



# Aarhus Convention

## Position Paper

2007



## 1. Background

Justice & Environment (J&E) is an association of public interest environmental law organizations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

In 2006, transposition and implementation of the Aarhus Convention (“Convention on access to information, public participation in decision-making, and access to justice in environmental matters”) was chosen by J&E as one of our three topics of concern. Based on previous assessments, we decided to focus on the Aarhus Convention’s third pillar – access to justice, particularly the transposition and implementation of Article 9.2.

J&E members from Austria, Czech Republic, Estonia, Hungary, Poland and Slovakia put together a collection of legal analyses and of case studies. Both of these collections reflect primarily the situation concerning transposition, interpretation and application of the access to justice pillar of the Aarhus Convention in the national legal systems.

Based on this one year comparative research, J&E members summarized the most pressing issues and outlined specific recommendations to be presented to governments of concerned countries, the Aarhus Convention Compliance Committee, the European Commission and other interested stakeholders.

## 2. Current Activities

In 2007, J&E members have decided to return to the issue of access rights in a different manner. Activities of the Annual Workplan for 2007 of J&E included four distinct topics:

- a) a legal analysis of and a case study illustrating the transposition of the Aarhus Convention into the legal system of Slovenia
- b) survey of the potential impacts the adoption of the so-called Access to Justice Directive would exercise on the access situation of Austria, Czech Republic, Estonia, Hungary and Slovenia
- c) testing in practice the applicability of the 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
- d) holding an Aarhus Convention related one-day outreach event at the Sixth Environment for Europe Ministerial Meeting in October 2007 in Belgrade (Serbia)

Activities a) to c) could produce specific findings that are relevant for the implementation of the Aarhus Convention and can serve as basis of recommendations aimed at improving overall access situation in the European Union.

### 3. Findings and Conclusions

#### a) Legal Analysis of and Case Study Illustrating the Transposition of the Aarhus Convention –Slovenia

Slovenia has ratified the Aarhus Convention in 2004 and it is a binding legal instrument in the country. As regards implementation of Art. 9.2 of the Convention, two acts of parliament are supposed to give effect to the provision of the Convention: Environmental Protection Act of 2006 and Nature Conservation Act of 2004. In fact, the biggest problem concerning the situation of access rights stems from this dichotomy, i.e. the two diverging regulations of legal standing in domestic law.

The Environmental Protection Act requires from an NGO to have a so-called status of “NGO acting in public interest” to be granted by the minister of environment upon the NGO’s application, in order to participate in decision-making procedures. Conditions of acquiring such status are quite strict; in fact they seem to be prohibitive, which evaluation is substantiated by the fact that to date no NGO has received the aforementioned status. Had an NGO been granted the status in question, it would be able to participate only in a limited number of proceedings, such as decision-making of the competent authority regarding environmental consents or environmental permits.

The Nature Conservation Act equally requires from an NGO to have a so-called status of “NGO acting in public interest”, again to be granted by the minister of environment upon the NGO’s application, in order to participate in respective procedures. However, conditions of acquiring such status under the Nature Conservation Act are milder and the range of procedures where participation is possible covers all administrative and judicial proceedings affecting nature conservation.

The case study from Slovenia (construction of a wind farm on Volovja reber at the Snežnik-Pivka Natura 2000 site) is a perfect example of the problems the above presented contradiction between two laws can produce in practice. DOPPS-BirdLife Slovenia requested legal standing in the environmental permitting procedure of the wind farm which was consistently and repeatedly refused by the competent authority, the Environmental Agency for Slovenia.

Eventually, the court ordered the authority to reconsider standing of DOPPS-BirdLife Slovenia and gave instructions in its judgment to interpret the different provisions of the two acts of parliament in question in a way that makes participation of NGOs acting in public interest possible in all proceedings affecting nature conservation. After a renewed attempt by the Environmental Agency for Slovenia to antagonize the final court ruling, finally it was the Ministry for the Environment and Spatial Planning that granted standing to DOPPS-BirdLife Slovenia.

In our evaluation, this situation where conditions of legal standing are practically prohibitive and implementation of the respective laws may well result in a controversial construction thereof is not in conformity with the Aarhus Convention. Thus it can even be said that Slovenia failed to establish a clear, transparent and consistent framework to implement the provisions of the Aarhus Convention, in particular its Art. 9.2.

## **b) Survey of the Potential Impacts of the Access to Justice Directive**

J&E experts from Austria, Czech Republic, Estonia, Hungary and Slovenia ran a brief survey to uncover what impacts the adoption of the proposal for a “Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters” would exercise on the implementation of access rights in their respective countries. They all called the attention to obvious loopholes in the draft, especially the criteria for recognition of qualified entities who later would be the ones to receive legal standing (Art. 5 of the draft).

However, their overall evaluation was that – after the necessary corrections – the Directive should eventually be adopted and should serve as a piece of EU legislation making the provisions of the Aarhus Convention fully instrumental in the European environmental acquis with the strict condition that it does not result in the restriction of currently prevailing rights.

## **c) Testing in Practice the Applicability of the Regulation (EC) No. 1367/2006**

This Regulation governs the application of the Aarhus Convention to Community institutions and bodies. To test the real applicability of the Regulation, J&E regularly monitored the Official Journal of the European Union in search for Community legal acts falling under the scope of environmental law. After several relevant acts identified, finally an official “request for internal review” was submitted against three Commission Decisions Nos. 2007/701/EC, 2007/702/EC and 2007/703/EC, all related to authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize.

The standpoint of J&E in this matter was that the Commission Decisions in question by not requiring the respective authorization holders to label their products with the words “genetically modified” but merely with the words “maize” and “not for cultivation”, were against the respective provisions of the major GMO Regulations of EC.

## **d) Aarhus Convention Related Outreach Event**

### **i) Sixth UNECE Environment for Europe Ministerial Meeting in October 2007 in Belgrade**

J&E members held a one-day NGO side event at the EfE Ministerial Meeting at 11 October 2007 in the Sava Center in Belgrade (Serbia). J&E presented its members, their activities, national legal analyses and related case studies, and held a special workshop focusing in South Eastern European countries and their opportunities and needs.

### **ii) EEB Aarhus Convention Conference in June 2007 in Brussels**

J&E members have participated at the Aarhus Convention Conference hosted by EEB and attended by representatives from the EC and EP at 6 June 2007 in Brussels. J&E presented its activities related to the Aarhus Convention and had a presentation on public participation with regard to EIA of large transport infrastructure projects.

## 4. Recommendations

Recommendations within the Aarhus Convention chapter of the Annual Workplan for 2007 of J&E were only made in two areas, as follows:

### a) Legal Analysis of and Case Study Illustrating the Transposition of the Aarhus Convention –Slovenia

- A clear, transparent and consistent framework to implement Art. 9.2 of the Aarhus Convention should be created in Slovenia in order to avoid misinterpretations of the two prevailing laws, the Environmental Protection Act and the Nature Conservation Act
- Adjacent to this, a less demanding and non-prohibitive set of criteria should be established for NGOs allowing them to gain legal standing more easily and broadly, in line with Art. 9.2 of the Aarhus Convention (the requirement to provide wide access to justice)

### b) Survey of the Potential Impacts of the Access to Justice Directive

- Criteria for recognition of qualified entities should be rephrased so as the adoption of the Directive not to result in the restriction of currently prevailing rights in Member States

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