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LIMITE

MEETING DOCUMENT

from :	General Secretariat
to :	Working Party on the Environment
on :	22 April 2005
Subject :	Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters

Delegations will find attached the contributions of Member States to the following questions raised by the Presidency:

1. Is the Directive desirable?
2. If yes, which substantial changes would be needed to make the Commission's proposal acceptable?

ANNEX

Contribution of the Commission

THE RATIONALE OF THE PROPOSED DIRECTIVE

The Explanatory Memorandum attached to the proposal for a Directive on access to justice in environmental matters explains that the proposal covers a double objective. Firstly, it will contribute to the implementation of the *UN/ECE Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (hereinafter named Århus Convention). Secondly, it will fulfil some shortcomings in controlling the application of environmental law.
Irrespective of the fact that the Community has ratified the Århus Convention on 17 February 2005, it remains undeniable that the proposal contributes to the implementation of Article 9 of the Convention.
The second objective pursued by the proposal, that is improving the implementation and enforcement of Community environmental law at national level, remains in any case as valid as before the ratification of the Århus Convention by the Community.

The Explanatory Memorandum states in that respect that:

"Furthermore, the objective of this proposal for a directive is to eliminate shortcomings in the enforcement of environmental law. These shortcomings have been demonstrated for numerous years[1]*. At European Union level, the importance of public participation in enforcing environmental law was stressed on several occasions*[2]*. These shortcomings are due to, among other things, the lack of a financial private interest in enforcing environmental law, in contrast to other areas of Community law where economic operators require the correct application of legislation, such as internal market and competition. Moreover, the failure to fully enforce environmental laws can distort the functioning of the internal market by creating unequal terms of economic competition for the economic operators. Thus, depending on the Member State concerned, the economic operators in non-compliance with their environmental obligations may receive an economic advantage over those that respect environmental law.*
Consequently, the enforcement of environmental law primarily falls on public authorities and depends on numerous factors such as the resources at their disposal, or the political importance attached to the enforcement of environmental protection. Resulting differences create considerable disparities between the systems of Member States and consequently result in different levels of environmental protection being applied. Notably, these disparities frequently cause conflicts between Member States, especially when considering the protection of international water-courses, air quality, or cross-border emissions of polluting substances.

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

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

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

It also mentions that *"[t]he purpose of this proposal is to strengthen the enforcement of environmental law, and therefore, environmental protection. Effective enforcement is crucial if environmental law is not to be a question of theory, but a matter of practice. Moreover, environmental law will only produce the desired effects if its enforcement is possible throughout the European Union*".

As far as the costs potentially entailed by the implementation of the proposal are concerned, the following elements can be put forward:

"*First, it must be recalled that the proposal aims to put Community law in line with the Århus Convention. At present, certain Member States have either ratified the Convention or announced their intention to ratify it as soon as possible. Under the terms laid down in the Convention all Member States have therefore committed themselves to take the necessary measures to grant access to justice in environmental matters*.
Likewise, all Member States have in their constitutional systems, judicial and administrative structures to ensure the correct application of their legal systems. Hence, the structures as such already exist in the Member States. To a minor extent Member States may incur additional costs because the recognition of environmental NGOs foreseen by the present proposal places some administrative burden on them. Minor additional costs may also be incurred by the judiciary due to a potential increase of legal proceedings in environmental matters. However, given past experience only a small increase of proceedings in environmental matters in relation to the total number of legal proceedings is to be expected and any additional case load can be handled within the framework of existing judicial systems.

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

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

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

STATE OF PLAY IN COUNCIL

The Luxembourg Presidency requested Member States to inform it of their position on the desirability of the above-mentioned proposal as well as, in the event of its being desirable, on the points of the proposal which would need to be reviewed in order to be supported by the Member States.

On 15 April 2005, thirteen Member States had sent written submissions whose content on the issue of the overall desirability of the initiative can be summarised as follows: most Member States consider that the proposal is no longer necessary since the implementation of the Århus Convention will be achieved through the ratification thereof by the Member States themselves; one State suggests that the proposed Directive is not necessary in any case to enable the European Community to comply with its obligations under the Convention.

One State considers in some detail whether the proposal is justified in light of the second objective pursued by it. On that specific point, this Member States notes that the proposal "*is only desirable as harmonisation measure if it can be clearly shown that it will help to raise the general level of the application and enforcement of environmental law in the Community without in any way diminishing the existing level of access to justice in environmental matters in individual Member States"*. Three Member States welcome the proposal as a starting point for further discussions.

THE CONTINUING NEED FOR A DIRECTIVE ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Even though the Explanatory Memorandum attached to the proposal for a Directive sets out a twofold objective, one should bear in mind that one of the overall objectives of Article 9(3) of the Århus Convention is to allow for a better enforcement of environmental legislation of the Parties (i.e. Community environmental legislation in the case of the Community). In that respect, there is a clear link between the two objectives pursued by the proposed Directive so that the remainder of this "non paper" will address the two issues under the general discussion of improving the implementation and enforcement of Community environmental legislation.

By way of introduction, it is to be noted that several Member States have not yet ratified the Århus Convention to date. In that case, it will be difficult to argue that ensuring an appropriate enforcement of Community environmental legislation can be achieved through national action.

It should also be recalled that the European Council of March 2003 called on the Council to "*adopt by mid-2004 [the] proposal for a Directive on access to justice*".[3]
Assuming that the Convention is ratified by all Member States, it would nevertheless remain that the application and enforcement of Community environmental legislation need being improved and enhanced.

The information and data, which can be found in the successive Annual Surveys on the Implementation and Enforcement of Community Environmental Law[4], illustrate clearly the nature and significance of the issue.

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[3] See para. 59 of the Presidency conclusions of the European Council (31 March 2003).

[4] See note 1 and : http://europa.eu.int/comm/environment/law/index.htm.

It is widely acknowledged that, in a field such as the environment, enforcement may suffer from the lack of vested or proprietary interest; this explains why "self-enforcement", i.e. the vindication of their rights by the interested persons, such as is the case in classical internal market type legislation, is more often than not unsatisfactory. (See also the above-mentioned excerpts from the Explanatory Memorandum attached to the proposal.) For instance, the Council, in its Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law[5] refers to the fact that "*the environment is a common good frequently not linked to a private interest*" to explain "*why the implementation and enforcement of environmental law, and in particular of Community environmental law, are so complex and not always satisfactory*". There seems to be no need to stress further that point, which has not been disputed in any of the submissions sent by Member States.

The question is therefore whether the proposal for a Directive can actually contribute to render the enforcement of Community environmental legislation more effective and whether it can do so in a manner which is not already ensured by the Århus Convention (in which case the ratification thereof by the Member States would suffice to achieve that goal).
Both the Århus Convention and the proposed Directive consider that the enforcement of environmental legislation will benefit from granting legal standing to environmental non-governmental organisations (NGOs) in those cases where no private interests are likely to lead to judicial proceedings being instituted.
NGOs are able and willing in many cases to act in an "altruistic" manner, i.e. to act for the benefit of the environment even though they do not have proprietary interests involved in the judicial proceedings. ("public interest" cases.)

The relevant provisions of the Århus Convention, i.e. Article 9(3) and (4), are worded in general terms, which allow a certain margin of discretion to States which are Parties to the Convention when implementing it.
It may therefore well be the case that the implementation of these provisions of the Århus Convention will differ from one State to the other. For instance, the Convention does not specify the criteria according to which a NGO will be entitled to institute proceedings. Similarly, the Convention does not specify the conditions under which members of the public may institute administrative or judicial proceedings. Nor does it define the confines of the concept of "law relating to the environment". On that last point, no one would dispute that Member States may not decide unilaterally what falls under Community environmental legislation or not. (This question is by no means an easy one to resolve since legal basis other than Article 175 EC Treaty can be used to adopt Community environmental legislation.) In that context, the mentioning of "national law" in Article 9(3) of the Århus Convention can only be understood as referring to Community law as far as Community obligations are concerned.

Such a situation can only be unsatisfactory in the European Community insofar as it may not ensure that Community environmental legislation, whose uniform application throughout the Community has always been a leitmotiv of the European Court of Justice, will be enforced in a more or less even manner in the various Member States.
One State noted in its submission that there is "*no clear correlation between these categories [in which Member States fall according to whether they take an "extensive", "restricted" or "intermediate" approach to legal standing in environmental cases] and the actual number of environmental "public interest" cases going to the courts in individual Member States*".

[5] OJ C 321/1 of 22.10.1997.

The point is however not whether there will be more cases, but whether it is made possible for the proceedings which would be instituted to be successful or, to be more specific, to make sure that such "public interest" cases will not fail simply on the ground of their being inadmissible. (Besides, it should not be forgotten that one case of principle can have significant consequences in legal terms.)

Even assuming that the Convention is ratified by all Member States, there would still not be a minimum common basis applicable throughout the Community (this being said independently of the final content of the Directive, which is still to be negotiated by Council and the European Parliament). The circumstance that the proposed Directive is based on Article 175 EC Treaty and that Member States may ensure wider access to justice on the basis of Article 176 EC Treaty does not detract in any way from the fact that the Directive would lay down rules which Member States would have to comply with to guarantee minimum access to justice.

This explains why the proposed Directive is justified in light of the subsidiarity principle since, as the Explanatory Memorandum puts it: "*As the proposal aims at setting out a common framework for Member States to ensure the respect of environmental law, Community inaction will result in different levels of environmental protection and different standards of environmental law enforcement at Member State level*."
Moreover, *"[a]n action at Community level is also required because of the transboundary dimension of environmental problems. Only Community action can guarantee the uniform application of environmental law. These aspects will increase in importance with the enlargement of the European Union*".

Common criteria applicable throughout the Community and on the basis of which NGOs would be entitled to avail themselves of review proceedings will clearly contribute to ensure an even enforcement of Community environmental legislation, including in the event of transboundary cases.

The fact that any future Directive could have a more or less important impact on the various Member States according to the stage of development of their national law is in itself nothing new in Community law; this could be said for almost all new Directives.

Some Member States are concerned that the proposed Directive could lead to a weakening of national standards in terms of access to justice; this has never been the intention of the Commission, as is illustrated by the use of Article 175 as legal basis. If need be, this point could well be clarified in the drafting of the proposed Directive itself.
Thus, for example, Member States may decide to dispense themselves of any criteria to be determined in the future Directive concerning the entitlement of environmental non-governmental organisations to institute environmental proceedings should they consider this desirable
There is no contradiction between the possibility for Member States to be more liberal in terms of access to justice than the Directive and the "level playing field" argument. Indeed, contrary to internal market type of harmonisation, the objective pursued here is to enhance throughout the Community the enforcement of Community environmental legislation so that a minimum standard of enforcement becomes common to all Member States. Minimum rules to be provided to that effect in the future Directive would suffice to achieve this. If any Member State decide on its own motion to go beyond what the Directive will require in terms of minimum access to justice cannot be detrimental to the achievement of that objective nor can it be detrimental to the protection of the environment.

Although there is no mention of this concern in the written submissions sent by Member States, it seems, however, that some have had concerns about the potential consequences of the proposal in terms of costs.
In that respect, and in addition to the comments set out on this point in the Explanatory Memorandum (see above), it is to be noted that the available empirical evidence does not support the view that "broadening access to the courts automatically leads to a case overload for the courts".[6]

Moreover, NGOs instituting "public interest" cases have on average a high success rate before the courts.

The above-mentioned considerations lead the Commission to submit that the adoption of a Directive on access to justice in environmental matters would still significantly contribute to a more effective enforcement of Community environmental legislation.

Contribution of Belgium

La Belgique souhaite tout d'abord remercier la présidence luxembourgeoise d'évoquer ce dossier au groupe Environnement, compte tenu de l'engagement politique pris en cette matière par le Conseil des Ministres de l'Environnement en décembre 2004.

La Belgique considère que l'établissement d'un cadre minimal en matière d'accès à la justice se justifie pleinement, particulièrement sous l'angle de l'application effective du droit communautaire. Sans revenir en détail sur les différents éléments de l'exposé des motifs de la proposition de directive, il nous paraît incontestable que seule une mesure communautaire permettrait de garantir une application effective, c'est-à-dire de manière réelle, cohérente et homogène, de la législation communautaire.

Au surplus, l'argument tiré de la Convention de Aarhus nous semble toujours pertinent notamment, afin de pouvoir « *(...) assurer l'accomplissement des objectifs définis dans la Convention de Aarhus* ». Le fait que la Communauté européenne ait déjà ratifié celle-ci n'empêche évidemment pas de considérer qu'une action communautaire puisse encore se justifier dans ce cadre.

Si nous soutenons l'idée d'une directive, nous considérons cependant qu'il convient d'être particulièrement attentif à son contenu proprement dit. Le texte actuel nous semble en effet comporter plusieurs éléments n'apportant pas nécessairement de plus-value dans le domaine de l'accès à la Justice, notamment sur base de la législation belge. Ces points pourraient donc nous poser problème dans la mesure où leur établissement ne remplirait pas l'objectif de la directive.

De manière liminaire, nous nous interrogeons particulièrement sur les deux points suivants :

- Etablissement d'une procédure « par palier » qui conditionne toute procédure d'ordre juridictionnel à une demande de réexamen interne
- Etablissement d'une procédure de reconnaissance des entités qualifiées

[6] See the study available on the Commission webpage: http://europa.eu.int/comm/environment/aarhus/index.htm.

Sur base de ce constat, il nous paraît donc approprié d'initier rapidement une modification de cette proposition de directive, notamment sur base des amendements du Parlement européen, afin de permettre au groupe Environnement d'avancer sur ce dossier. La Belgique enverra à ce propos ultérieurement des commentaires plus détaillés.

Contribution of the Czech Republic

The Czech Republic does not consider the proposal for a directive necessary.

Justification: Third pillar of the Aarhus Convention – access to justice in environmental questions – is closely linked to legal protection systems that are different in different Member States. Thus the identification of goals on the EU level through the directive seems to be extremely difficult if possible at all. Moreover MS are already parties of the Convention therefore they already have to fulfill the obligations set by Art. 9 (3) of it.

Contribution of Germany

Question 1
The German government does not consider further negotiation on the Directive to be appropriate.

1. The German government appreciates the Commission's wish to advance the implementation of the Aarhus Convention at European level and in the Member States. It supports the goals and guarantees of the Aarhus Convention and within this framework advocates appropriate and effective legal protection for individuals and associations in environmental matters. With the entry into force of the Act on restructuring the Environmental Information Act on 14 February 2005 and the drafts currently being drawn up within the German government of an Act on public participation in environmental matters pursuant to Directive 2003/35/EC and an Act on supplementary provisions for judicial remedies in environmental matters, Germany is – including in implementing the relevant EC Directives - clearly strengthening the legal protection in environmental matters called for in Article 9 paras. 1 and 2 of the Aarhus Convention.

However, the German government is of the opinion that the submitted proposal for a Directive is not necessary to enable the European Community to comply with its obligations from the Aarhus Convention. Article 9 para. 3 of the Convention takes account of the different legal systems and legal traditions in the Member States and deliberately allows leeway for varying forms of access to courts or administrative procedures. This **leeway** is granted to the Parties to the Aarhus Convention with good reason and **should remain available to the EU Member States**.

Since Article 9 para. 3 of the Convention does not require the elaboration of the Directive, the high-ranking initiative for improved legislation should also be taken into account. This initiative is geared towards avoiding legislation - for the simplification of European law - that does not need to be adopted at Community level.

2. The form of legal protection is a matter that with good reason is traditionally laid down in national law rather than Community law. The effectiveness of monitoring the legality in particular of state action is dependent on a combination of many factors. For example, whether action because of infringing environmental law has a suspensory effect, whether compensation liability arises from an unsuccessful complaint and to what degree the competent courts can control the affected official procedure are all significant factors. European law provisions on access to justice in environmental matters can therefore – depending on their content, scope and detail of provisions – mean significant interference in existing legal protection systems in the Member States. The proposal for a Directive can in particular only in part address these factors that shape the effectiveness of legal protection.

3. The premise of the Commission that a general representative action in environmental law will contribute to effectively enforcing environmental law is doubted by many stakeholders. Here it appears advisable to wait for and evaluate practical experience gained with expanding the rights of associations to representative action in future, inter alia during implementation of EC Directive 2003/35/EC (Public Participation Directive).

Irrespective of this it is important to wait and see in what form the Aarhus Regulation (Regulation on the application of the Aarhus Convention for reviewing decisions by EC institutions) will ultimately be adopted.

Question 2
The German government does not consider further negotiation of the proposal for a Directive to be appropriate. However, should further negotiations nevertheless take place, the German government would like to outline some aspects against which it has **additional** reservations. We retain the right to submit further proposals for amendments.

1. Relationship with provisions on access to justice in other Directives
A range of other Directives in the field of environmental law already contain – in part within the framework of implementing the Aarhus Convention – provisions on access to justice that are carefully coordinated with the subject of provisions of each respective proposal for a Directive. This applies to the Directive on public access to environmental information (Directive 2003/4/EC), the Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Directives 85/337/EEC and 96/61/EC (Directive 2003/35/EC) and the Directive on environmental liability (Directive 2004/35/EC). Systematically the provisions on access to justice given for the scope of application of the respective Directive must take precedence over the general provisions on access to justice contained in the working document now submitted.

2. Definitions, especially “environmental law” and administrative act
The term “environmental law” is of key importance according to the system of the proposal. The German government, however, sees considerable difficulties in limiting this term with a legal definition with the necessary clarity without overshooting the objective of the proposal – more effective enforcement of environmental protection provisions. The German government therefore considers it primarily advisable with a view to the principle of subsidiarity and in line with Article 9 para. 3 of the Aarhus Convention that the Member States are given clear room for manoeuvre as far as implementation is concerned when incorporating individual environmental areas. Should a definition attempt be adhered to, the scope of the Directive must be limited to clearly identifiable environmental provisions for reasons of competence and certainty.

In order to prevent legal distortion, human health should – as in the Environmental Information Directive – only be assigned to environmental law to the extent that it can be affected by the state of environmental components or environmental factors. Furthermore, the figures "V. town and country planning and land use", "XI. environmental impact assessment" and "XII. access to environmental information and public participation in decision-making" should be deleted from the current list.

The German government requests the Commission to outline which EC Directive are in its opinion currently covered by the scope of the proposal for a Directive and how it aims to ensure access to justice in line with this Directive for future directives.

The definition of "administrative act" should be supplemented by the criterion for decision-making on a case-by-case basis.

3. Re. Article 3 - Acts and omissions by private persons

The provision in Article 3 merely reflects the corresponding provision in Article 9 para. 3 of the Aarhus Convention without containing any additional content (an opinion also shared by the Commission). This should be omitted in order to rule out misunderstandings and with a view to the initiative for improved legislation already referred to.

4. Re. Article 5 - Legal standing of qualified entities

The German government does not consider an automatic legal standing of a qualified entity recognised in another Member State to be advisable. Taking account of the different legal traditions, Article 9 of the proposal for a Directive prescribes the execution of an ad-hoc procedure or an advance recognition procedure for the Member States for recognising qualified entities. At least in the case of ad-hoc recognition it will often not be possible to determine whether the association concerned has been authorised under the prerequisites in Article 9 of the proposal or – following the more generous regulation of the Member State – under the more simple prerequisites for the procedure.

5. Article 6 - Request for internal review

The German government considers it necessary – also in view of the subsidiarity principle – that it remains up to the Member States as to whether they prescribe the internal review procedure provided for in Article 6 or not. In any case, the deadline provisions in paras. 2 and 4 should be combined to a single maximum deadline of for example 18 weeks. The criteria for setting the deadline in para. 4 should be omitted.

6. Article 8 - Criteria for recognition of qualified entities

The German government expressly advocates that the criteria in Article 8 for recognising qualified entities should remain as proposed and should under no circumstances be weakened.

7. Article 9 - Procedure for recognition of qualified entities

With a view to the need for subsidiarity, the choice between a general recognition (so-called advance recognition) or recognition on a case-by-case basis (so-called ad-hoc recognition) should be left up to the Member States.

Contribution from Estonia

Estonia does not see the need for such Directive. As the general objective of the Aarhus Convention is to provide the public as broad access to justice as possible, such a directive within the EU would substantially narrow the number of NGOs able to file cases in the court. Estonian courts have applied the Convention directly in respect of NGOs and respected their right to challenge administrative acts. Such a broad recognition of access to justice has not resulted in a substantive and unjustified number of cases filed in courts. Hence, the laying down of limiting criteria is not justified in Estonia.

As regards the criteria as proposed in the Directive, there would only be very few NGOs (if any) meeting these criteria and hence stand for public interest in the courts. The most restrictive would be the requirement for certification of annual statement of accounts which is not obligatory in Estonia in respect of non-profit organisations and would prove to be quite expensive for smaller organisations. As regards other criteria - Estonian courts have also recognised the right of civil partnerships to challenge administrative acts in public interest, i.e. without direct personal interests or impairment of rights.
Such criteria, if any, should be enforced individually by each Member State, taking into account the characteristics of local NGOs, traditions and national legal systems.

Contribution from Greece

Our first opinion is that the Directive contributes positively to the improvement of the uniform enforcement of the environmental law in the European Union.
The legal framework in Greece concerning access to juctice in environmental matters meets generally most of the provisions of the Directive.
Further comments will follow as soon as a more synthetic approach will be completed.

Contribution from Spain

Question 1
Spain would like to thank the Presidency for inviting MS to comment on the proposed Directive and for the efforts made in order to achive a common Council strategy regarding this issue.

Spain welcomes the proposal for a Directive on access to Justice and considers it a useful instrument to improve the implementation of the Aarhus Convention at comunitary level.

Question 2
Spain is of the opinion that the proposal for a Directive on access to Justice is a good starting point. Nevertheless, some modifications could be introduced in order to make it clearer and more flexible. To that respect, we would like to point out three issues that we are a somewhat concerned about. First of all, we consider that the criteria for legal standing of qualified entities might be reviewed in order to make them compatible with those laid down by the regulation of the provisions of the Aarhus Convention to EC institutions and bodies. Secondly, interim relief provisions should be extensively discussed. Thirdly, some kind of flexibility would be desirable regarding time frames for public authorities to take a decision on a request for internal review.

Contribution from France

A titre principal, la France n'est pas favorable à l'adoption d'une directive sur l'accès à la justice en matière d'environnement qui intervienne de façon détaillée dans le fonctionnement des procédures administrative ou civile des Etats membres pour les raisons générales suivantes :

- les conditions d'accès aux procédures juridictionnelles sont des questions qui concernent le droit processuel des Etats membres, elles relèvent de leur autonomie procédurale et ne doivent pas donner lieu de la part de la Communauté à un instrument juridique contraignant ; or certaines dispositions de la directive reviennent en définitive à donner à la Commission européenne un droit de regard sur ce droit processuel, ce qui constitue une atteinte excessive à leur souveraineté sur l'organisation de leur système juridictionnel.

- en dehors de certaines problématiques spécifiques à l'environnement (représentation des intérêts de l'environnement, en particulier lorsqu'il s'agit de biens non appropriés ou sans valeur économique), il n'est pas concevable d'instituer un droit processuel (coûts, délais, ministère d'avocats, régime des preuves, etc.) spécifique en matière d'environnement ;

- certaines propositions du texte de la Commission vont au-delà des obligations qui découlent de la Convention d'Aarhus, alors même que les dispositions de celle-ci, relatives à l'accès à la justice(article 9 § 3) sont en ce qui concerne la France déjà appliquées en droit interne et peuvent l'être, pour tous les Etats membres qui sont parties à la convention, directement sur la base de leur droit interne.

  L'adoption d'un texte d'harmonisation au niveau communautaire, s'il doit reprendre en termes identiques les dispositions et es principes de la convention d'Arhus, est sans pertinence ; s'il doit, par ailleurs, aller au-delà des stipulations de la convention, en exigeant des Etats membres des obligations qui n'étaient pas prévues par celle-ci, il prive alors de tout effet utile le texte international tout en violant le principe de proportionnalité ainsi que la compétence des Etats membres.

Enfin, l'adoption de cette directive sur l'accès à la justice n'est plus nécessaire pour la conclusion de la convention par la Communauté, puisque cette conclusion est maintenant achevée.
Pour toutes ces raisons, les autorités françaises ne voient pas comment cette proposition de directive pourrait apporter une valeur ajoutée au droit communautaire de l'environnement.
Elles estiment donc que cette discussion sur la directive relative à l'accès à l'accès à la justice doit être reportée à la fin de la négociation sur le règlement appliquant la Convention d'Aarhus aux institutions et organes communautaires et après un retour d'expérience sur les dispositions qui existent déjà en la matière (dans la directive 2003/35 notamment sur les plans et programmes).
A titre subsidiaire, si la Présidence décidait néanmoins d'engager un examen détaillé de ce dossier, les autorités françaises considèrent que les principales dispositions suivantes devraient être modifiées ou supprimées :

- **Article 2 : définitions**

Plusieurs définitions sont discutables. Il n'est pas nécessaire de citer au titre des autorités publiques les procureurs qui entrent nécessairement dans la catégorie des organismes, administrations ou institutions agissant à titre judiciaire. La convention d'Aarhus ne les mentionne pas. Par ailleurs, faire référence aux procureurs, chargés en France de l'action pénale, est inadéquat dans un texte relevant du 1er pilier communautaire.
Des éclaircissements sur les définitions « d'acte administratif » et « d'omission administrative » sont notamment nécessaires.

C'est cependant la définition de la législation relative à l'environnement qui est la plus discutable aux yeux des autorités françaises (notamment la formulation de la référence à la santé humaine et à la protection ou l'utilisation rationnelle des ressources naturelles). Il est préférable de reprendre une rédaction fidèle aux termes de l'article 174 CE. L'opportunité d'une liste des domaines est également discutable.

- **Article 3 : actes ou omissions des personnes privées**

La France a une réserve d'examen négative sur cet article.
L'exposé des motifs précise que la proposition de directive prend en considération l'obligation énoncée dans la Convention d'Aarhus (article 9, paragraphe 3), sans préjuger des dispositions qui seront adoptées par les Etats membres.
Toutefois, la rédaction de l'article a pour conséquence d'élargir le champ d'application du dispositif et risque de poser des difficultés de transposition et de mise en œuvre.
Par ailleurs, les actes ou omissions des personnes privées contrevenant au droit de l'environnement ne font l'objet d'aucune définition dans la proposition de directive.

- **Article 4 : droit d'ester en justice du public**

Les dispositions concernant les mesures de redressement provisoires soulèvent de nombreuses questions (accès, implications et portée).

- **Article 6 : demande de réexamen interne**

La demande de réexamen interne devient un préalable obligatoire avant tout recours contentieux. Elle n'est pas conforme à la Convention d'Aarhus (article 9§3) qui laisse plus de flexibilité car elle permet soit de demander un réexamen interne soit d'ester en justice ou de cumuler les deux successivement. Par ailleurs, les modalités pratiques de ce réexamen sont trop détaillées (délais …) et doivent être laissées à la discrétion des Etats membres. A cause de ces détails, la rédaction s'apparente à celle d'un règlement alors qu'il s'agit d'une proposition de directive.

- **Article 8 : critères de reconnaissance des entités qualifiées**

Il est absolument essentiel que les entités qualifiées (ONG) soient dotées de la personnalité juridique. L'exposé des motifs retient ce critère, mais il n'est pas repris clairement dans le texte de la proposition de directive (article 8.c).

- **Article 10 : dispositions relatives à des procédures en matière d'environnement**

Cet article devrait être supprimé. En effet, il exige que « Les Etats membres prévoient des procédures adéquates et efficaces, qui soient objectives, équitables et rapides sans coûter excessivement cher ». De ce fait, il porte une atteinte excessive à la nécessaire autonomie des Etats membres dans l'organisation de leur système juridictionnel.
En effet, si cet article s'applique aux procédures juridictionnelles elles-mêmes, une telle disposition n'a pas sa place dans la directive pour trois raisons :

- ces objectifs ne semblent pas pouvoir être mis en œuvre pour les seules affaires contentieuses relatives à l'environnement et font donc peser cette exigence sur l'ensemble du système juridictionnel des Etats membres (judiciaire, pénal et administratif) ;

- à travers le contrôle de la mise en œuvre de la directive, la Cour de justice des Communautés européennes devient le juge de la qualité et de l'organisation judiciaire des Etats membres, ce qui va au-delà de la répartition des tâches entre la CJCE et les systèmes judiciaires nationaux ;

- elle constitue une atteinte au principe de subsidiarité, dans une mesure qui dépasse largement les exigences d'une directive limitée aux seules questions d'environnement.

Contribution from Ireland

Ireland is currently working towards the transposition of the EU Directives on Access to Information (2003/4/EC) and Public Participation in Decision-Making (2003/35/EC) in environmental matters and towards the ratification of the Aarhus Convention.

Ireland considers that it will be in a position to satisfy all the requirements of the Convention when it has completed the transposition of these two Directives.

On this basis, Ireland does not consider that a Directive on Access to Justice to implement provisions of the Convention is required.

Contribution from Italy

Italy is not convinced of the added value that the draft directive might bring to the overall implementation of the Aarhus Convention at the time being.

Italy's goal was to have the Convention ratified as soon as possible by the EC. Once the agreement on the Aarhus Regulation and on the Decision for the conclusion of the Convention by the EC has been reached, we believe that no urgent matter remains to be addressed at the legislative level.

It is our opinion that on overall the provisions on access to justice already existing at the national level are sufficient to ensure compliance with the third pillar of the Aarhus Convention. The adoption of a directive on access to justice on one hand would not bring a substantial added value and, on the other hand, may cause serious problems of coherence with the existing national systems. Therefore we prefere not to continue the discussion at the moment.

Contribution from Cyprus

Cyprus welcomes the proposal for a Directive on access to justice in environmental matters as the starting point for further negotiations.

The proposed Directive goes beyond the scope of the Aarhus Convention and places extensive requirements on Member States regarding administrative procedures. Article 9(3) of the Convention takes into account the substantial differences that exist in the legal systems of Member States with regards to administrative procedures and access to justice. Cyprus believes that the Directive should be more closely linked to the requirements and flexibility of the Aarhus Convention. The detailed administrative and legal procedures for the implementation of the Directive must be left to the discretion of Member States in accordance with their domestic legal systems.

Contribution from Latvia

Without going in further details the Latvian delegation found that comments expressed by Austrian delegation is similar to the Latvian views, therefore, Latvia associates with the Austrian position on the proposed Directive on Access to Justice in Environmental Matters.

Contribution from Lithuania

The objectives of the proposed Directive of the European Parliament and of the Council on access to justice in environmental matters are to contribute to the implementation of the Aarhus Convention and to fulfill shortcomings in controlling the application of environmental law.

Lithuania ratified the Aarhus Convention in 2002 and has implemented all the requirements for the access to justice (Article 9 of the Aarhus Convention). According to the national legislation, NGOs have access to environmental proceedings and may request for internal review. Lithuanian courts, explaining and directly applying Articles 2(5), 9(2) of the Aarhus Convention and the requirements of the national legislation for administrative proceedings, recognize and respect the right of NGOs to challenge administrative actions.

Therefore, the Lithuanian position is that the proposed directive is not substantial to the achieve aforementioned objectives.

Contribution from Hungary

Hungary is not opposed to further deliberations on the proposal.

In Hungary's view the new directive on access to justice may prove to be a useful tool to ensure a timelier and more comprehensive application of EC environmental legislation, in particular with regard to the fact that the ratification of the Convention by certain Member States is still in progress.

Contribution from the Netherlands

In the Council Working Group on the Environment of 3 March 2005 the Luxembourg Presidency asked the Member States to send in the Member States' views on the opportunity of a directive on access to justice, and on which topics would need further elaboration or change in such a directive.

The Netherlands ratified the Aarhus Convention on 30 December 2004 and the implementing legislation entered into force on 14 February 2005. Our national legal system on access to justice is in conformity with the Aarhus Convention.

As we already expressed in our preliminary written comments on the Aarhus EU package (February 2004) and during our Presidency, we attach importance to the soon ratification of the Aarhus Convention by the EU. With the approval of the decision on the ratification of the Convention taken in the Ecofin Council on 17 February 2005 this objective will be reached.

On the directive proposal we have doubts about the question of subsidiarity. We are not convinced that there is a particular need for a directive on access to justice.

In case the Presidency decides, on the basis of comments from Member States, to further discuss the text of the directive, our general remark is that we do not wish to see any additional elements taken up into the directive that do not directly follow from the Aarhus Convention. Other more specific comments are:

- ***Level of protection and consistency with the Aarhus Convention***: a directive on access to justice should be consistent with the Aarhus Convention, and the level of access to justice provided by such a directive should be in line with the Aarhus Convention. The proposed directive seems to result in a limitation of access to justice compared to the right of access to justice guaranteed by the Aarhus Convention; it would also be a decline with regard to Dutch law. From the text of the articles of the directive it should be clear that it is only aimed at minimum harmonisation and that national legislation that provides for broader access to justice than the directive can be maintained. To avoid misinterpretation and confusion the proposed directive should follow formulation and terminology of the Aarhus Convention as closely as possible.
- ***Scope****:* the directive only relates to community environmental law and the national law implementing it. Consequently, the directive would result in different regimes for access to justice existing next to each. This would complicate the national legal system and harm the transparency of legal access.
- ***Recognition procedure and criteria for NGOs***: these do not follow from the Aarhus Convention. The criteria are more restrictive than what follows from Dutch case law. Moreover, we do not favour the extra administrative burden that would follow from such a recognition procedure.
- ***Request for internal review***: this instrument does not necessarily follow from the Aarhus Convention. We have questions on the compatibility of this instrument with our national legal system for access to justice in environmental matters.

Contribution from Austria

Austria would like to thank the Presidency for inviting Member States to comment on the proposed Directive in order to find a common Council strategy.

Austria's general position is that the proposed Directive on access to justice is not essential to contribute to the implementation of the Aarhus Convention. Furthermore, the Directive goes beyond what is required under the Aarhus Convention concerning the alignment of administrative procedures.

It should also be taken into account that the proposed Directive is the only outstanding dossier of the "Aarhus package". After having agreed upon the regulation as well as the decision for ratification, the EC will be a Party to the Convention at MOP 2, which was an important objective from Austria's point of view.

As the Commission has primarily proposed the Directive in order to ratify the Aarhus Convention, the impact of the Directive needs to be reassessed. We suggest a re-evaluation by the Commission of the need for a legislative act on access to justice in environmental matters. On the basis of existing numerous studies the Commission should define possible gaps where Member States' legislation is not sufficient to comply with Article 9(3) of the Aarhus Convention. In any case it should be possible for Member States to maintain their national systems and - if necessary - complete them to meet the requirements set out in Art. 9(3).

Austria is not convinced of the merit in taking up the negotiations on the proposed Directive in view of Member States' critical positions. It would be very difficult to find a compromise, which satisfies all main concerns.

In view of those considerations, Austria at this stage would not like to enter into a detailed discussion by indicating the substantial changes that should be made to the Directive to be more acceptable, and therefore we will only give a very general indication that the major difficulties relate to the definition of the scope of application, the compulsory nature of internal reviews and the provisions on qualified entities.

Contribution from Poland

Poland is of the opinion that the proposed Directive on access to justice in environmental matters is not necessary for the effective implementation of the third pillar of the Aarhus Convention.

In case of continuing the work on proposal of that Directive, the Polish government proposes to work out a text which will not go beyond the scope of the Aarhus Convention and will not cause substantial changes in Member States' legislation implementing this Convention.

The provisions of the proposed Directive are – in Poland's opinion - more restrictive in comparison to Aarhus Convention and significantly go beyond its scope. Moreover, a transposition of the Directive could contradict the provisions of Aarhus Convention (for example Article 8 of proposed Directive could be incompatible with definitions in Article 2 para. 4,5 of the Convention).

Contribution from Portugal

Portugal is of the opinion that the proposal for a directive on access to justice in environmental matters (Document 14154/03 ENV of 3rd November 2003) should be discussed in the Environmental Council Working Group with a view to reaching a common position among Member States that will allow for its adoption within a short period of time.

Portugal advocates the need for the EC to establish a legal framework on access to justice in defence of environmental law, in light of the differences between the legal systems and the legislative traditions of the different Member States. Portugal further supports the need to conduct a comparative study of the existing legal framework on access to justice in the 25 Member States.

The Portuguese legal system establishes the right of citizens and non-governmental environmental associations to take legal action in order to stop any breaches of their subjective right to live in an adequate environment, as well as the right to public participation in defence of the environment.

The right to public participation was foreseen in the Constitution since 1976 and finally established by law in 1995 though the adoption of the *Action Popularis* Law from 31st August. This right can be invoked against the State (public participation in an administrative matter) or against an individual (public participation in a civil matter).

Contribution from Slovenia

Slovenia generally supports a proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters as it represents the package of the EU legislation regarding the Aarhus Convention and thus contributes to a better implementation of the Convention. With this in mind, environmental law will have its desired effects only if the citizens and environmental NGO's will have access to justice in environmental matters. The aim of the Directive is to achieve a harmonised approach in all the member states when dealing with the access on environmental matters and thus to set a lowest common denominator that member states shall put in force in their national legislation on the basis of the principle of subsidiarity.

Slovenia finds Directive an adequate tool to provide a harmonised approach when dealing with that issue. However, Directive still needs to go through some substantial changes, as its substance as such could also be subject of the member state's competence with respect of subsidiarity principle. Member states already have a set framework of their respective legal systems and would consequently have a hard work adapting them to the Directive standards.

Regarding the substance as such Slovenia has some concerns in respect with criteria for recognition of qualified entities that should by no way be less stringent than the ones in the present proposal. Furthermore, the procedure for recognition of qualified entities shall not ensure a possibility for an expeditious ad hoc« recognition where a Member State opts for an advance recognition procedure as that would allow an access to numerous NGO's that would not comply with a set criteria for a recognition and would by these means be found in a privileged position.

To conclude Slovenia finds the Directive desirable and sees the added value in its adoption, despite the fact of being aware of the need for several adaptations to be done before it can be acceptable for all the Member States.

Contribution from Slovakia

Slovakia is of the opinion that Aarhus Convention provides for the EU Member States sufficient ground to fulfil the requirements of the third pillar and that Directive on access to justice is not necessary for the implementation of the Aarhus Convention. Moreover, legal systems in the Member States are very diverse and require a specific approach. Therefore, we consider trying to set out unified provisions on access to justice in environmental matters as contra-productive. We suggest that the proposal is not the subject of legislative procedure during the Luxembourg Presidency.

Contribution from Finland

Question 1
Finland does not consider the directive legally necessary, nor are we convinced that it would substantially contribute to the implementation of the requirements of the Århus Convention.

Question 2
Finland is not opposed to further discussions on the proposal. However, if discussions are continued, Finland is of the opinion that for the directive to be approved, changes will be required in the contents so as to achieve better correspondence with the provisions in the Århus Convention.

In Finland's interpretation, the proposed directive goes far beyond what is required under the provisions in the Århus Convention. Additionally, the proposed directive also contains such regulation of administrative and judicial procedures and processes where, in Finland's view, the Community is not necessarily competent, or where the aims, according to the subsidiarity principle, could more effectively be achieved by regulation at the member state level. However, it might be possible to find a solution to these problems, provided that the proposal is made more flexible.

In Finland's opinion, the main problems in the proposal relate to the definition of the scope of application; the definition of environmental procedures which deviates from that in the Århus Convention, with subsequent varied impacts on national appeal procedures; the mandatory nature of the provisions on internal reviews; and the provisions on qualified entities. Moreover, Finland has a number of other observations to make on the content of the proposed directive, although they are not of equal magnitude as those mentioned.

Scope of application (Article 1)

The scope of application of the proposed directive should be clarified especially in relation to directive 2003/35/EC. For this purpose, the second sentence in Article 1 should make it clear which provisions are referred to here. Finland also thinks that parts of Article 2(1) could be deleted as unnecessary or groundless.

The definition of environmental procedure (Article 2(1) sub-paragraph f)

Under Article 9(3) of the Århus Convention, members of the public shall, where they meet the criteria laid down in national law, have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law. The provisions in the Convention do not require such a procedure to end up in a binding decision, which is what is proposed for the directive.

Finland is of the opinion that the provisions on environmental procedure should be amended so as to correspond with those in the Århus Convention.

Provisions referring to internal review (Articles 6 and 7)

Finland cannot approve of the mandatory character of the provisions on internal review, nor of the fact that an internal review should be a prerequisite for environmental proceedings. Such provisions may actually contribute to slowing down an appeal process. The intention can hardly be to jeopardise the provision in Article 6(1) of the Convention on Human Rights, referring to the right to a timely legal procedure. The mandatory character of the present proposal should be adjusted and the issue decided in national law.
Provisions referring to qualified entities (Articles 5, 8 and 10)

Finland states that the Århus Convention does not require the proposed regulation of qualified entities. According to Article 9(3) and Article 2(5) in the Århus Convention, organisations promoting environmental protection and fulfilling the criteria in national law and independent of states shall have access to administrative or judicial procedures as referred to in Article 9(3).

In Article 5(1) in the proposal, a prerequisite for the legal standing of qualified entities shall be that such entities have a sufficiently concrete connection, regionally and in matter of substance, with the decision which is subject to access to justice. This means, for instance, that in order to be qualified, the entities should have factual activities in the geographic area where the impact of the decision appears.

The provision in Article 5(2) of the proposal is not acceptable. The prohibition against discrimination in Article 3(9) in the Århus Convention does not justify the proposed provisions. The existence of a prohibition against discrimination is fully acceptable as a principle, but the justification and the starting point should be that the legal standing of qualified entities is, in each member state, dependent on its national law and regulations which guarantee an equal and impartial treatment, regardless of the country of origin of the qualified entity.

The Århus Convention gives no grounds for the provisions in the proposed Article 9 on the procedure for recognition of qualified entities. However, the proposal is flexibly worded so that the prior recognition procedure is not the exclusive and mandatory system, but member states can choose to apply a case-by-case approach in recognising qualified entities. Nevertheless, the Article should be clarified so that it is possible to investigate the legal standing of an organisation during the same process where the appealed issue is resolved.

Contribution from Sweden

Sweden believes that there is a need to go ahead with a Directive on access to justice, particularly since the EC has ratified the Århus Convention.

Sweden is of the opinion that the proposed directive currently goes beyond what follows from the Convention in relation to access to justice. Article 9.3 of the Convention does not in itself stipulate the extensive requirements that are provided for in the proposed directive. Due to differences in the manner in which the right of access to justice is addressed in the member states, which is a consequence of the different orders and traditions in relation to procedural law within the EC, it will be a difficult task to negotiate an entirely homogenous system on this issue. Moreover, given the wording of article 9.3 of the Convention, Sweden is not convinced that such a homogenous system is necessary to achieve an adequate EC-implementation of the Convention.

Sweden therefore believes that the directive on access to justice, if it is agreed, should be limited in scope to the requirements that follow from the Convention. The directive should also enable individual member states to decide on the detailed implementation of this part of the Convention in a manner that is consistent with their domestic legal order.

Contribution from the United Kingdom

Question 1

The Directive is only desirable if it contributes significantly to the pursuit of Community environmental objectives. Of the two main objectives cited in the explanatory memorandum to the proposal, only one is now relevant.

COMPLIANCE WITH THE AARHUS CONVENTION

The first objective – compliance with international environmental obligations through implementation of the Aarhus Convention – is already being met. Most Member States, and the Community as a whole, have ratified the Convention; so there should be no doubt the EU can meet its Convention obligations without the Directive. Member States that have individually ratified the Convention are legally bound to meet all of the Convention's requirements on access to justice, whether or not Community measures cover particular requirements.

BETTER APPLICATION OF COMMUNITY ENVIRONMENTAL LAW

The second objective – better application of Community environmental law through harmonised access to justice provisions relating to such law – may still provide a justification for the Directive, whether or not there is a specific Aarhus reason for it. The evidence as to whether a common minimum level of requirements would be effective is unclear. For example, a consultants' report on the Commission's website in support of its proposal places Member States into categories according to whether they take an "extensive", "restricted" or "intermediate" approach to legal standing in environmental cases. Yet, the report shows no clear correlation between these categories and the actual number of environmental "public interest" cases going to the courts in individual Member States. (See http://europa.eu.int/comm/environment/aarhus/pdf/accesstojustice_final.pdf)

In trying to establish a common Community standard of access to justice in environmental matters, there is a risk that the operation of individual Member States' justice systems, including their ability to facilitate members of the public or groups wishing to pursue environmental cases in the public interest, could be compromised. Whilst unable to comment on the position in other Member States, there is a strong possibility that, if the Directive proceeds in its current form, this risk could be realised in the UK without any corresponding significant benefits. (See http://www.defra.gov.uk/corporate/consult/aarhus/ria.pdf)

Conclusion on desirability of the Directive

In conclusion, the UK is of the view that the Directive is unnecessary for Community implementation of the Aarhus Convention. It is only desirable as a harmonisation measure if it can be clearly shown that it will help to raise the general level of the application and enforcement of environmental law in the Community without in any way diminishing the existing level of access to justice in environmental matters in individual Member States. The UK considers that it has not yet been demonstrated that a Directive on Access to Justice in Environmental Matters would achieve this outcome.

Question 2

The UK would support the start of negotiations on the Directive only if it was convinced of the potential benefits of the Directive as a harmonisation measure. The UK remains to be convinced of that case.

If detailed negotiations on the Directive were to go ahead, the UK considers that changes in the following areas would be needed, both for the sake of consistency with the requirements of the Aarhus Convention and of flexibility to suit the requirements of individual Member States:

1) **Definitions**. The UK considers that the definitions used in Article 2 of the Directive should, where appropriate, be changed to reflect those agreed for the Regulation to apply the Convention to Community institutions and bodies. This applies particularly to the definition of "environmental law".

2) **Access to substantive proceedings**. To avoid the risk of restricting access to justice where it currently exists, the current capacity of Member States to regulate access to full proceedings in the courts (for example, through requirements for a case to be arguable and brought within specific time limits) should be made explicit within the framework of Articles 4, 5 and 7 of the draft Directive.

3) **Internal reviews**. The Directive should make clear that an administrative internal review procedure (Article 6) is neither compulsory in itself, at least in cases where court proceedings are available, nor is it a mandatory precondition for access to environmental proceedings.

4) **"Qualified entities"**. The UK questions the need for the stipulation of criteria (Article 8) for qualified entities, a new category of applicants with enhanced legal standing in relation to environmental proceedings, and for the associated mandatory recognition procedure (Article 9). If this concept is pursued further, we should like the Directive to make clear that (a) such bodies would not have an automatic right of access to all stages of environmental proceedings; and (b) the scope of their access does not go beyond the right to challenge an administrative act or omission by judicial review.

5) **Requirements of environmental proceedings**. Whilst recognising that Article 10 essentially replicates the text of Article 9(4) of the Aarhus Convention, we consider that this provision should be modified to make clear that it does not prevent the maintenance of safeguards in national law necessary to protect the fairness and efficiency of the court system in Member States.