is no obligation on the institution to send an acknowledgement of receipt, although it will usually do so. As with the initial application, the institution must answer the confirmatory application within 15 working days from its registration. Equally, in exceptional cases (for example, if the application relates to a very long document or to a very large number of documents), the institution may extend the time frame by a further 15 working days. In this case, the institution must inform the applicant of this extension in advance and offer him detailed reasons for the delay. If the institution does not grant full access to the document(s) requested, it is able to respond to the confirmatory application in a number of different ways. It may:

- a) not give an answer within the 15 day time limit (or the extended time limit); this "shall be considered as a negative reply which opens the right to make a confirmatory application or to challenge the implicit refusal".<sup>39</sup>
- b) refuse total or partial access to the document(s) requested, in which case detailed reasons for the refusal must be given in writing.

## A total or partial refusal of a confirmatory application

If an institution totally or partially refuses access to documents, the applicant may either make a complaint to the European Ombudsman or institute court proceedings.

In its written answer to a confirmatory application, the institution is obliged to inform the applicant of his right to institute court proceedings under Article 263 TFEU or to make a complaint to the European Ombudsman under Article 228 TFEU. Frequently, the institution's legal service is consulted in the drafting of the response.

For access to environmental information, the same provisions apply. However, the institution is obliged to state why, in its opinion the narrower exceptions of the Aarhus Convention justify the total or partial refusal.

If the institution has not complied with the Aarhus Convention, the applicant may also submit his case to the Aarhus Convention Compliance Committee.

38. Regulation 1049/2001, Article 7(2).

39. Regulation 1049/2001, Article 8(3).

# Challenging the reply from the institution



## Making a complaint to the European Ombudsman

The European Ombudsman is elected by the European Parliament and addresses complaints concerning cases of maladministration of an institution, body or other office of the EU. Complaints may be made by any EU citizen or natural or legal persons residing or having a registered office in one of the EU Member States.

A complaint to the Ombudsman must be in reference to the reply from the institution to the confirmatory application (or absence of reply). The Ombudsman does not accept complaints where a confirmatory application has not been addressed to the institution and handled by it. Equally, the Ombudsman will not accept complaints on matters that are, or have been, pending in court. In contrast, applications to the General Court may be made on a case which is pending before the Ombudsman.

A refusal to grant total or partial access to information, in cases where exceptions provided by Regulation 1049/2001, Regulation 1367/2006 or the Aarhus Convention do not apply, is considered an instance of maladministration.

When addressing the Ombudsman, the applicant does not need to be represented by a lawyer, and the procedure is free of charge. The applicant must submit his complaint within two years of receiving the institution's answer to his confirmatory application. A complaint form is available on the European Ombudsman website.<sup>40</sup>

If institutions withhold documents without giving legal reasons, making a complaint to the Ombudsman is one solution. However, it can be a long process, and is not always successful. The Ombudsman's decisions are non-binding on the institutions, and in some cases the findings and recommendations have been ignored by institutions.

## Making an application to the General Court

The applicant has a **right of access to information**, and as a consequence any total or partial refusal not allowed under the relevant pieces of legislation constitutes a violation of his right. This means that the applicant has legal standing before the EU courts.

General Court decisions are binding on EU institutions, although in practice institutions may try to ignore the judgment.<sup>41</sup>

40. [www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)

41. See, for example, case C-64/05P, *Sweden v. Commission*, ECR 2007, I-11389, where the Court quashed the Commission's refusal to grant access to a specific document. In 2008, a new application was made by the initial applicant, since the document had still not been released, case T-362/08, *IFAW v. Commission*. The Commission invoked a new exception – the protection of economic interests of a Member State – which the General Court accepted (judgment of 13 January 2011).

Applications to the General Court must be made by an independent lawyer, and must be in reference to the reply from the institution to the confirmatory application. Applications cannot be made against the institution's initial response. The rules on the procedure before the EU Courts are laid down in the Statute of the Court of Justice and the Rules of Procedure of the General Court.<sup>42,43</sup>

## Making an application to the Aarhus Convention Compliance Committee

Applications before the Aarhus Convention Compliance Committee are called **communications**. Any communication must concern a disregard of the provisions of the Aarhus Convention.

Communications must be addressed to the Secretary General of the Convention. Representation by an independent lawyer is not necessary. The Compliance Committee procedure is "non-confrontational, non-judicial and consultative". When examining a communication, the Compliance Committee takes into consideration whether all available **domestic remedies** were exhausted before the communication was made. Domestic remedies refer to cases when all other possible actions at national level have been explored by the applicant.

The Committee's findings have to be approved by the Conference of the Parties to the Aarhus Convention. While the findings are non-binding, they carry considerable political and moral weight and may therefore be used in court proceedings.

In case of a refusal of a document held by an institution it is advisable to take complaints to the General Court or the Ombudsman. The Compliance Committee is more appropriate to examine an issue of compliance of the regulations with the Convention.

42. See Protocol (No.3) on the Statute of the Court of Justice of the European Union, OJ 2008, C 115, p.210. Consolidated version of the Rules of Procedure of the General Court, OJ 2010, C 177 p.37.

43. Consolidated version of the Rules of Procedure of the General Court, OJ 2010, C 177, p.37.



# Exceptions to the right of access



## Article 4

## Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
  - (a) the public interest as regards:
    - public security,
    - defence and military matters,
    - international relations,
    - the financial, monetary or economic policy of the Community or a Member State;
  - (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.
  
2. The institutions shall refuse access to a document where disclosure would undermine the protection of:
  - commercial interests of a natural or legal person, including intellectual property,
  - court proceedings and legal advice,
  - the purpose of inspections, investigations and audits,
 unless there is an overriding public interest in disclosure.

*Text of Article 4 of Regulation 1049/2001 regarding public access to documents*

## Article 4 of Regulation 1049/2001 regarding public access to documents lays down the provisions under which the institutions can refuse access to information.<sup>44</sup>

These provisions are exceptions to the general right of access to information, as exceptions to the general objective to grant the “widest possible access” to information<sup>45</sup> must be interpreted narrowly.<sup>46</sup> This provision corresponds to the general orientations of EU policy which are laid down in the EU Treaties.<sup>47</sup>

There are several differences in the exceptions to the right of access depending on whether the information requested is environmental or of another type. Some exceptions are allowed for non-environmental information (under Regulation 1049/2001) and not for environmental information (under the Aarhus Convention): see below.

### The existence of an overriding public interest in disclosure

For information that is not environmental, Article 4(1) of Regulation 1049/2001 sets out several grounds for refusal to grant access to information which do not need to be weighed against the public interest in disclosure of the documents requested. If one of the protected interests under Article 4(1) (the protection of public security, defence and military matters, international relations or the financial, monetary or economic policy of the EU or Member States) would be undermined by disclosure, then the institution is obliged to refuse access to the requested document.

If the information required is environmental, Regulation 1367/2006 (on the application of the Aarhus Convention) states that each of the exceptions of Article 4(1) (of Regulation 1049/2001) and all the other exceptions of Article 4, must be weighed against “the public interest served by disclosure and whether the information requested relates to emissions into the environment”.<sup>48</sup> EU institutions are obliged to weigh up different interests in all cases, as access to information on the environment is in the public interest. The environment is seen to be the interest of all. In this regard the Aarhus Convention, which is part of EU law, states that “public authorities hold environmental information in the public interest.”<sup>49</sup>

44. Regulation 1049/2001, Article 4.

45. Regulation 1049/2001, Article 1(a). See also the general objectives laid down in Article 1 TEU and 15 TFEU.

46. See Court of Justice, case C-39/05P, Sweden v. Council, ECR 2008, p.I-4723, paragraph 36: “In view of the objectives pursued by Regulation 1049/2001, [the] exceptions must be interpreted and applied strictly.” See also case C-64/05P (n.41, above). This interpretation rule is also laid down in Article 4(4), last subparagraph of the Aarhus Convention and in Regulation 1367/2006, Article 6(1).

47. See section 6, ‘Exceptions to the Right of Access’, below.

48. Regulation 1367/2006, Article 6(1).

49. Aarhus Convention, Recital 18.

## The information sought relates to emissions

According to the Aarhus Convention, information that relates to emissions into the environment shall be disclosed even if the confidentiality of commercial and industrial information would be adversely affected by disclosure.<sup>50</sup> For protected interests other than commercial or industrial ones, the institutions must also always “take into account whether the information requested relates to emissions into the environment.” Regulation 1367/2006 on the application of the Aarhus Convention also applies this rule.

The term **emissions into the environment** is not defined, but Article 2(1.d.ii) in Regulation 1367/2006 refers to “emissions, discharges and other releases into the environment”. This clarifies the objective of the requirement, to weigh the interest in not releasing environmental information against the interest of informing about the state of the environment.

One interpretation could be to say that whatever is put into the environment, whatever leaves the control of a person, plant, vehicle etc. and is capable of contributing to environmental damage, is **released** and therefore constitutes an emission into the environment. The term **emission** also includes deliberate and involuntary emissions and discharges of substances, gases, solid or liquid products which enter the environment.

Directive 2004/35 on environmental liability also provides an understanding of **emissions**. The Directive covers damage to water, soil and nature, and defines emissions as “the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms.”<sup>51</sup>

## Documents held by the Court of Justice, the European Central Bank and the European Investment Bank

For both access to documents and access to environmental information, Article 15(3) of the Treaty on the Functioning of the European Union (TFEU) applies which states that “The

### No protection of the financial, monetary and economic policy of the EU or of a Member State

For environmental information, the Aarhus Convention takes precedence over Regulation 1049/2001.<sup>52</sup> The Convention does not provide any similar exception on the protection of the “the financial, monetary or economic policy of the Community or a Member State” as Article 4(1) of the regulation. Therefore, this exception does not apply in environmental matters.<sup>53</sup>

Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph [on access to documents] only when exercising their administrative tasks”. This provision prevails over the Aarhus Convention, Regulation 1049/2001 and Regulation 1367/2006. The EU courts have yet to define what is meant by “**administrative tasks**”.

## Exceptions to the right of access to legislative documents

Transparency is even more required for legislative documents than elsewhere. Regulation 1049/2001 contains specific provisions insisting on the need for transparency within the legislative process. Article 12(2) of the Regulation states that “documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States” should be made directly accessible. Recital 6 of the Regulation’s preamble further adds, “wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including delegated powers, while at the same time preserving the effectiveness of the institutions’ decision-making process. Such documents should be made directly accessible to the greatest possible extent.”

The Lisbon Treaties strengthened the rule that documents adopted within a legislative process are in principle public in the EU. This is stated in the provisions of the TFEU concerning the disclosure of documents relating to a legislative process, as well as in other articles which increase transparency in decision-making and strengthen participatory democracy.<sup>54</sup>

Institutions must therefore interpret the exceptions provided under Article 4 of Regulation 1049/2001 more narrowly when the documents requested are adopted within a legislative process.

## Obligations of the EU institutions in assessing requests

EU institutions may refuse access to a document based on several of the grounds set out in Article 4 of Regulation 1049/2001, as nothing in that regulation prevents them from doing so;<sup>55</sup> for example, when a document refers to both **defence and military matters** and to **international relations**. When refusing access to documents, the institution is obliged to treat each document individually when explaining why one of the exceptions of Article 4 applies and which exceptions apply to each document.

The General Court stated that: “In the case of a request for access to documents, where the institution refuses such access, it must demonstrate, in each individual case, on the basis of the

50. Aarhus Convention, Article 4(4)(d).

51. Directive 2004/35, OJ 2004, L 143 p.56, Article 2(8).

52. See on this issue the hierarchy of provisions, p.XX, below.

53. In case T-362/08 (n.64, above), the General Court should therefore not have based its decision on the economic policy of the Member State in question, as the document in question concerned the construction of a private airport in a Natura 2000 habitat – which constitutes “environmental information – and the exception “economic policy” does neither exist under the Aarhus Convention nor under Regulation 1367/2006.

54. See TFEU, Articles 10, 11, 16(8) and 15(2)(3).

55. General Court, case T-42/05 (n.16), paragraph 126.

information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. It is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the scope of the exception relied on and, second, whether the need for protection relating to that exception is genuine.<sup>56</sup>

However, such an assessment is sometimes not required when the request relates to a very long document or to a very large number of documents.

In case T-2/03 (*Verein für Konsumenteninformation v. Commission*), the General Court applied this principle of an individual assessment for each document to a case, where the file comprised 13,000 pages. However, it admitted, that according to the specific circumstances of a case, such an individual assessment might not be necessary, for example, where it was clear that a number of documents were “manifestly covered in their entirety by an exception”<sup>57</sup> or because of the “very large amount of work” which such an individual examination would necessitate. The Court was of the opinion that this was possible in “particular cases, where concrete, individual examination of the documents would entail an unreasonable amount of administrative work”.<sup>58</sup> However, the Court stated that in such a case the institution must have “genuinely investigated all other conceivable options” and explained in detail to the applicant the reasons why other options were not available.<sup>59</sup> In case T-2/03, the Court held that the Commission had not investigated all available options.

According to case law, the fact that a document concerns an interest protected by an exception provided under Regulation 1049/2001, is not sufficient to justify the application of that exception.<sup>60</sup> The exceptions provided may, as a rule, only be justified if the institution has previously assessed whether access to the document would “specifically and effectively” undermine the protected interest. In addition, the risk of a protected interest being undermined must be “reasonably foreseeable and not purely hypothetical”, in order to be relied on.<sup>61</sup>

## Grounds for refusal under Article 4(1) of Regulation 1049/2001

### Public security, defence and international matters

Article 4(1) of Regulation 1049/2001 requires institutions to refuse access to documents if disclosure would undermine the protection of **public security, defence and military matters, international relations** and the **financial, monetary or economic policy of the Community or a Member State**. These notions are not defined in the Regulation, nor in Regulation 1367/2006 or the Aarhus Convention. Public security however, is used in Article 36 TFEU and is used to mean measures which could threaten the internal or external security of a State.<sup>62</sup> Such measures could include the trade in weapons or military goods, as well as the interruption of petroleum supply, acts of violence within a State and police measures to prevent or combat them. Measures taken by a Member State may also be considered to be measures relating to public security, according to Article 347 TFEU.<sup>63</sup>

While **public security** refers in general to police, border protection and similar issues, **defence and military matters** concern the military forces of the Member States, the cooperation within the EU, NATO or other alliances, and military interventions. In recent years, however, the line between public security and military measures has become more and more difficult to define.

**International relations** concerns the relations of the EU or its Member States with other States and international organisations on any subject matter, including trade or other economic issues. “Financial, monetary or economic policies” are very general terms which have, so far, not been the subject of EU court decisions.

In case C-552/07,<sup>64</sup> a citizen wanted to know exactly where genetically modified (GM) plants were cultivated in a municipality. The municipality was afraid that opponents to GM might, as had happened in the past, destroy the seeds, so wished to limit the detail of the location either to the whole of the municipality, or the region. Therefore the application was rejected, invoking reasons of public order and public security. The Court of Justice decided that Article 25(4) of Directive 2001/18 (on the deliberate release into the environment of genetically modified organisms) required detailed information to be released.<sup>65</sup> The level of detail required was further defined in Annex III to the Directive. It was not possible to invoke reasons of public security in order to justify a refusal to disclose that information. Even if social unrest were caused by the disclosure of the information, the Member State must take necessary measures to contain it, in order to ensure a full practical application of EU law.

56. *Ibidem*, paragraph 95; case T-2/03 (n.33, above), paragraph 74.

57. General Court, case T-2/03 (n.33, above), paragraph 75.

58. *Ibidem*, paragraphs 102 and 112.

59. *Ibidem*, paragraph 115.

60. General Court, case T-211/00, *Kuijjer*, ECR 2002, II-1959, paragraph 60.

61. Court of Justice, case C-39/05P and C-52/05P, *Sweden and Turco v. Council*, ECR 2008, I-4723, paragraphs 61, 63 and 66.

62. See, for example, General Court, case T-174/95, *Svenska Journalistenförbundet v. Council*, ECR 1998, p.II-2289, paragraph 122.

63. This Article mentions measures „in the event of serious internal disturbances... in the event of war, serious international tensions constituting a threat of war, or... maintaining peace and international security”.

64. Court of Justice, case C-552/07, *Azelvandre*, ECR 2009, p.I-987; see also Conseil d'Etat (France), Decision 279817 of 16 April 2010.

65. Directive 2001/18 on the deliberate release into the environment of genetically modified organisms, OJ 2001, L 106 p.1, Article 25(4): “In no case may the following information when submitted according to Articles 6,7,8,13,17,20 or 23 be kept confidential: - general description of the GMO or GMOs, name and address of the notifier, purpose of the release, location of release and intended uses.”

In case T-362/08 (*IFAW Internationaler Tierschutz- Fonds v Commission*), the General Court held that access to a document concerning the construction of a private airport in a Natura 2000 area could undermine the economic policy of a Member State, so access to information in this case could be refused.<sup>66</sup>

All provisions can be interpreted broadly. When assessing applications EU institutions have wide discretion in deciding whether the public interest requires them to refuse disclosure of information or not.<sup>67</sup>

However, Article 4 of Regulation 1049/2001 explicitly requires that the disclosure of information concerning these issues would “undermine” the interest in question. It is not enough that these interests are touched by the disclosure of information. Rather, disclosure must generate a serious, more than transitional disturbance, of international relations or significantly affect the activities of military or security forces and their cooperation. It must be a public interest which would be undermined. For example, where an individual in a third State or in the military or security forces has committed an error, it is not necessarily in the public interest to keep information on such issues from public awareness.

In case C-266/05P, the applicant wanted to have access to documents which Member States had sent to the Council and which had led the Council to update lists of persons with suspected links to international terrorism.<sup>68</sup> Access to the documents was denied, as the subject-matter concerned public security. Appeals to the Court were without success.

In case T-264/04, an environmental organisation requested access to documents which concerned international trade negotiations.<sup>69</sup> Access was refused as the international negotiations were ongoing and the documents in question concerned the attitude which the EU or Member States could or would adopt towards developing countries.<sup>70</sup>

In case T-211/00, the applicant requested access to reports that a human rights organisation had made to the Council on missions to third countries. The reports examined the situation of human rights in those countries, and were intended to provide background to Council decisions on asylum-seekers. The Council refused access to the reports. The General Court then found that access would not undermine international relations, even where negative remarks were made in the reports with regard to the situation in third countries.

On the contrary, for environmental information, in each case, Institutions must weigh the different interests at stake and carefully examine whether access to information should be refused in the public interest, or if the interests of keeping information confidential prevail over the interest of protecting the environment. For example if:

- a request to have access to information on the fuel which is used by military ships or on their air emissions does not appear to undermine the public interest in seeing military or defence matters protected.
- information on what quantities of nuclear waste were shipped to a third State does not undermine the relations with that state.
- information on the chemical composition of a specific gas which was used by the police in order to dissipate demonstrations, does not undermine public security.

Additionally, as mentioned above, for environmental information the Aarhus Convention takes precedence over Regulation 1049/2001<sup>71</sup> and only allows access to information to be refused where disclosure would undermine<sup>72</sup> “international relations, national defence or public security” and does not mention military matters.<sup>73</sup> The exception of Regulation 1049/2001 on “the financial, monetary or economic policy of the Community or a Member State” does not apply in environmental matters.<sup>74</sup>

The difference to the rest of the exceptions of Regulation 1049/2001 is not huge, except that as regards environmental information, under the Aarhus Convention there is no obligation of the EU authorities to refuse access to such information, whereas under Regulation 1049/2001 the authorities are obliged to refuse access to documents.

The exception clause concerning “military matters” used in Regulation 1049/2001, but not in the Aarhus Convention, was relevant in a case decided by the German Bundesverwaltungsgericht, the Supreme Administrative Court. In this case, the administration of a military airport had concluded a contract which allowed a private parachuting association to use the airport for flights. The contract in question concerned military, but not defence matters. The German court granted access to the contract.<sup>75</sup>

66. General Court, case T-362/08 *IFAW v. Commission*, judgment of 13 January 2011. This case is under appeal, as the information in question is “environmental information” and neither the Aarhus Convention nor Regulation 1367/2006 provide for a defence “economic policy of a Member State”. See also n.72, below.

67. Court of Justice, case C-266/05P *Sison v. Council*, ECR 2007, p.I-1233.

68. Court of Justice, case C-266/05P (n.65, above).

69. General Court, case T-264/04, *WWF v. Council*, ECR 2007, p.II-911.

70. General Court, case T-211/00 (n.58, above).

71. See on this issue the hierarchy of provisions, p.61, below.

72. The term “undermine” stems from Regulation 1049/2001 itself. The Aarhus Convention refers to “adversely affect” (Article 4(4)). However, it allows Contracting Parties to introduce or maintain provisions which provide for broader access to information, see Article 3(5).

73. Aarhus Convention, Article 4(4.b).

74. In case T-362/08 (n.64, above), the General Court should therefore not have based its decision on the economic policy of the Member State in question, as the document in question concerned the construction of a private airport in a Natura 2000 habitat – which constitutes “environmental information” – and the exception “economic policy” does neither exist under the Aarhus Convention nor under Regulation 1367/2006.

75. See Bundesverwaltungsgericht, 7C5.04, Decision of 5 December 2007.

## The protection of privacy

Regulation 1049/2001, Article 4(1.b) protects “privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”. In this area, the EU adopted Regulation 45/2001 on the protection of privacy,<sup>76</sup> to which Article 4(1.b) expressly refers. Under Regulation 45/2001, a person who requested access to data to which Regulation 45/2001 applies, must establish the need for having the data transferred.<sup>77</sup> The person whose data has been requested to be released may object to such a transfer citing “compelling legitimate grounds relating to his or her particular situation”.<sup>78</sup> Names and first names of persons are personal data which fall under the application of Regulation 45/2001; any communication of the data to others constitutes a processing under that Regulation.

In case 28/08P (*Commission v Bavarian Lager*), the Court of Justice had to decide on the interrelationship between Regulation 1049/2001 and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies.<sup>79</sup> The applicant requested access to the minutes of a meeting between officials of the European Commission and the United Kingdom as well as representatives of a European breweries’ association. The Commission granted access to the minutes, but blanked out the names of five participants, arguing that two of them had not consented to the disclosure of their names, and three other participants could not be reached to give their consent to disclosure. The Court of Justice confirmed the Commission’s decision. It held that the applicant had not established why it was necessary or legitimate to have access to the names. The requirement of Regulation 45/2001 applied, despite Regulation 1049/2001 which stipulates that an applicant is not obliged to state reasons for their request. The Court held that the two Regulations stood next to each other, and both had to be applied.

In case T-121/05, a chemical company requested access to the names of participants of an expert meeting of the Commission, where scientific experts from Member States discussed the classification of a chemical substance and made recommendations to the Commission.<sup>80</sup> The Commission granted access to the full minutes, but refused to disclose the names of the experts. The General Court quashed the Commission’s decision, stating that scientific advice was not protected under Regulation 1049/2001 in the same way as legal advice, and that the Commission had given no specific reason which could justify the refusal to disclose the names. The General Court did not discuss in detail Article 4(1.b) of Regulation 1049/2001 or Regulation 45/2001. It rejected the application citing that the Commission had remained too general in its justification and had not explained specifically why the experts’ privacy or integrity would be affected by a communication

of their names. The General Court confirmed its position in case T-166/05, where it also rejected the Commission’s argument that it had made a commitment towards the scientific experts that their names and positions would not be disclosed.<sup>81</sup> This decision preceded the judgment of the Court of Justice, in case C-28/08P mentioned above.

In case T-111/00, the General Court granted access to the names of government officials who had participated in a committee under the EU’s comitology procedure. The applicant had received the full minutes of the committee meeting with names of the officials blanked, so he could not ascertain the differences in Member States’ positions. The General Court ruled that British American Tobacco was entitled to know the names of the officials, so that it could argue its case before the tax and customs authorities of the Member State concerned.<sup>82</sup> It should be noted that neither Regulation 1049/2001 nor Regulation 45/2001 were discussed by the Court, as they had not yet, or had just been adopted by the EU.

In view of the judgment in case C-28/08P, one might wonder what interest the applicant had in requesting the names of experts divulged having already received the full transcript of the recording with names and countries deleted.

While it is difficult to see a specific interest of an applicant to have the name of a government official who participates in a meeting with an EU institution disclosed, the situation might be different with non-governmental persons. Indeed, the principles of openness and transparency suggest that opinions and positions are discussed openly and that experts who participate in meetings with EU institutions, stand by their opinions and are also ready to defend them in public. A solution could in practice easily be obtained by the EU institution stating in invitations to meetings that by participating in a meeting, all representatives accept that their names may be disclosed; and that those who do not accept this will not be able to participate. Keeping the names of experts confidential only increases the closed-society mentality which the EU wishes to combat, as asserted in Article 1 of TEU. This secrecy also promotes undue influence and, ultimately, mental or material corruption. It is hoped that the Court of Justice soon finds an opportunity to clarify the diverging interests at stake.

At present, though, access to the individual names of experts or participants in a meeting will require particular justifications, not only why the arguments put forward in a meeting should be released, but also, why the names of the participants should be made public. The EU institution or body will then have to weigh the interests of an applicant seeking a disclosure against the interests of the individual participant wishing his or her name not to be disclosed.<sup>83</sup>

76. Regulation 45/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data. OJ 2001, L 8 p.1.

77. Regulation 45/2001, Article 8(b).

78. Regulation 45/2001, Article 18.

79. Court of Justice, case C-28/08P *Commission v. Bavarian Lager*, ECR 2010, I-6055.

80. General Court, case T-121/05 *Borax v. Commission*, judgment of 11 March 2009.

81. General Court, case T-166/05, *Borax v. Commission*, judgment of 11 March 2009, paragraph 41.

82. General Court, case T-111/00 *British American Tobacco v. Commission*, ECR 2001, p.II-2997.

83. See also Commission proposal for an amendment of Regulation 1049/2001, COM(2008) 229, Article 4(5): “Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned...”.

In environmental matters, the Aarhus Convention allows the EU institutions to refuse disclosure of information, in order to protect “the confidentiality of personal data and/or files relating to a natural person”, where the individual (**natural person**, not company or association) has not consented to the disclosure. This provision clarifies that companies and professional associations may not invoke ‘data protection’ as a reason to object to the disclosure of information relating to their activity. In addition, the confidentiality of that type of data must be provided for in a national law for the documents to be withheld. The provision of the Aarhus Convention prevails over Regulation 45/2001 and, as mentioned above, Regulation 1049/2001. In environmental matters, data protection is thus significantly narrower than under these two regulations.

## Grounds for refusal under Article 4(2) of Regulation 1049/2001

Article 4(2) of Regulation 1049/2001 on the rights of public access to European Parliament, Council and Commission documents requires that the EU institutions refuse access to a document where disclosure would undermine either the protection of commercial interests, court proceedings and legal advice or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

### The protection of commercial interests

Article 4(2) of Regulation 1049/2001 on the rights of public access to European Parliament, Council and Commission documents requires that the EU institutions refuse access to information where disclosure would undermine “the protection of commercial interests of a natural or legal person, including intellectual property.”<sup>84</sup> In each case, the EU institution must weigh up the interest in seeing information on such issues remain undisclosed against the “overriding public interest in disclosure.”<sup>85</sup>

“**Commercial interests**” is a broad term, made still broader by the inclusion of intellectual property. It is up to the person who has generated the information – the “**third-party**”<sup>86</sup> – to decide whether disclosure of information would affect his or her commercial interests. For this reason, the institution must consult the third party with a view to assessing whether disclosure would affect his or her commercial interests. The final decision is made by the institution and not the third party.

Commercial interests include information that could influence the economic situation of a natural

person with regard to competitors, market position, methods of manufacture, turnover and benefits, links with other economic operators, the composition of products including the presence of dangerous substances, residues or impurities. Intellectual property includes patent rights, copyrights, trademarks and similar rights.

A number of pieces of EU legislation set out which information is considered to concern commercial interests; sometimes these specific provisions indicate that disclosure of such information would “normally be deemed to undermine” the protection of commercial interests.<sup>87</sup> Such provisions constitute a presumption in favour of not disclosing the information mentioned. But the provisions do not take away the obligation of the institution to examine whether the disclosure of information in each case would affect, and even undermine, the commercial interests in question, and whether there is an overriding public interest in the disclosure.

Disclosure of information can only be refused, if it would “undermine” commercial interests. Undermining commercial interests is much stronger than “affecting” commercial interests. Commercial interests must be put at risk by the disclosure, for example if disclosure of information would lead to an economic disadvantage for the economic operator.<sup>88</sup>

In a number of Member States, access to studies is sometimes refused as disclosure might undermine the copyright of the author of the study. This reasoning does not hold in cases where a study is publicly funded or in view of a public permitting procedure. Documents submitted with a view to obtaining an authorisation or a permit are part of the public permitting procedure and cannot be withheld; at the most, disclosure of parts of such studies (such as the name of the author of the study) could be refused.<sup>87</sup> Furthermore, disclosure of other studies made with public funds cannot be refused in order to protect the intellectual property of their author. It is possible under civil and commercial law for the author to protect themselves against the abuse of their copyright; however, administrative secrecy is not a proportionate means to protect them.

In cases where an overriding public interest in disclosure of information exists, disclosure must be granted even if it would undermine commercial interests.<sup>90</sup> The interest in disclosure must be “public”, rarely are personal or private interests of the applicant sufficient. A public interest may exist where the information is of interest to a large number of people, or where it concerns aspects of importance for society. For example, in cases affecting the protection of human health or the environment.<sup>91</sup>

87. See for example Regulation 1907/2006 (REACH-Regulation), OJ 2006, L 396 p.1, Article 118(2); Regulation 1107/2009 concerning the placing of plant protection products on the market, OJ 2009, L 309 p.1, Article 63.

88. See General Court, case T-211/00 (n.58, above).

89. See Aarhus Convention Compliance Committee, Doc.ECE/MO.PP/2008/5/Add.7. The case concerned an environmental impact study. The Compliance Committee concluded that the general exclusion of disclosing such studies to the public could not be justified by intellectual property rights.

90. In EU law, the term “overriding public interest” is used in Article 6(4) of Directive 92/43 on the conservation of natural habitats and wild fauna and flora, OJ 1992, L 206 p.7. In that provision it is used to allow the balancing of interests in the conservation of a habitat against the realisation of a plan or project which would significantly affect that habitat.

91. There is not yet jurisdiction of EU courts on this question. A UK court considered it to be of overriding public interest that the UK public be informed of the localisation of masts for mobile telephones, as there was a potential risk for persons of the electromagnetic waves emanating from these masts, see Office of Communication v. The Information Commissioner, (2009) EWCA Civ.90.

84. In its proposal for a recast of Regulation 1049/2001, COM(2008) 229, the Commission adds to these grounds the copyright of a person, see Article 16 of that proposal.

85. Regulation 1049/2001, Article 4(2).

86. The term “third party” is defined in Regulation 1049/2001, Article 3(b), as any natural or legal person or entity outside the institution concerned.

For environmental information, there are a number of important differences regarding the disclosure of commercial or industrial information. The institution holding the information must also examine whether there is an overriding public interest in disclosure.

However, to refuse access to environmental information, institutions must demonstrate that the information is “protected by law in order to protect a legitimate economic interest.”<sup>92</sup> The confidentiality of the economic interest in question must be protected by law either through legislative provisions or by the case-law of the courts. Public authorities must also consider whether there is “legitimate” economic interest, that the provisions of national law provide for the non-disclosure of commercial or industrial information is not sufficient. The term “legitimate” is not defined, but should be interpreted as the existence of good reasons to protect the commercial or industrial interests, for example, to avoid the abuse of the information by a competitor or to keep manufacturing processes confidential.

Additionally, in accordance with the Aarhus Convention, “information on emissions which is relevant for the protection of the environment, shall be disclosed.”<sup>93</sup> The term “emission” was discussed above on page 36. Disclosure of information on emissions may not be refused in order to protect commercial or industrial interests, even where the protection of such interests is economically legitimate. This also applies to information which is classified as protected for reasons of commercial or industrial interests by EU regulations or directives.<sup>94</sup> The Aarhus Convention prevails in both instances.

This is confirmed by Article 6(1) of Regulation 1367/2006 which provides that “As regards Article 4(2), first and third indents, of Regulation (EC) 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where information requested relates to emissions into the environment”. This prevents institutions from refusing disclosure of environmental information to protect commercial interests (including intellectual property), as well as inspections and audits. Information on emissions however may be withheld to protect investigations within infringement proceedings provided there is no overriding public interest in disclosure.

This broad provision may cause difficulties for economic operators in some cases: for instance, test results or expensive practical experiments could be used by competitors to gain competitive advantage. The solution must be found on a case-by-case basis. In many cases, it may be sufficient to block some parts of the information, so that abuse is avoided. Where this is not possible, the rights of access to environmental information prevail over the interest of an economic operator to have

commercial or industrial information undisclosed. The right of access to environmental information is a fundamental right. The environment is neither the property of the economic operator nor of the administration; rather, it is “everybody’s property”. In such a case it is only legitimate that everybody has the right to know which emissions enter the environment.

## The protection of court proceedings and legal advice

Article 4(2) of Regulation 1049/2001 on the rights of public access to European Parliament, Council and Commission documents requires that the EU institutions refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice unless there is an overriding public interest in disclosure.

“**Court proceedings**” include the written pleadings made before one of the EU courts, oral statements, reports, statements by the court and other material used during the court proceedings.

The Court of Justice justified the exclusion of some documents where:

- the pleadings and the other documents were specifically drafted in view of a concrete case which was pending before the court;
- the disclosure of such documents might lead to external pressure exercised on the court;
- the purpose of this exception and of that which exempted the EU courts altogether from the application of Article 15 TFEU and Regulation 1049/2001 when they acted in a judicial capacity, would be disturbed; and
- the court proceedings were meant to take place in “total serenity”, which would not be the case when the documents pertaining to the procedures were publicly available.<sup>95</sup>

The Court of Justice upheld the judgment of the General Court which had stated that pleadings and other documents of a case, already closed by a court decision must in principle be disclosed, as there were no longer (pending) court proceedings.<sup>96</sup> That a certain document was the subject of a court case in the past does not entitle the EU institutions to invoke this exception.

**Legal advice** is the opinion given by the legal advisers to the institutions in a specific case or for a specific piece of legislation. It is not limited to legal advice given during court proceedings, but is an exception independent from any court proceedings<sup>97</sup> The provision must be read together with

92. Aarhus Convention, Article 4(4.c).

93. Aarhus Convention, Article 4(4.d).

94. See for an example n.88, above.

95. Court of Justice, joined cases C-514-07P, C-528/07P and 532/07P *Sweden a.o. v. Commission*, judgment of 21 September 2010; see also General Court, case T-36/04, *API v. Commission*, ECR 2007, p.II-3201 (the judgment which was appealed against by case C-514/07P etc).

96. Court of Justice, *ibidem*.

97. General Court, case T-36/04, *API v. Commission* (see n.93, above).



Recital 11 of Regulation 1049/2001 which states that institutions should be entitled to protect their “internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks”. Usually the legal opinion of the internal legal service of the institution is considered under this provision. It depends on the content – rather than on the title or its author – whether a document is considered **legal advice**.<sup>98</sup> The legal opinion must refer to a specific conflict and discuss the legal argument(s) that pleads for a means of resolving the situation. For example, a legal study is normally not legal advice, as it does not propose to solve a specific conflict.

Where the legal advice concerns legislative matters, institutions must give wider access to it. This follows from Recital 6 of Regulation 1049/2001<sup>99</sup> and the principles which underlie the provisions of access to documents; openness, transparency, democracy and the greater participation of citizens in the decision-making process of the EU institutions. “Openness in that respect [when an institution acts in a legislative capacity] contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.<sup>100</sup> The Court of Justice also stated that Regulation 1049/2001 imposes, in principle, an obligation to disclose opinions of the Council’s legal service relating to a legislative process.<sup>101</sup> The same reasoning would have to apply to the advice of the Commission’s legal service when it gives an opinion on a legislative proposal.

For environmental information, there is no exception protecting legal advice, as the Aarhus Convention does not contain any corresponding provision. Exceptions do occur, however, when the legal advice refers to “material in the course of completion”, concerns “internal communications” of EU institutions or where disclosure would adversely affect “the confidentiality of proceedings of public authorities”. These exceptions are laid down in Article 4(3.c) and (4.a) of the Aarhus Convention and are discussed below.

## The purpose of inspections, investigations and audits

Under Article 4(2) of Regulation 1049/2001, institutions shall refuse access to documents where disclosure would undermine the protection of “the purpose of inspections, investigations and audits”, unless there is an overriding public interest in disclosure.

The purpose of inspections, investigations and audits is to discover facts on a per-case basis.

The investigating, inspecting or auditing authority will establish facts, if necessary without or against the will of the investigated person or company. The authority may accede to documents or other evidence which is in the hands of the investigated person and which has not yet been released. An objection from the investigated person is not relevant. Such investigating, inspecting or auditing powers must explicitly be given to the public authority in a regulatory instrument, as this procedure constitutes a form of intrusion into the personal or professional sphere of the investigated person. This is the case, for example, with the Court of Auditors,<sup>102</sup> competition investigations,<sup>103</sup> inspections in the context of the Common Fisheries Policy,<sup>104</sup> or more generally, with the powers of public prosecutors or the police.

Where a public authority has to make an inquiry into a case, the very purpose of that enquiry, namely the establishment of the facts of the case, might be jeopardised, if the public authorities had to disclose some or all documents which were found or established during the enquiry. It is thus legitimate to provide an exception to the disclosure of documents, as long as the facts which were to be investigated (inspected, audited) are not completely established and therefore the objective of the investigation was not reached.

When the investigation, inspection or audit ends, so does the period during which the exception is applicable. Normally, this will coincide with the investigator or the investigating body establishing its final report. From that moment, access to all documents drawn up before the final report will also be made available.

The General Court treats letters of formal notice and reasoned opinions which the Commission addresses to a Member State as part of an infringement procedure under Article 258 TFEU<sup>105</sup> as documents which are part of an investigation, inspection or audit procedure, and accepts that these documents are not disclosed. It sees the purpose of such investigations as to reach “an amicable settlement of the dispute between the Commission and the Member State concerned.”<sup>106</sup>

It is arguable whether this opinion is compatible with Article 4(2) of Regulation 1049/2001 and the general system of openness, transparency and access to documents which was set up by the European Union. When the Commission made the proposal for a regulation which later became Regulation 1049/2001,<sup>107</sup> it suggested the exceptions of “inspections, investigations and audits” and

98. Court of Justice, case C-39/05P (n.59, above), paragraph 39.  
 99. Regulation 1049/2001, Recital 6: “Wider access should be granted to documents in cases where the institutions are acting in their legislative capacities, including under delegated powers...”.  
 100. Court of Justice, case C-39/05P (n.59 above), paragraph 46.  
 101. *Ibidem*, paragraph 68.

102. See Article 287 TFEU.  
 103. See Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1 p.1, Articles 17ss.  
 104. See Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002, L 358 p.59, Article 27.  
 105. See Article 258 TFEU: “if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations”. The form in which the Commission gives a Member State the opportunity to present its observations, is done by a letter (letter of formal notice); when the Commission is not satisfied with the answer or when it did not receive an answer, it may send a second formal notice to the Member State concerned (reasoned opinion).  
 106. General Court, case T-36/2004, *API v. Commission*, ECR 2007, p.II-3201, paragraph 121; case T-59/09 *Germany v. Commission*, judgment of 14 February 2012, paragraph 68.  
 107. Commission OJ 2000, C 177E p.70.

“infringement proceedings, including the preparatory stages thereof”. The European Parliament and the Council then deleted the second exception. This demonstrates that the Commission did not consider that the documents drawn up during an infringement procedure constituted documents of an investigation, inspection or audit procedure.

In addition, one may argue that the pre-judicial procedure under Article 258 TFEU cannot be treated as an investigation, inspection or audit procedure, or be considered equivalent to such a procedure. The Commission exchanges correspondence with the Member State concerned on the subject-matter, but has no means to gain access to documents or to other facts which the Member State does not wish to release. The procedure therefore lacks the essential element of an investigation, inspection or audit procedure, namely the unilateral access to factual elements by the investigating body. The decision by the Commission to issue a letter of formal notice, or a reasoned opinion, may be compared with the final report in an inspection or audit process and must be disclosed, just as those reports must be disclosed.

The Aarhus Convention allows disclosure of environmental information to be refused in cases where it would adversely affect “the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature”.<sup>108</sup> This exception is narrower than the one under Regulation 1049/2001. As the procedure under Article 258 TFEU within infringement proceedings initiated by the Commission against Member States is neither a criminal nor a disciplinary procedure, access to documents, in particular to the letters of formal notice and reasoned opinions, cannot be refused. This will have to be clarified, in due course, by the EU Court of Justice.

Article 6 of Regulation 1367/2006 on the application of the provisions of the Aarhus Convention states that an overriding public interest in disclosure must be deemed to exist where the information requested relates to emissions into the environment preventing the institutions from protecting the confidentiality of commercial interests, inspections and audits “with the exception of investigations, in particular those concerning possible infringements of Community law”. This provision constitutes an attempt to expand the exception to the exception which is foreseen under the Aarhus Convention but it does not change the comments made above about the lack of exceptions applying to procedures such as the infringement procedure under Article 4(4.c) of the Aarhus Convention as the provisions of the Aarhus Convention prevail over Regulation 1367/2006 as well as Regulation 1049/2001.

## Grounds for refusal: Exceptions under Article 4(3) of Regulation 1049/2001

According to Article 4(3) of Regulation 1049/2001, the EU institutions shall refuse access to a document which relates to a matter where a decision has not yet been taken by the institution, documents relating to a matter after the decision was taken, or documents which were transferred from third parties.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

### The decision has yet to be taken

Article 4(3) of Regulation 1049/2001 states that the EU institutions shall refuse access to a document which relates to a matter where a decision has not yet been taken by the institution, “if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.”

This exception is intended to protect the institutions’ decision-making process. It is drafted in relatively broad terms and refers to any document drawn up by officials of the institution for internal use or drafted by outside persons. The document must relate to the subject-matter on which a decision is to be taken. This could be the case with:

- opinions of other administrative units within the same institutions
- opinions of other institutions
- position papers or comments by Member States
- position papers or comments by representatives of third parties.

The exception may only be applied where the disclosure of the document is deemed to “seriously undermine” the institution’s decision-making process. In contrast, this condition is rarely fulfilled in situations where private persons or groups give an opinion or make a statement in order to influence the institution’s decision. The EU institutions act in the general European interest; disclosure of statements or opinions from lobby group should not be considered as **seriously undermining** their decision-making process.

108. Aarhus Convention, Article 4(4.c).

For environmental information there are no similar provisions to protect the decision-making process. However, the Aarhus Convention states that disclosure of environmental information may be refused “if the request concerns material “in the course of completion or concerns internal communications of public authorities” where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure”.<sup>109</sup>

Information may also be withheld where disclosure would adversely affect “the confidentiality of proceedings of public authorities, where such confidentiality is provided for under “national law”. The term “national law” has to be understood, as regards the EU institutions and bodies, as meaning “EU law”.<sup>110</sup> Thus, the Aarhus Convention refers to Regulations 1049/2001 and 1367/2006 on the application of the provisions of the Aarhus Convention. Article 6(1) of Regulation 1367/2006 requires the institution, when using the exception for the protection of their decision-making process, to interpret the exception in a restrictive way, taking into account both the public interest served by disclosure and whether the information requested relates to emissions into the environment. The institutions must consider carefully whether an overriding public interest in disclosure exists, as the legislature assumes that there is always a strong public interest in disclosing information regarding emissions into the environment.<sup>111</sup>

## The decision was taken

Article 4(3), second subparagraph, of Regulation 1049/2001 states that institutions may refuse disclosure of some documents relating to a decision-making process even after the decision has been taken, “if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure”.

The documents which are covered by this provision are documents which contain “opinions for internal use as part of deliberations and preliminary consultations within the institution”. This means that the documents must be essential for the institution to reach a decision: an example would be the opinion of the Commission’s legal service or the opinion of a Member State during the Council deliberations. In both cases, disclosure of such documents could allow citizens to compare decisions to check for consistency in decision-making, or to extrapolate the institution’s decision in future, similar cases. In contrast, documents concerning persons or bodies which are not directly involved in the decision-making process itself, such as lobby groups, journalists, non-governmental

organisations and so forth, are not “part” of the deliberations within the institution. The institutions cannot refuse access to such documents on the basis of this provision.

If the institution were to legitimately refuse disclosure of a document it would again be necessary that disclosure would “seriously undermine” the decision-making process. As the actual decision-making process is already finished, the disclosure of the requested document can only threaten to undermine future decision-making processes. The document requested must be of a type that is usually adopted by the institutions as part of the decision-making process. Disclosure of a specific document, relevant only within a past process and not of the type of document that is usually adopted, could not influence future similar decision-making processes. This consideration excludes opinions, statements and other documents from lobby groups or other organisations that are not regularly involved in the institution’s decision-making process.

Any document must be disclosed where there is an overriding public interest in disclosure. The institution’s analysis of whether this condition is fulfilled will be stricter than in cases where the institution has not yet taken a decision as it is normal to disclose information on past events, and the interest of the institution to keep the information undisclosed, even after the decision was taken, is restricted to the protection of the decision-making process, not the process in a specific case.

## Documents transferred from third parties

The EU institution to which a request for disclosure is addressed, must consult any third party which had transferred a document to that institution about whether or not one of the exceptions of Regulation 1049/2001 on the rights of public access to European Parliament, Council and Commission documents applies - “unless it is clear that the document shall or shall not be disclosed”.<sup>112</sup> A third party can be anybody other than the institution who had received the request; in particular it includes other EU institutions, Member States, third countries, or citizens.<sup>113</sup> However, the final decision to disclose the document or not lies with the institution to which the application for access was made.

These principles also apply when a document originates from a Member State. Article 4(5) of Regulation 1049/2001 states that the Member State must agree to the disclosure. However, the Member State has to invoke one of the exceptions provided under Article 4 of Regulation 1049/2001. The EU institution must then assess this request and decide whether or not access to the document is granted.<sup>114</sup>

109. Aarhus Convention, Article 4(3)(c).

110. Aarhus Convention, Article 4(4.a).

111. See Aarhus Convention, Article 4(4), last subparagraph; Regulation 1367/2006, Article 6(1); Directive 2003/4 (n.53, above), Article 4(2), last subparagraph.

112. Regulation 1049/2001, Article 4(4).

113. See the definition of third party in Regulation 1049/2001, Article 3(b).

114. See Court of Justice, case C-64/05P (n.41, above).

The need to consult a third party, including a Member State, is not per se an exceptional circumstance which would allow the institution to prolong the 15 working days time limit<sup>115</sup> for answering a request. The institutions must speed up communications with third parties in order to answer the request for access to documents within the time limit. However, in practice institutions most of the time prolong and do not reply within the prescribed time limits.

Requests for environmental information may be refused if disclosure “would adversely affect the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material.”<sup>116</sup> The Aarhus Convention draws a distinction between information that must be provided by third parties to public authorities as a consequence of a legal obligation and information that is provided on a voluntary basis. Only for the latter may the third party refuse that the information be disclosed. A Member State will have to demonstrate that its interests would be adversely affected by the disclosure of the documents it voluntarily transmitted to the institution in order to request the documents be withheld. However, it will not be able to oppose to the disclosure if it were required to supply the institution with it.

## The obligation to provide partial access

Sometimes documents which have been requested, contain information covered by one of the exceptions mentioned above. Examples are the names of natural persons, the turnover of a private company or the composition of a specific product. In these cases, the EU institution has to grant partial access to the requested information, for example by deleting the names, the specific data or the process descriptions. A failure to examine the possibility of granting partial access is a serious error which makes the institution’s decision defective.<sup>117</sup> The same provisions apply in environmental matters.

115. Article 7(1) of Regulation 1049/2001.

116. Aarhus Convention, Article 4(4)(g).

117. General Court, case T-14/98, *Hautala v. Council*, ECR 1999, p.II-2489; case T-211/00 (n.58, above).

# Annex 1: The legal framework

It is necessary to understand how the different pieces of legislation apply when asking for access to documents as the matter is governed by different laws from various levels in the hierarchy of norms. This is even more true for access to environmental information which is governed by the Aarhus Convention in addition to the EU Treaties and Regulation 1049/2001 and 1367/2006.

## The EU Treaties and the Charter of Fundamental Rights

A number of provisions in the EU Treaties are important for access to information as they indicate the EU's general policy and orientation towards the issue. As the Treaties form a sort of constitution for the EU, all secondary EU legislation has to be interpreted in a way that complies with their provisions.

Article 1(2) of the Treaty of the European Union (TEU) establishes a fundamental EU objective, stating: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." In the same line, Article 11(2) TEU states that: "The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society". Article 11(3) TEU stipulates that the Union's actions shall be "coherent and transparent."

The Treaty on the Functioning of the European Union (TFEU) expounds on these basic tenets, stating that: "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible."<sup>118</sup>

The TFEU states that the governing principle of access to information is for a citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, [to] have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph."<sup>119</sup>

This last provision is also reiterated in the Charter of Fundamental Rights of the European Union<sup>120</sup> that has the same legal value as the EU Treaties: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents."<sup>121</sup> The charter also provides for the explicit protection of personal data, stating: "Everyone has the right to the protection of personal data concerning him or her",<sup>122</sup> and provides for the right to protect the privacy of persons.<sup>123</sup> These provisions create several exceptions to the right of access to information,<sup>124</sup> which will be discussed below.

118. in Article 15(1) of the Treaty on the Functioning of the European Union (TFEU).

119. Article 15(3) TFEU.

120. (Article 42) OJ 2000, C 364 p.1.

121. Article 6(1) of the Treaty of the European Union (TEU).

122. Article 8, Charter of Fundamental Rights of the European Union.

123. Article 7, Charter of Fundamental Rights of the European Union.

124. See for example Court of Justice, joined cases C-92/09 and C-93/09 *Schecke GbR and Eifert*, judgment of 9 November 2010.

## The evolution of secondary EU legislation

In 1993, the Council and the Commission agreed on a Code of Conduct concerning public access to Council and Commission documents.<sup>125</sup> This code was quickly replaced by a Council Decision on public access to Council Documents<sup>126</sup> and a Commission decision on the same subject.<sup>127</sup> The Treaty of Amsterdam, which amended the EU Treaty on European Union, inserted an Article 255 into the EC Treaty which corresponded very largely to the above-mentioned wording of the present Article 15(3) TFEU. Subsequently, Regulation 1049/2001 regulated the access to documents which were held by the European Parliament, the Council and the Commission.<sup>128</sup>

By 1990 a directive on access to information had already been adopted in the **environmental** sector: Directive 90/313 on access to environmental information.<sup>129</sup> In 1998, the Convention on access to information, public participation in decision-making and access to justice in environmental matters was signed in Aarhus (Denmark). Subsequently, the EU replaced Directive 90/313 by Directive 2003/4,<sup>130</sup> adhered to the Aarhus Convention<sup>131</sup> and adopted Regulation 1367/2006 which applied the provisions of the Aarhus Convention to EU institutions and bodies.<sup>132</sup>

## How to interpret the EU legal provisions

Legal provisions regulate access to information held by EU institutions. The institutions individually apply and interpret these provisions. If interpretations differ from that of another party, under the system of the EU Treaties, it is the Court of Justice of the EU that is responsible for an authentic interpretation of the law.

The Court of Justice has developed a number of principles on the interpretation of EU law that other EU institutions must follow. These principles are as follows:

- a. **Check the wording of a legal provision.** Where the wording of a provision is clear and unambiguous, the understanding of that provision must follow its wording.

However, the Court of Justice has explained that there are difficulties linked to this approach, when EU law is in question. "It must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must

125. OJ 1993, L 340 p.1.

126. Decision 93/731 on public access to Council documents, OJ 1993, L 340 p.43.

127. Commission Decision 94/90 on public access to Commission documents, OJ 1994, L 46 p.58.

128. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145 p.43.

129. Directive 90/313 on the freedom of information on the environment, OJ 1990, L 156 p.58.

130. Directive 2003/4 on public access to environmental information, OJ 2003, L 41 p.26.

131. Decision 2005/370, OJ 2005, L 124 p.1. The Aarhus Convention is reproduced in the annex to that Decision.

132. Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, OJ 2006, L 264 p.13.

also be borne in mind, even where the different language versions are entirely in accord with each other, that Community law uses terminology which is peculiar to it... legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.<sup>133</sup>

It is also possible that one term may be used with different meanings in EU and national law. An example is the term “forest”: the Court clarified that the word’s definition in an EU regulation only referred to that Regulation and its application within the Member States, but did not exclude that national law could have another definition of “forest”.<sup>134</sup>

Where the language in an EU provision is not entirely clear or is ambiguous, or where different linguistic versions of a provision diverge from each other, the Court of Justice looks at the “objective and content” of the provision. The Court will sometimes also use the words “the purpose and general scheme of the rules of which it [the provision in question] forms part”, or a similar wording.<sup>135</sup> In this context, the Court examines the objective of the regulation or directive in question: whether it is meant to be widely applied or limited to a specific time, sector or circumstance. An example of a wide application is Directive 85/337 on the environmental impact of projects, where the Court concluded, from the provisions of Articles 1(2), Article 2(1), and Article 3, that the Directive “has a wide scope and a broad purpose”.<sup>136</sup>

**b. The purpose of an EU regulation, directive or decision is derived from its scope,** its recitals, its relation with other provisions of the same act, other elements which are found in the adopted text, and other EU acts. These criteria are in the public domain; where this is not the case the Court refuses to take them into consideration. Therefore, declarations made by one or several Member States or an EU institution, at the moment of the adoption of an act, cannot be used to interpret its provision.<sup>137</sup>

In earlier EU law, **the discussions during the elaboration** of a text were rarely taken into consideration as the Council legislative proceedings were not public. With the increased transparency of EU legislative decision-making, the Court of Justice now looks more readily into the history of the making of an act. For example, in case C-558/07, the Court of Justice rejected a specific interpretation of a term in a regulation as the applicants’ use of a new term was due to an amendment introduced by Sweden during the Council discussions and was specific to the Swedish

language.<sup>138</sup> In case C-266/05P, the Court referred several times to preparatory documents to justify its interpretation of a provision in Regulation 1049/2001.<sup>139</sup>

When it comes to access to information, the Court of Justice states that “Regulation 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions”.<sup>140</sup> Exceptions to the right of access must be to be interpreted narrowly.

## The hierarchy of provisions

As several EU provisions are applicable to questions on access to information, it is important to place them in a hierarchy. This allows for distinctions of which provisions should prevail in the case of contradiction between different interpretations. The rules of the TEU and of the TFEU are the basis of any interpretation. As these EU Treaties are the constitution of the European Union, all provisions that are contained in regulations, directives or decisions (together, these acts are called secondary legislation or secondary law) must be interpreted in a way which optimises and renders fully operational the objectives, principles and orientations of the TEU and the TFEU. The provisions of the Treaties are not always very precise, but their wording clarifies that the basic principles governing access to information are **openness** and **transparency**, and the objective is to grant access to information as widely as possible.

This is expressed by Regulation 1049/2001 in the following terms:

“The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.”<sup>141</sup>

The Court of Justice expressly referred to these recitals at the beginning of one of its landmark decisions concerning access to information<sup>142</sup> as well as in other judgments. Any interpretation of EU

133. Court of Justice, case 283/81, Cifit ECR 1982, p.3415, paras 18 and 19.

134. Court of Justice, case C-82/09 Dimos Agios Nikolaos, judgment of 22 April 2010.

135. Court of Justice, case C-36/98, Spain v. Council (2001) ECR I-779, para 49; case C-72/95, Kraaijeveld, (1996 ECR) I-5403, paras 30 and 38; case C-64/05P, Sweden v. Commission (2007) ECR I-11389, paras 51 et seq; case C-558/07 S.P.C.M and others, ECR 2009, p.I-5783,

136. Court of Justice, case C-72/95 (n.133, above), para 31.

137. Court of Justice, case 429/85, Commission v. Italy (1988) ECR 843, para 9: “an interpretation based on a declaration by the Council, cannot give rise to an interpretation different from that resulting from the actual wording of... the Directive”.

138. Court of Justice, case C-558/07 (n.18, above), paras 25 and 26: “The fact that “monomeric units” are used in Article 6(3) of the REACH Regulation rather than the words “monomer units” which appear in Article 3(5) of the English and French versions of the REACH Regulation, cannot affect that finding. It is clear from the document of the Council of the European Union of 5 November 2004 (no 13788/04, p.5) that those terms were added at the request of the Kingdom of Sweden. The Swedish-language version of the REACH Regulation uses the same words “monomer units” in Articles 3(5) and 6(3) of the Regulation.”

139. Court of Justice, case C-266/05P, Sison v. Council, ECR 2007, p.I-1233, paragraphs 37, 38 and 45.

140. Court of Justice, case C-139/07P, Commission v. Technische Glaswerke Ilmenau, judgment of 29 June 2010, paragraph 51.

141. Regulation 1049/2001, Recitals 1 and 2.

142. Court of Justice, joined cases C-39/05P and C-52/05P, Sweden and Turco v. Council, ECR 2008, p.I-4723, paragraph 34. See also Court of Justice, case C-64/05P (n.41, above), paragraph 54; case C-28/08P, Commission v. the Bavarian Lager, judgment of 29 June 2010, paragraphs 53 and 54.

legislation on access to information will therefore have to be based on these principles.

The Aarhus Convention is part of EU law.<sup>143</sup> By signing on to it, the EU committed itself towards the other Contracting Parties of the Convention, to making sure that the Convention's provisions<sup>144</sup> are respected within the EU. The provisions of the Aarhus Convention on access to information on environmental matters are binding on the EU institutions and on the Member States.<sup>145</sup> Therefore EU provisions on access to environmental information must be interpreted in the light of the Aarhus Convention and, as far as possible, aim at a result that is compatible with its provisions.

Where an interpretation compatible with the Aarhus Convention is not possible, either because a provision of EU law on access to information contradicts or is incompatible with a provision of the Aarhus Convention, the provision of the Aarhus Convention should prevail. The Court of Justice expressed this in the following terms: "Article 300(7) EC [now Article 216(2) TFEU] provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case law, those agreements prevail over secondary Community law."<sup>146</sup>

Where there is a contradiction between two pieces of legislation, administrations and courts within the EU are therefore obliged to set aside the provisions of secondary EU law and to apply the provisions of the Aarhus Convention. Regulation 1049/2001 explicitly recognised this priority, and at the same time that, in the case of conflict between Regulation 1049/2001 and Regulation 1367/2006, the provisions of Regulation 1367/2006 prevail.<sup>147</sup>

The provisions of the Aarhus Convention which prevail over the rules of EU secondary legislation in cases of conflict must themselves be specified case by case. There is no international court to give an authentic interpretation of the Aarhus Convention, but there is a Compliance Committee that at the request of Contracting Parties to the Convention or of NGOs and individuals, will examine whether national legislation or a specific practice is compatible with the provisions of the Convention.<sup>148</sup> The discussions and findings of this Committee are public. The Committee's findings and recommendations have to be approved by the Meeting of the Contracting Parties of the

Aarhus Convention. As the findings of the Compliance Committee are of a remarkable quality, until now, all the Committee's suggestions were approved by the Meeting of the Contracting Parties, including the affected Party itself. Although they are not legally binding on the contracting parties including the EU and its institutions, the findings are thus an important and innovative source of interpretation of the Aarhus Convention

143. Article 216(2) TFEU: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States".

144. These observations apply to all provisions of the Aarhus Convention. In the past, there were legal doubts, if and to what extent Article 9(3) of the Convention which deals with access to justice, was – in the absence of EU legislation on access to justice in environmental matters – part of EU law. However, in its judgment of 8 March 2011 in case C-240/09, *Lesoochrannárske zoskupenie*, the Court of Justice confirmed that also Article 9(3) is part of EU law. No doubts ever existed that the provisions of the Aarhus Convention on access to information are part of EU law.

145. Article 216 (2) TFEU.

146. Court of Justice, case C-344/04, *IATA and ELFAA*, ECR 2006, p.I-403, paragraph 35; see also cases C-61/96, *Commission v. Germany*, ECR 1996, p.I-3989, paragraph 52; C-286/02 *Bellio Fratelli*, ECR 2004, p.I-3465, paragraph 33.

147. Regulation 1049/2001, Article 2(6): "This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them."

148. See <http://www.unece.org/env/pp/ccBackground.htm>



# Annex 2: Text of Regulations 1049/2001, 1367/2006 and of the Aarhus Convention

**REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 30 May 2001**

**regarding public access to European Parliament, Council and Commission documents**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Acting in accordance with the procedure referred to in Article 251 of the Treaty <sup>(2)</sup>,

Whereas:

- (1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.
- (2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.
- (3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.
- (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.
- (5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from

this Regulation as regards documents concerning the activities covered by those two Treaties.

- (6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.
- (7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.
- (8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.
- (9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.
- (10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.
- (11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.
- (12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

<sup>(1)</sup> OJ C 177 E, 27.6.2000, p. 70.

<sup>(2)</sup> Opinion of the European Parliament of 3 May 2001 (not yet published in the Official Journal) and Council Decision of 28 May 2001.

- (13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.
- (14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.
- (15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.
- (16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.
- (17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents <sup>(1)</sup>, Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents <sup>(2)</sup>, European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents <sup>(3)</sup>, and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed.

HAVE ADOPTED THIS REGULATION:

*Article 1*

**Purpose**

The purpose of this Regulation is:

- (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

<sup>(1)</sup> OJ L 340, 31.12.1993, p. 43. Decision as last amended by Decision 2000/527/EC (OJ L 212, 23.8.2000, p. 9).

<sup>(2)</sup> OJ L 46, 18.2.1994, p. 58. Decision as amended by Decision 96/567/EC, ECSC, Euratom (OJ L 247, 28.9.1996, p. 45).

<sup>(3)</sup> OJ L 263, 25.9.1997, p. 27.

- (b) to establish rules ensuring the easiest possible exercise of this right, and

- (c) to promote good administrative practice on access to documents.

*Article 2*

**Beneficiaries and scope**

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.
2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.
3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.
4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.
5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.
6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

*Article 3*

**Definitions**

For the purpose of this Regulation:

- (a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;
- (b) 'third party' shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

## Article 4

## Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents,

the exceptions may, if necessary, continue to apply after this period.

## Article 5

## Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

## Article 6

## Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

## Article 7

## Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

## Article 8

## Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

## Article 9

## Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

## Article 10

## Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

## Article 11

## Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

## Article 12

**Direct access in electronic form or through a register**

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.
3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.
4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

## Article 13

**Publication in the Official Journal**

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:
  - (a) Commission proposals;
  - (b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;
  - (c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;
  - (d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;
  - (e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;
  - (f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.
2. As far as possible, the following documents shall be published in the Official Journal:
  - (a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;
  - (b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

## Article 14

**Information**

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.
2. The Member States shall cooperate with the institutions in providing information to the citizens.

## Article 15

**Administrative practice in the institutions**

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.
2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

## Article 16

**Reproduction of documents**

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

## Article 17

**Reports**

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.
2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

## Article 18

**Application measures**

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community<sup>(1)</sup> with this Regulation in order to

ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

## Article 19

**Entry into force**

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

It shall be applicable from 3 December 2001.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 May 2001.

For the European Parliament  
The President  
N. FONTAINE

For the Council  
The President  
B. LEJON

<sup>(1)</sup> OJ L 43, 15.2.1983, p. 1.

**REGULATION (EC) No 1367/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 6 September 2006**

**on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

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,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 22 June 2006 <sup>(2)</sup>,

Whereas:

- (1) Community legislation in the field of the environment aims to contribute *inter alia* to preserving, protecting and improving the quality of the environment and protecting human health, thereby promoting sustainable development.
- (2) The Sixth Community Environment Action Programme <sup>(3)</sup> stresses the importance of providing adequate environmental information and effective opportunities for public participation in environmental decision-making, thereby increasing accountability and transparency of decision-making and contributing to public awareness and support for the decisions taken. It furthermore encourages, as did its predecessors <sup>(4)</sup>, more effective implementation and application of Community legislation on environmental protection, including the enforcement of Community rules and the taking of action against breaches of Community environmental legislation.

<sup>(1)</sup> OJ C 117, 30.4.2004, p. 52.

<sup>(2)</sup> Opinion of the European Parliament of 31 March 2004 (OJ C 103 E, 29.4.2004, p. 612), Council Common Position of 18 July 2005 (OJ C 264 E, 25.10.2005, p. 18), and Position of the European Parliament of 18 January 2006 (not yet published in the Official Journal). Legislative resolution of the European Parliament of 4 July 2006 (not yet published in the Official Journal) and Decision of the Council of 18 July 2006.

<sup>(3)</sup> Decision No 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).

<sup>(4)</sup> Fourth Community Action Programme for the Environment (OJ C 328, 7.12.1987, p. 1), Fifth Community Action Programme for the Environment (OJ C 138, 17.5.1993, p. 1).

(3) On 25 June 1998 the Community signed the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention). The Community approved the Aarhus Convention on 17 February 2005 <sup>(5)</sup>. Provisions of Community law should be consistent with that Convention.

(4) The Community has already adopted a body of legislation, which is evolving and contributes to the achievement of the objectives of the Aarhus Convention. Provision should be made to apply the requirements of the Convention to Community institutions and bodies.

(5) It is appropriate to deal with the three pillars of the Aarhus Convention, namely access to information, public participation in decision-making and access to justice in environmental matters, in one piece of legislation and to lay down common provisions regarding objectives and definitions. This contributes to rationalising legislation and increasing the transparency of the implementation measures taken with regard to Community institutions and bodies.

(6) As a general principle, the rights guaranteed by the three pillars of the Aarhus Convention are without discrimination as to citizenship, nationality or domicile.

(7) The Aarhus Convention defines public authorities in a broad way, the basic concept being that wherever public authority is exercised, there should be rights for individuals and their organisations. It is therefore necessary that the Community institutions and bodies covered by this Regulation be defined in the same broad and functional way. Under the Aarhus Convention, Community institutions and bodies can be excluded from the scope of application of the Convention when acting in a judicial or legislative capacity. However, for reasons of consistency with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents <sup>(6)</sup>, the provisions on access to environmental information should apply to Community institutions and bodies acting in a legislative capacity.

<sup>(5)</sup> Council Decision 2005/370/EC (OJ L 124, 17.5.2005, p. 1).

<sup>(6)</sup> OJ L 145, 31.5.2001, p. 43.

(8) The definition of environmental information in this Regulation encompasses information in any form on the state of the environment. This definition, which has been aligned to the definition adopted for 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>, has the same content as the one laid down in the Aarhus Convention. The definition of 'document' in Regulation (EC) No 1049/2001 encompasses environmental information as defined in this Regulation.

(9) It is appropriate for this Regulation to provide for a definition of plans and programmes taking into account the provisions of the Aarhus Convention, in parallel with the approach followed in relation to the Member States' obligations under existing EC law. 'Plans and programmes relating to the environment' should be defined in relation to their contribution to the achievement, or to their likely significant effect on the achievement, of the objectives and priorities of Community environmental policy. For the ten-year period starting from 22 July 2002, the Sixth Community Environment Action Programme establishes the objectives of Community environmental policy and the actions planned to attain these objectives. At the end of this period, a subsequent environmental action programme should be adopted.

(10) In view of the fact that environmental law is constantly evolving, the definition of environmental law should refer to the objectives of Community policy on the environment as set out in the Treaty.

(11) Administrative acts of individual scope should be open to possible internal review where they have legally binding and external effects. Similarly, omissions should be covered where there is an obligation to adopt an administrative act under environmental law. Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty.

(12) The Aarhus Convention calls for public access to environmental information either following a request or by active dissemination by the authorities covered by the Convention. Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community

<sup>(1)</sup> OJ L 41, 14.2.2003, p. 26.

legal act. It lays down rules for these institutions that comply to a great extent with the rules laid down in the Aarhus Convention. It is necessary to extend the application of Regulation (EC) No 1049/2001 to all other Community institutions and bodies.

(13) Where the Aarhus Convention contains provisions that are not, in whole or in part, to be found also in Regulation (EC) No 1049/2001, it is necessary to address those, in particular with regard to the collection and dissemination of environmental information.

(14) For the right of public access to environmental information to be effective, environmental information of good quality is essential. It is therefore appropriate to introduce rules that oblige Community institutions and bodies to ensure such quality.

(15) Where Regulation (EC) No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information. The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment. The term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.

(16) Pursuant to Decision No 2119/98/EC of the European Parliament and the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community <sup>(2)</sup>, a network at Community level has already been set up to promote cooperation and coordination between the Member States, with the assistance of the Commission, with a view to improving the prevention and control in the Community of a number of communicable diseases. Decision No 1786/2002/EC of the European Parliament and of the Council <sup>(3)</sup> adopts a programme of Community action in the field of public health that complements national policies. Improving information and knowledge for the development of public health and enhancing the capability to respond rapidly and in a coordinated fashion to threats to health, both of which are elements of this programme, are objectives that are equally fully in line with the requirements of the Aarhus Convention. This Regulation should therefore apply without prejudice to Decision No 2119/98/EC and Decision No 1786/2002/EC.

<sup>(2)</sup> OJ L 268, 3.10.1998, p. 1. Decision as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

<sup>(3)</sup> OJ L 271, 9.10.2002, p. 1. Decision as amended by Decision No 786/2004/EC (OJ L 138, 30.4.2004, p. 7).

- (17) The Aarhus Convention requires Parties to make provisions for the public to participate during the preparation of plans and programmes relating to the environment. Such provisions are to include reasonable timeframes for informing the public of the environmental decision-making in question. To be effective, public participation is to take place at an early stage, when all options are open. When laying down provisions on public participation, Community institutions and bodies, should identify the public which may participate. The Aarhus Convention also requires that, to the extent appropriate, Parties shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.
- (18) Article 9(3) of the Aarhus Convention provides for access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene provisions of law relating to the environment. Provisions on access to justice should be consistent with the Treaty. It is appropriate in this context that this Regulation address only acts and omissions by public authorities.
- (19) To ensure adequate and effective remedies, including those available before the Court of Justice of the European Communities under the relevant provisions of the Treaty, it is appropriate that the Community institution or body which issued the act to be challenged or which, in the case of an alleged administrative omission, omitted to act, be given the opportunity to reconsider its former decision, or, in the case of an omission, to act.
- (20) Non-governmental organisations active in the field of environmental protection which meet certain criteria, in particular in order to ensure that they are independent and accountable organisations that have demonstrated that their primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question.
- (21) Where previous requests for internal review have been unsuccessful, the non-governmental organisation concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.
- (22) This Regulation respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Article 37 thereof.

HAVE ADOPTED THIS REGULATION:

#### TITLE I

#### GENERAL PROVISIONS

##### Article 1

#### Objective

1. The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as 'the Aarhus Convention', by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

- guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;
- ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted;
- providing for public participation concerning plans and programmes relating to the environment;
- granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.

2. In applying the provisions of this Regulation, the Community institutions and bodies shall endeavour to assist and provide guidance to the public with regard to access to information, participation in decision-making and access to justice in environmental matters.

##### Article 2

#### Definitions

1. For the purpose of this Regulation:

- 'applicant' means any natural or legal person requesting environmental information;
- 'the public' means one or more natural or legal persons, and associations, organisations or groups of such persons;

- 'Community institution or body' means any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions under Title II shall apply to Community institutions or bodies acting in a legislative capacity;
- 'environmental information' means any information in written, visual, aural, electronic or any other material form on:
  - the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
  - measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
  - reports on the implementation of environmental legislation;
  - cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);
  - the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);
- 'plans and programmes relating to the environment' means plans and programmes,
  - which are subject to preparation and, as appropriate, adoption by a Community institution or body;
  - which are required under legislative, regulatory or administrative provisions; and
  - which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.

General environmental action programmes shall also be considered as plans and programmes relating to the environment.

This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection;

- 'environmental law' means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty; preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;
- 'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects;
- 'administrative omission' means any failure of a Community institution or body to adopt an administrative act as defined in (g).

2. Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

- Articles 81, 82, 86 and 87 of the Treaty (competition rules);
- Articles 226 and 228 of the Treaty (infringement proceedings);
- Article 195 of the Treaty (Ombudsman proceedings);
- Article 280 of the Treaty (OLAF proceedings).

#### TITLE II

#### ACCESS TO ENVIRONMENTAL INFORMATION

##### Article 3

#### Application of Regulation (EC) No 1049/2001

Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

For the purposes of this Regulation, the word 'institution' in Regulation (EC) No 1049/2001 shall be read as 'Community institution or body'.

#### Article 4

##### Collection and dissemination of environmental information

1. Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Regulation unless it is already available in electronic form. Community institutions and bodies shall as far as possible indicate where information collected before entry into force of this Regulation which is not available in electronic form is located.

Community institutions and bodies shall make all reasonable efforts to maintain environmental information held by them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

2. The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12(2) and (3) and in Article 13(1) and (2) of Regulation (EC) No 1049/2001, the databases or registers shall include the following:

- (a) texts of international treaties, conventions or agreements, and of Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;
- (b) progress reports on the implementation of the items referred to under (a) where prepared or held in electronic form by Community institutions or bodies;
- (c) steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion pursuant to Article 226(1) of the Treaty;
- (d) reports on the state of the environment as referred to in paragraph 4;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed;

(g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.

3. In appropriate cases, Community institutions and bodies may satisfy the requirements of paragraphs 1 and 2 by creating links to internet sites where the information can be found.

4. The Commission shall ensure that, at regular intervals not exceeding four years, a report on the state of the environment, including information on the quality of, and pressures on, the environment is published and disseminated.

#### Article 5

##### Quality of the environmental information

1. Community institutions and bodies shall, insofar as is within their power, ensure that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable.

2. Community institutions and bodies shall, upon request, inform the applicant of the place where information on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information can be found, if it is available. Alternatively, they may refer them to the standardised procedure that was used.

#### Article 6

##### Application of exceptions concerning requests for access to environmental information

1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation (EC) No 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.

#### Article 7

##### Requests for access to environmental information which is not held by a Community institution or body

Where a Community institution or body receives a request for access to environmental information and where this information is not held by that Community institution or body, it shall, as promptly as possible, but within 15 working days at the latest, inform the applicant of the Community institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant Community institution or body or the public authority and inform the applicant accordingly.

#### Article 8

##### Cooperation

In the event of an imminent threat to human health, life or the environment, whether caused by human activities or due to natural causes, Community institutions and bodies shall, upon request of public authorities within the meaning of Directive 2003/4/EC, collaborate with and assist those public authorities in order to enable the latter to disseminate immediately and without delay to the public that might be affected all environmental information which could enable it to take measures to prevent or mitigate harm arising from the threat, to the extent that this information is held by or on behalf of Community institutions and bodies and/or those public authorities.

The first subparagraph shall apply without prejudice to any specific obligation laid down by Community legislation, in particular by Decision No 2119/98/EC and by Decision No 1786/2002/EC.

#### TITLE III

##### PUBLIC PARTICIPATION CONCERNING PLANS AND PROGRAMMES RELATING TO THE ENVIRONMENT

#### Article 9

1. Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.

2. Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a

plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation.

3. Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of:

- (a) the draft proposal, where available;
- (b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and
- (c) practical arrangements for participation, including:
  - (i) the administrative entity from which the relevant information may be obtained,
  - (ii) the administrative entity to which comments, opinions or questions may be submitted, and
  - (iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

4. A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given. Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.

5. In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take due account of the outcome of the public participation. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation.

#### TITLE IV

##### INTERNAL REVIEW AND ACCESS TO JUSTICE

#### Article 10

##### Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

3. Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

#### Article 11

##### Criteria for entitlement at Community level

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

- (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 6 September 2006.

For the European Parliament  
The President  
J. BORRELL FONTELLES

2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

#### Article 12

##### Proceedings before the Court of Justice

1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

#### TITLE V

##### FINAL PROVISIONS

#### Article 13

##### Application measures

Where necessary, Community institutions and bodies shall adapt their rules of procedure to the provisions of this Regulation. These adaptations shall take effect from 28 June 2007.

#### Article 14

##### Entry into force

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 June 2007.

For the Council  
The President  
P. LEHTOMÄKI

## CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

done at Aarhus, Denmark,  
on 25 June 1998



The Parties to this Convention,

Recalling principle 1 of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also 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,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

**Article 1**

**OBJECTIVE**

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

## Article 2

### DEFINITIONS

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;
2. "Public authority" means:
  - (a) Government at national, regional and other level;
  - (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
  - (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
  - (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:
  - (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
  - (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;
4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;
5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

## Article 3

### GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.
2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.
3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.
4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.
5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.
6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.
7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.
8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.
9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

## Article 4

### ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

- (a) Without an interest having to be stated;
- (b) In the form requested unless:
  - (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
  - (ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

- (a) The public authority to which the request is addressed does not hold the environmental information requested;
- (b) The request is manifestly unreasonable or formulated in too general a manner; or
- (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

- (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- (b) International relations, national defence or public security;
- (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
- (e) Intellectual property rights;
- (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
- (g) The interests of a third party which has supplied the information

requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

#### Article 5

##### COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

- (a) Public authorities possess and update environmental information which is relevant to their functions;
- (b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;
- (c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, *inter alia*, by:

- (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;
- (b) Establishing and maintaining practical arrangements, such as:
  - (i) Publicly accessible lists, registers or files;
  - (ii) Requiring officials to support the public in seeking access to information under this Convention; and
  - (iii) The identification of points of contact; and
- (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

- (a) Reports on the state of the environment, as referred to in paragraph 4 below;
- (b) Texts of legislation on or relating to the environment;
- (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
- (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*:

- (a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;
- (b) International treaties, conventions and agreements on environmental issues; and
- (c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

- (a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;
- (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and
- (c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

#### **Article 6**

##### **PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES**

1. Each Party:

- (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
- (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and
- (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:

- (i) The commencement of the procedure;
- (ii) The opportunities for the public to participate;
- (iii) The time and venue of any envisaged public hearing;
- (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
- (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
- (vi) An indication of what environmental information relevant to the proposed activity is available; and

- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;

- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and
- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

#### Article 7

##### **PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT**

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

#### Article 8

##### **PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS**

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

- (a) Time-frames sufficient for effective participation should be

fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

#### 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.

#### Article 10

##### MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

#### Article 11

##### **RIGHT TO VOTE**

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

#### Article 12

##### **SECRETARIAT**

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

#### Article 13

##### **ANNEXES**

The annexes to this Convention shall constitute an integral part thereof.

#### Article 14

##### **AMENDMENTS TO THE CONVENTION**

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

#### Article 15

##### REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

#### Article 16

##### SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
  - (a) Submission of the dispute to the International Court of Justice;
  - (b) Arbitration in accordance with the procedure set out in annex II.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

#### Article 17

##### SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

#### Article 18

##### DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

#### Article 19

##### RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.
2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.
3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.
4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.
5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

#### Article 20

##### ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.
2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.
3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

#### Article 21

##### WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

#### Article 22



#### AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

#### Annex I

##### LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:
  - Mineral oil and gas refineries;
  - Installations for gasification and liquefaction;
  - Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
  - Coke ovens;
  - Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
  - Installations for the reprocessing of irradiated nuclear fuel;
  - Installations designed:
    - For the production or enrichment of nuclear fuel;
    - For the processing of irradiated nuclear fuel or high-level radioactive waste;
    - For the final disposal of irradiated nuclear fuel;
    - Solely for the final disposal of radioactive waste;
    - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.
2. Production and processing of metals:
  - Metal ore (including sulphide ore) roasting or sintering installations;
  - Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
  - Installations for the processing of ferrous metals:
    - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
    - (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
    - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
  - Ferrous metal foundries with a production capacity exceeding 20 tons per day;
  - Installations:
    - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
    - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
  - Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m<sup>3</sup>.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m<sup>3</sup> and with a setting density per kiln exceeding 300 kg/m<sup>3</sup>.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

- (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
- (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
- (iii) Sulphurous hydrocarbons;
- (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
- (v) Phosphorus-containing hydrocarbons;
- (vi) Halogenic hydrocarbons;
- (vii) Organometallic compounds;
- (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
- (ix) Synthetic rubbers;
- (x) Dyes and pigments;
- (xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

- (i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
- (ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
- (iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
- (iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

- (v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

- (c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);

- (d) Chemical installations for the production of basic plant health products and of biocides;

- (e) Installations using a chemical or biological process for the production of basic pharmaceutical products;

- (f) Chemical installations for the production of explosives;

- (g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:

- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
- Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
- Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
- Landfills receiving more than 10 tons per day or with a total capacity exceeding 25 000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.

7. Industrial plants for the:

- (a) Production of pulp from timber or similar fibrous materials;
- (b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;

- (b) Construction of motorways and express roads; 3/

- (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;

- (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40 000 places for poultry;

(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;

- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

(b) Treatment and processing intended for the production of food products from:

(i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

(ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
- Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

#### Notes

1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

## Annex II

### ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.
2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.
4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.
5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.
6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.
7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.
8. The tribunal may take all appropriate measures to establish the facts.
9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
  - (a) Provide it with all relevant documents, facilities and information;
  - (b) Enable it, where necessary, to call witnesses or experts and receive their evidence.
10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.
12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.
13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.
14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.
15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.
16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.
17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.
18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

# Notes

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