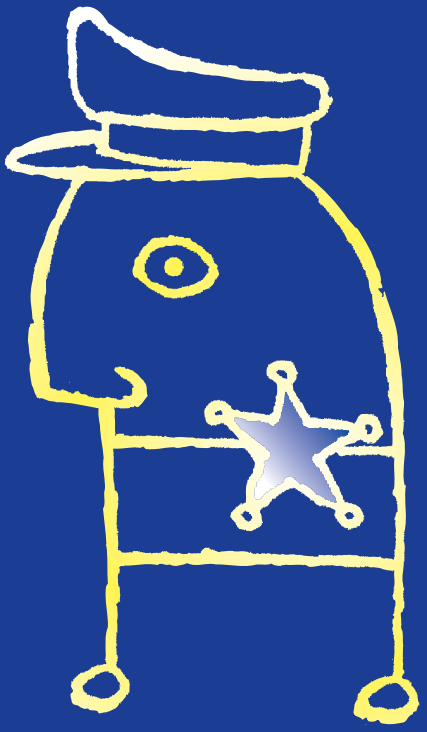
SPECIAL REPORT



Your Rights Under the Environmental Legislation of the EU

DECEMBER 2004

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The European Environmental Bureau (EEB)

The EEB is a federation of around 140 environmental citizens' organisations based in all EU Member States and most Accession Countries, as well as in a few neighbouring countries. These organisations range from local and national, to European and international. The aim of the EEB is to protect and improve the environment of Europe and to enable the citizens of Europe to play their part in achieving that goal.

The EEB office in Brussels was established in 1974 to provide a focal point for its Members to monitor and respond to the emerging EU environmental policy. It has an information service, runs working groups of EEB Members, produces position papers on topics that are, or should be, on the EU agenda, and it represents the Membership in discussions with the Commission, the European Parliament and the Council. It closely co-ordinates EU-oriented activities with its Members at the national levels, and also closely follows the EU enlargement process and some pan-European issues.

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SPECIAL REPORT
OF THE EUROPEAN ENVIRONMENTAL BUREAU (EEB)

Your Rights Under the Environmental Legislation of the EU

Author: Marco Contiero

DECEMBER 2004

December 2004

YOUR RIGHTS

Dear Members,

This year the EEB celebrated its 30th anniversary, thirty years during which environmental organisations across the European Union and an office in Brussels have been working together to represent the interests of environmentally minded people vis-à-vis European institutions.

We have had victories and defeats. The general trend however is that the EU has developed an impressive set of legislation and other policies to promote environmental protection. This trend is supported by the inclusion of an important environmental chapter in the Treaty of the European Community, as well as general principles with regard to sustainable development and the requirement of integration of environmental interests.

However, we cannot rely on the system to produce an environmentally sustainable Europe by itself. Ongoing action for new initiatives, for phasing out EU policies that frustrate environmental objectives, and mobilisation against lack of respect for political decisions on the ground remain essential.

The environmental movement in the EU can profit from increased transparency, acceptance of the usefulness of public participation, and the democratisation of decision-making through a stronger role for the European Parliament. In fact, in environmental matters the concept of participatory democracy has moved ahead, compared to other areas. In this area, politicians and other decision-makers have started to understand the crucial role of environmental citizens' organisations in order to mobilise the public, to balance commercial interests and to find creative solutions.

Ultimately, however, for the environment and for public health only real implementation and enforcement on the ground makes a difference and here we cannot be satisfied. EU environmental legislation continues to be violated across the board. In fact, 1/3 of all legal cases of the Commission against Member States because of infringements of EU legislation concern the environment. Even the Commission itself does not always respect its own rules; for example when it grants funds for infrastructure projects.

In 1994 the EEB produced the first revision of its guide for citizens on how to influence EU environmental decision-making. Since then, our rights and opportunities have improved and are still under development, as you will see in this revised version. This guide is to inform you about your rights and opportunities as an EU citizen to follow and influence EU environmental decision-making on the one hand, and to insist on proper enforcement of existing EU legislation on the other. "Brussels" gives you many opportunities to complain/oppose national and local non-compliance, and using them not only helps in individual cases, but also helps to make visible a huge problem of lack of political will in many parts of the EU. Making this problem visible is the first step to structural solutions.

So using "your rights" is not only good for your local environment. It also contributes to better environmental governance across the EU.

We are certain that in the coming years, this guide will have to be updated once more. There is still a great deal which remains to be done to improve environmental governance. In the meantime we hope that this update is useful for you.

Please inform us of your own experiences and comments related to these issues.

John Hontelez
Secretary General EEB

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I. THE EUROPEAN UNION

1. WHAT IS THE BASIC STRUCTURE OF THE EUROPEAN UNION?

Three international organisations emerged shortly after the end of the Second World War, namely the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). The first of these, the ECSC, was founded in 1951 for a period of 50 years and expired in July 2002; whereas the other two, concluded in Rome on 25th March 1957, are still in force. The Treaty establishing the European Economic Community (renamed 'European Community' by the Treaty of Maastricht), entered into force on 1st January 1958.

Out of these 'European Communities' grew the European Union (EU), which has existed since November1st 1993, the date of entry into force of the Treaty of Maastricht.

The European Union is based upon three pillars: 1) the European Community pillar (embracing the three Communities Treaties); 2) the Common Foreign and Security Policy (CSFP); and 3) Police and Judicial Co-operation in Criminal Matters. What distinguishes the first pillar from the other two is the method of integration followed, which is supranational instead of intergovernmental. In other words, in the areas covered by the first pillar the Member States have ceded their sovereign rights to a greater extent, conferring to the Community institutions the power to act independently and to adopt binding instruments, effective in the national legal orders in the same way as domestic laws (as far as the environment is concerned, practically all provisions are to be found in the EC Treaty). Conversely, in the field of Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters, the leading role is still played by the Member States. The applicable decision-making process is unanimity (which means that every action at Community level must be agreed by all Member States) and there is no supremacy or direct effect for EU law adopted in these fields.

It is necessary to stress that, within this (rather confused) institutional framework, the concept of European Community and the notion of European Union are linked together in an indissoluble manner. Not only does the European Community represent one of the Union's pillars but it also shares all its institutions and bodies with the Union.

Since May1st 2004, date of the last and largest enlargement, the European Union has been composed of 25 Member States - Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Four other countries are currently involved in negotiations to join the EU in the future - namely Bulgaria, Romania, Croatia and Turkey.

2. WHAT IS THE ROLE OF THE EUROPEAN UNION?

According to Article 2 of the Treaty Establishing the European Community (hereinafter EC Treaty) the Community has to promote, among other things, "*a harmonious, balanced and sustainable development of economic activities*" and "*a high level of protection and improvement of the quality of the environment*" by creating "a common market and an economic and monetary union" and by "implementing common policies or activities referred to in Articles 3 and 4". As regards Article 3, it expressly states that, in order to achieve the purposes set out in Article 2, the activities of the Community shall include "a policy in the sphere of the environment". In other words, (since the entry into force of the Single European Act) "Environmental Policy" is expressly included among the Union's fundamental activities. Article 2 of the Treaty on the European Union has a provision similar to Article 2 of the EC Treaty, including among the objectives of the Union a *"balanced and sustainable development"*.

3. HAS ENVIRONMENTAL PROTECTION ALWAYS BEEN GIVEN THE SAME IMPORTANCE THROUGHOUT THE HISTORY OF THE EUROPEAN UNION?

a) European Community Treaty

The original Treaty on the European Economic Community of 1957 did not contain any provisions relating to the environment or its protection. However, in the mid 70s the Community started adopting measures for the protection of the environment (in the shape of regulations and directives as well as the Environmental Action Plans) based on Article 100 (now Art. 94) and Article 235 (now Art. 308), referring both to the common market and not to the environment. Since these Treaty provisions did not

even mention the word 'environment', the Community had to interpret them very broadly, showing a strong political will to take into account environmental interests.

b) Single European Act

Only in 1987, with the adoption of the Single European Act, was a specific section on the environment included in the EEC Treaty (Articles 130R - 130T, now Articles 174 to 176) and the environment explicitly mentioned in Article 100A (now Art. 95), dealing with the Internal Market. However, the environment was not yet "formally" included among the objectives of the Community.

c) Treaty of Maastricht

With the entry into force of the Treaty of Maastricht the protection of the environment was finally given a formal place among the objectives of the Community (former Articles 2 and 3(k) of the EC Treaty). Moreover, the Treaty introduced for the first time a qualified majority voting system applicable to the decisions taken under the Title on the Environment (former Article 130S).

d) Treaty of Amsterdam[1]

When the Treaty of Amsterdam, entered into force in 1999, Community environmental policy witnessed significant changes. Firstly, Article 2 ECT was given better wording, since it expressly introduced the promotion of '*harmonious, balanced and sustainable development*' as well as the promotion of '*a high level of protection and improvement of the quality of the environment*' among the general objectives of the Community. Then, the principle of integration was given far more relevance, being enshrined in Article 6 of the Treaty, among the other 'Principles' of the European Community. Moreover, the co-decision procedure (see question 12c) became the general rule for adopting environmental measures based on Article 175 (except for the areas listed in Article 175(2), for which unanimity is still applicable), as well as for measures based on Article 95 (internal market). Finally, Article 95 was also given an improved text, clearly establishing the right of the Member States to maintain or introduce, even after the adoption of Community harmonisation measures, national provisions deemed to be necessary for protecting the environment.

[1] *Following the Treaty of Amsterdam, the numbering of the articles of the Treaty has been changed. In this booklet the new numbering has been used.*

e) Treaty of Nice

Unfortunately, with regard to environmental protection, no progress was made with the adoption of the Treaty of Nice. Indeed, even though some environmental issues appeared on the agenda for the Intergovernmental Conference, such as the adoption of qualified majority voting for introducing provisions on eco-taxes, no positive results were achieved.

f) European Constitution

On 29 October 2004 the final text of the 'Treaty establishing a Constitution for Europe' (Constitutional Treaty) was solemnly signed in Rome by the 25 Member States. This Treaty, once ratified by all the Member States, will replace the existing European Treaties (the EU, EC and Euratom Treaties as well as the Treaties by which the former have been amended) and the European Union will be given a legal personality, considerably simplifying the existing confused institutional framework, in which the 'European Union' and the 'European Communities' coexist.

Due to the scope of the present publication, a complete analysis of all the changes that the Constitution will bring is not needed. What is interesting to stress is that the co-decision procedure, the most 'democratic' decision-making scheme (which gives the European Parliament a stronger position, even if still weaker than that of the Council), will significantly increase its relevance. Almost 95% of European laws will be adopted under this procedure, to be referred to as 'ordinary legislative procedure'. This is even more important if we bear in mind that lately the European Parliament has in general shown itself to be the European institution most inclined to take environmental considerations seriously into account during the drafting of Community legislation.

As regards environmental provisions, only limited changes were brought about by the adopted text. The same cannot be said of the first draft, presented in February 2003. Only thanks to the intensive work carried out by environmental NGOs and some other stakeholders, such as the European Parliament, did the final text of the Constitutional Treaty leave existing Community provisions on the environment unchanged. Unfortunately, this means that a huge opportunity to update several provisions affecting the environment was missed. For a detailed analysis of the new environmental provisions set forth by the Constitution it is useful to read the position paper "Towards a Green Constitution", published in August 2003 by the 'Green Eight' (currently 'Green Nine'), a coalition of leading environmental organisations active at EU level (Full text

of the position paper can be found on the Internet at: **http://www.eeb.org/publication/2003/G8-IGC-EN-final-8-8-03.pdf**).

However, particularly interesting for the purposes of this publication are the provisions concerning participatory democracy. Article 47 lays down the Principle of participatory democracy, stating in particular that the European Commission, in the exercise of its exclusive power of legislative initiative, has to carry out broad consultation with all the stakeholders concerned. Unfortunately, this Article contains only a general and vague declaration of principle, leaving the discretionary power to the Commission. In our view, consultations with the public can lead to effective results only where clear and precise criteria imposing specific duties on the Commission are adopted, such as the need to carry out consultations at an early stage of the legislative procedure and to take into account comments expressed by the public.

Another significant criticism concerns the absence of provisions granting access to the European Court of Justice to citizens and their organisations. Granting such a right is the only way in which a truly participatory democracy can be achieved. The sole provision dealing with access to justice is Article III-270(4), which repeats the text of the existing Article 230(4) of the EC Treaty, limiting access to justice to natural and legal persons 'directly and individually concerned' by the challenged Community act. However, even though this formulation imposes some restrictions, it also leaves some room for the provisions of the Århus Convention to come into effect within the EU. The Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted in 1998, under the auspices of the UN Economic Commission for Europe (UNECE) and entered into force on 30 October 2001 (Full text of the Convention can be found on the Internet at: **http://www.unece.org/env/pp/documents/cep43e.pdf**).

Further information on the Constitution can be found on the Internet at: **http://europa.eu.int/futurum/1000debates/index.cfm?page=dsp_content_page&lng_id=1.**

4. WHAT ARE THE MAIN PROVISIONS IN THE EXISTING EC TREATY DEALING WITH THE PROTECTION OF THE ENVIRONMENT?

Art. 2	'Community objectives'
Art. 3 sub 1 (ex Art. 2 K)	'Environmental policy'
Art. 6	'Principle of integration'
Art. 28 (ex Art. 30)	'Prohibition of quantitative restrictions on imports'
Art. 30 (ex Art. 36)	'Exceptions to the prohibition of Art. 28'
Art. 95 (ex Art. 100 A)	'Internal market'
Art. 174 (ex Art. 130 R)	'Objectives of European environmental policy' 'Fundamental principles of European environmental policy'
Art. 175 (ex Art. 130 S)	'Legal basis for environmental action' 'Decision-making procedures for environmental action'
Art. 176 (ex Art. 130 T)	'National more stringent measures'

5. WHAT ARE THE OBJECTIVES OF THE EUROPEAN UNION'S ENVIRONMENTAL POLICY?

The objectives that Community environmental policy should pursue and achieve are set out in detail in Article 174 of the EC Treaty, which lists them as follows:

- **preserving, protecting and improving the quality of the environment,**
- **protecting human health,**
- **prudent and rational utilisation of natural resources,**
- **promoting measures at international level to deal with regional or worldwide environmental problems.**

These objectives specify what is already included in the general objective of protecting the environment, enshrined in Article 2 of the Treaty. They are useful, in particular, in determining the correct legal basis of a Community measure. As a matter of fact, it is the main objective of the measure that determines its legal basis. Therefore, if, for instance, the main purpose of a directive was to rationalise the utilisation of natural resources, its legal basis would be Article 175, which has relevant consequences on the applicable decision-making process and on the powers left to the Member States.

6. WHAT ARE THE PRINCIPLES THAT THE EUROPEAN UNION HAS TO RESPECT IN PURSUING THESE OBJECTIVES?

The second paragraph of Article 174 of the EC Treaty states that Community policy on the environment has to be based on the following fundamental principles:

a) The **high level of protection principle**

Community environmental policy has to aim at achieving a high level of environmental protection. This principle, enshrined in Article 2, 174 and 95 of the EC Treaty, does not impose the achievement of the 'highest' level of protection possible. What it does is to prohibit the adoption of European environmental measures establishing low levels of protection. Academics contest whether the legality of a measure can be challenged, when it does not aim at a high level of protection. However, as far as the Court of Justice is concerned, it has never excluded such a possibility.

b) The **precautionary principle**

Even though there is no specific definition of the precautionary principle in the Treaty, it generally means that when there are reasonable indications that a particular activity can have dangerous effects on the environment, preventive measures can be validly taken, even where there is no scientific evidence establishing a causal link between the activity and the negative effects. Such a principle is not limited exclusively to the environment. It also applies, for example, in health matters.

c) The **prevention principle**

This principle is closely linked to the precautionary one and it is constantly used in conjunction with the latter. According to this principle, the Union has to take a preventive approach with regard to environmental issues. This means that preference should be given to measures preventing damage to the environment rather than to action restoring the environment after actual damage has occurred.

d) The **rectification of damage at source principle**

Community policy on the environment should be based on the principle that environmental damage should, as a priority, be rectified at source. This means that the Union should concentrate its greatest possible efforts on dealing with problems at the

level where the pollution originates. To understand its practical importance it is worthwhile mentioning that in the Walloon Waste case (Case C-2/90, Commission v. Belgium, [1992] E.C.R. 4431), the European Court of Justice, on the basis of this principle, considered not discriminatory a regional ban on the import of waste, despite Community provisions on free movement of goods.

e) The **polluter-pays principle**

According to this principle, which has shaped Community environmental policy since the early 70s, those who are responsible for pollution must bear the costs involved in cleaning up the environment. In other words, it should not be the public authorities, thus the taxpayer, who bears the cost of pollution. This principle has been of particular relevance in the process that recently led to the adoption of the Directive on environmental liability.

f) The **integration principle**

This principle, introduced by the Single European Act in Article 174 and subsequently reformulated and relocated by the Treaty of Amsterdam to the present Article 6 EC, states that environmental considerations must be integrated into the definition and implementation of Community polices and activities listed in Article 3. The basic idea underpinning this principle is that environmental considerations cannot be considered as an isolated sector, since other polices such as agriculture, transport or energy, have serious impacts on the environment. In practice, this principle does not imply that priority should be given to Community environmental policy but that protection of the environment must be fully taken into account in the adoption of other Community polices. Article 6 does not cover the measures that come under the second and third pillars of the European Union ('common foreign and security policy' and 'police and judicial co-operation in criminal matters').

7. ARE THERE ANY LIMITS TO THESE PRINCIPLES?

No real limitations to these principles are laid down in the Treaty. However, the Treaty refers to certain other principles that the Community, in preparing its policy on the environment, has to take into consideration. In particular, Article 174(3) states that account should be taken of the following:

- available scientific and technical data,
- environmental conditions in the various regions of the Community,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Community as a whole and the balanced development of its regions.

However, the very wording used in the Article, 'taken into account', clarifies that these conditions are not binding preconditions affecting Community policy.

8. CAN THE UNION TAKE ACTION AT AN INTERNATIONAL LEVEL TO PROTECT THE ENVIRONMENT?

Yes. Article 174 paragraph 4 gives the Union and the Member States, within their respective spheres of competence, the power to work on environmental protection together with third countries and international organisations. To this end, the Union may also conclude international agreements with other countries or international organisations, which are binding on Member States and the other European institutions. However, this does not prejudice Member States' competence to negotiate in international bodies and to conclude international agreements.

According to Article 300 of the EC Treaty, the European Commission conducts negotiations on the basis of a mandate from the Council, the Council itself, acting by qualified majority, is competent for the conclusion of the agreements, while the European Parliament has only the right to be consulted.

This power to engage in international co-operation, which existed even before the Treaty on the European Union came into effect, has been used by the Community on several occasions.This is, for instance, how the Community was able to conclude:

- the Vienna agreement on protection of the ozone layer (1985), and the resulting Montreal protocol on Substances that Deplete the Ozone Layer (1987);
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (1989); and
- the Rio de Janeiro Framework Convention on Climate Change (1992).

9. APART FROM ARTICLE 174 OF THE EC TREATY, ARE THERE OTHER LEGAL PROVISIONS WHICH HAVE IMPORTANT REPERCUSSIONS FOR EUROPEAN UNION ENVIRONMENTAL POLICY?

As already mentioned, the EC Treaty, in addition to the rules set out under the Title on the Environment, contains other legal provisions that can significantly affect the environment, such as Article 95, dealing with the internal market, Article 33 regarding the common agricultural policy and Articles 70 – 80 concerning the common transport policy.

As regards the internal market, some further considerations can be useful in understanding the role that environmental interests play within the EU. The creation of a unified economic area between all the Member States represents one of the main objectives of the Union. Within this economic area, all goods and products must be allowed to circulate freely and on an equal footing in all Member States. This means, for example, that a car manufactured in France can be sold in Germany, requiring that conditions applicable to vehicle approvals in Germany should not differ from those applicable in France. In order to approximate these potentially different regulations, Article 95 of the EC Treaty gives the Community competence in the field of approximation of legislation. Interestingly, the third paragraph of Article 95 expressly states that, when the Commission, exercising this competence, drafts a proposal concerning environmental protection, it has to take as a basis a high level of protection. In other words, if the Commission is dealing with provisions concerning product characteristics, such as the exhaust emission limits for cars, it has to take into account environmental considerations.

10. CAN THE MEMBER STATES ADOPT MORE STRINGENT ENVIRONMENTAL MEASURES THAN THE COMMUNITY MEASURES?

Yes. Article 176 of the EC Treaty expressly confers on Member States the right to introduce or maintain protective measures which are more stringent than those adopted by the Community pursuant to Article 175, provided that they notify these measures to the Commission. It is worthwhile noticing that this opportunity is given to Member States only with regard to measures adopted by the Community pursuant to Article 175, which means that when environmental measures are taken on the basis of other EU provisions (such as Articles 95 or 37), Member States do not enjoy such a right.

On the basis of Article 95, the Union adopts harmonisation measures. In such a case, the Member States have to respect stricter rules, listed in Article 95, paragraphs 4 and 5. Under these paragraphs, Member States can 'maintain' national provisions necessary for pursuing major needs relating to the protection of the environment, provided that they notify the Commission of the provisions and the grounds for maintaining them. Under paragraph 5 Member States can 'introduce' new national provisions aiming at the protection of the environment, provided that the latter are based upon new scientific evidence and concerning problems specific to the Member State concerned. All maintained or introduced national measures are subject to Commission approval, which can reject them if they are 'means of arbitrary discrimination' or 'disguised restriction on trade between Member States' or constitute an 'obstacle to the functioning of the internal market'.

It should be noted that neither the provisions of Article 176 nor those of Article 95 apply where a legislation is based on Article 37 (Agriculture – example: pesticides) or Article 80 (Transport – example: noise from airplanes).

The power of the Union, both in the field of environmental protection and approximation of legislation is subject to the **subsidiarity principle**, laid down in Article 5 of the EC Treaty. This states that the Union may act only "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". The Treaty of Amsterdam introduced a Protocol on the application of the principle of subsidiarity, providing clarifications on the proper functioning of this principle. In particular, it stresses that Community action must respect both aspects of the subsidiarity principle, the negative one (not sufficiently achieved by Member States' action) and the positive one (more effectively achieved by the Community). Moreover, the Protocol lists some clarifying guidelines when a Community measure is justified under the subsidiarity principle, namely when the issue under consideration has transnational aspects, when actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty, and, finally, when action at Community level would produce clear benefits by reason of its scale or effects. It must be stressed that EC institutions have a rather large discretion in their application of the principle. When the Commission, the European Parliament and the Council accept that legislation conforms to the subsidiarity principle, a case then has to be rather extreme for the legislation to later be annulled because of disregard of the principle.

11. CAN THE MEMBER STATES ADOPT LESS STRINGENT ENVIRONMENTAL MEASURES?

No. From the wording of Article 176 it is clear that once the Union has adopted a harmonised measure, Member States are not allowed to adopt less stringent environmental measures. It should also be mentioned that, where tjhe Union has not legislated, Member States may take any kind of measures relating to environmental matters, provided that they respect the EC Treaty provisions and in particular Articles 28 and 29.

12. WHO RULES THE EUROPEAN UNION?

Even though it is normal to talk in rather abstract terms about "The Union", it is one of the following institutions of the Union or bodies which take action, exercising powers which have been conferred upon it. These institutions can be divided into three groups:

- **LEGISLATIVE BODIES**
  Council
  European Commission
  European Parliament
- **JUDICIAL BODIES**
  Court of Justice of the European Communities
  Court of First Instance
- **ADVISORY COMMITTEES**
  Economic and Social Committee
  Committee of the Regions

In addition there are other institutions which have been given powers in the fields of budgets, investment and monetary policy - such as the Court of Auditors, the European Central Bank and the European Investment Bank.

a) The Council

Council (Art. 202 of the EC Treaty) meets, as often as is necessary, in several different configurations (e.g. Environment Council, Transport Council, Agricultural Council), depending on the issues under examination, and is made up of the relevant minister

from each Member State (Art. 204 of the EC Treaty), authorised to commit the government of that Member State. As regards environmental matters, it consists of the twenty-five environmental ministers, which meet generally three times each Presidency.

The Council defines the general political guidelines for European integration by taking policy decisions that provide the basis for the development of the European Union as a whole. It takes binding decisions and exercises the legislative function within the Union. Even though it still has a pre-eminent position among the European institutions, its role within the European legislative process changed with the entry into force of the Treaty of Amsterdam. Since then, the general rule has become the co-decision procedure, which gives the Parliament a greater role.

The work of the Council is prepared by the Committee of Permanent Representatives - COREPER (Art. 207 of the EC Treaty), which consists of representatives of the Member States to the European Union. This is the forum where the Member States defend their own national interests. In the other institutions, the role played by national interests is less relevant, especially because of the structure of the institutions themselves.

A General Secretariat, under the responsibility of the Secretary-General, High Representative for the common foreign and security policy, assists the Council.

The 'Council' should not be confused with the 'European Council' (Article 4 EU Treaty), which is not a legislative body. This term refers to the biannual meetings between the Heads of State or Government of the Member States and the President of the Commission, assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. These meetings are held under the chairmanship of the Head of State or Government of the Member State that holds the Presidency of the Council (Article 4 of the EU Treaty). Each Member State holds the Presidency for a term of six months, in the order decided unanimously by the Council (Art. 203 of the EC Treaty).

b) The Commission

The European Commission also plays a very prominent role in the institutional framework of the European Union. Among its tasks it has the exclusive power to draft legislative proposals, in environmental matters, also known as the 'right of initiative'. In other words, if the Union wishes to enact new legislation, it first requires a proposal from the Commission. However, there are some areas (the so called 'third pillar') in

which the Council may act without a proposal from the Commission. Moreover, it has to ensure that the provisions of the EC Treaty and the measures taken by the European institutions are applied throughout the EU, to formulate recommendations and opinions or take decisions. In addition, it exercises all the powers conferred on it by the Council for the implementation of legal provisions (Art. 211 of the EC Treaty).

Finally, where the Commission considers that a Member State is not complying with EU law, it can address to that State a reasoned opinion and, if the latter does not fulfil its obligations, can initiate an infringement proceeding, by bringing the matter before the Court of Justice (Art. 226 of the EC Treaty). The Court has ruled that the Commission's discretion to start infringements procedures cannot be controlled. Such discretionary power has been exercised several times by the Commission, especially in the environmental field. Far too often the Member States have proven themselves incapable of either respecting Community legislation or of implementing it, or both, by the required deadline or in the right manner.

The Commission currently consists of 25 Members, one per Country, including the President, appointed for five years by the Council. Unlike the Council, the Members of the Commission must be completely independent in the performance of their duties and do not have to take or seek instructions from any governments or any other body.

Since 1995 the European Parliament has started playing a greater role in the appointment of the Commission, previously a task carried out solely by the Member States. The nomination of the President and of the other Members of the Commission, is now subject to a vote of approval by the European Parliament

Internally, the Commission is divided into Directorate-Generals, which all report to a Commissioner. DG Environment is responsible for environmental protection. The environmental Commissioner is currently Stavros Dimas, from Greece.

c) The European Parliament

Since 1987 the relevance of the role played by the European Parliament has increased significantly. While in the past it was a purely consultative assembly with advisory functions, the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam, gave it greater powers which transformed it into a legislative parliament, closer to the national ones.

The representatives in the European Parliament are elected by direct universal suffrage in all the Member States, for a term of five years and their number cannot exceed 732. With an EU made up of twenty-seven states, the number of parliamentarians would first reach quota 786 and then decrease to 736, as decided in the Constitutional Treaty. A proposal for holding future elections according to a uniform electoral procedure in all Member States has to be drawn up by the Parliament itself. Until now, the contingent of Members of the EP has been elected according to the electoral system of each Member State, varying from proportional representation systems to first-past-the-post systems.

As regards the mentioned legislative powers, in certain areas the Maastricht Treaty gave the Parliament powers of co-decision, enhancing the role played by the Parliament in the EU decision-making process. When co-decision is the applicable procedure, Community legislation can be adopted exclusively if the Parliament and the Council come to an agreement. With the entry into force of the Treaty of Amsterdam this procedure became 'the rule', used for the adoption of Community legislation in the majority of cases, including environmental measures pursuing the objectives listed in Article 174 (Art.175(1) of the EC Treaty).

Different procedures are currently applicable to the Community legislative process, all characterised by a different level of involvement of the European Parliament. Worth mentioning are the consultation procedure, the co-operation procedure and the co-decision procedure. (For a more detailed description of these procedures visit: **http://europa.eu.int/institutions/decision-making/index_en.hmt**)

- The **consultation procedure** involves the European Parliament only marginally, as it has to be consulted but its opinion does not bind the Council. With regard to environmental issues this procedure applies to provisions of a fiscal nature, measures affecting town and country planning, water management and provisions affecting a Member State's choice between different energy sources and the general structure of its energy supply (Art. 175(2) of the EC Treaty).
- The **co-operation procedure** introduces a second reading at the end of which the Parliament can agree on amendments or reject the whole proposal by absolute majority. However, in the case of rejection, the Council still has the power to adopt the legislation, which it can do simply by reaching a unanimous decision. This procedure is in practice applicable only to issues relating to economic and monetary union.

- In the **co-decision procedure** the Parliament has a decisive say. During the first reading it can propose amendments to the Commission's proposal and, if the Council approves these amendments, the legislative instrument is adopted. In the opposite case a second reading is required, introduced by a common position adopted by the Council. In this case, if the Parliament accepts the position or remains inactive for three months, the proposal is adopted. On the other hand, if it rejects the common position by absolute majority, the legislative process comes to an end. In other words, it has a right of veto. Finally, if the Parliament proposes amendments to the common position, which is possible only by absolute majority, the Council can adopt the legislative instrument, as amended by the EP, by qualified majority or by unanimity (depending on whether the Commission accepts or not the parliamentary amendments). If, however, the Council does not accept certain amendments, a Conciliation Committee must be convened with the aim of reaching a workable compromise between the diverging positions of the Council and of the Parliament.

The Parliament may, acting with a majority of its Members, request the Commission to submit legislative proposals for Community legislation that it considers necessary for the implementation of the EC Treaty (Art. 192 of the EC Treaty). Opinions differ among academics whether the Commission is bound by a request of the Parliament under Article 192.

Apart from the legislative powers discussed above, the European Parliament has budgetary and supervisory powers which greatly enhance its political role. Under Article 272 (4), for instance, the Parliament has the right to adopt amendments and propose modifications to the draft budget, which is adopted by the Council and subsequently placed before the Parliament. As regards supervisory powers, the European Parliament may set up a temporary Committee of Inquiry to investigate alleged infringements and maladministration in the implementation of Community law, provided that the request for setting up such a committee comes from a quarter of its Members. Moreover, the Parliament deals with the petitions that individual citizens and any natural or legal person can submit to it on the basis of Article 194 of the Treaty (See Part III question 25b).

d) The Court of Justice of the European Communities and the Court of First Instance

The Court of Justice plays a fundamental role in the development of the European integration process. It ensures that, in the interpretation and application of the EC Treaty,

including, obviously, its environmental provisions, the law is observed (Art. 220 of the EC Treaty). In other words, it ensures that the Member States and the EU institutions comply with Community law and that the latter is applied in a uniform way throughout the Union.

In particular the Court of Justice has jurisdiction:

- in actions brought by Member States or by EU institutions against other Member States, for failures to fulfil their obligations under the Treaty (Art. 226-227 of the EC Treaty);
- in actions brought by Member States or by Community institutions for annulment of acts illegally adopted or failures to act (Art. 230-232 of the EC Treaty);
- to give preliminary rulings in cases referred to it by national courts concerning the interpretation of this Treaty and the validity and interpretation of acts of the Community institutions (Art. 234 of the EC Treaty)

Moreover, according to Article 228 of the Treaty, the Court of Justice is entitled to impose a lump sum fine or a penalty payment on those Member States that continue to breach Community law notwithstanding their behaviour had already been challenged before the Court of Justice in an infringement procedure. In July 2000, Greece was the first Member State to receive a fine on the basis of this provision, for not having taken the necessary measures to comply with a previous judgement of the Court of Justice, which had ordered Greece to fully implement Community legislation on waste (Case C-387/97).

Finally, it must be stressed that the Court of Justice has always played a significant role in the protection of the environment. Indeed, in several judgements it has interpreted and applied Community law in a 'green' way, ensuring an environmentally sound interpretation of EU fundamental principles and granting their application to Community secondary legislation.

The Court of First Instance is responsible for dealing with certain proceedings, such as:

- actions brought by natural and legal persons for annulment of acts illegally adopted or failures to act (Art. 230-232 of the EC Treaty) (see question 21b);
- actions brought by natural and legal persons relating to compensation for damage deriving from non-contractual liability (Art. 235 and 288(2) of the EC Treaty);
- actions brought by Community servants against the European Union (Art. 236 of the EC Treaty).

The judgements of the Court of First Instance are subject to a right of appeal to the Court of Justice, but only on points of law (Art. 225(1) of the EC Treaty). In other words, the Court of Justice is not allowed to rule on the merit of the decisions taken by the Court of First Instance. It can only intervene when procedural mistakes have been made or in case of lack of competence.

The text of all judgements adopted by the Court of Justice and the Court of First Instance can be found at the following address: **http://curia.eu.int/en/index.htm**

e) The Economic and Social Committee and the Committee of the Regions

These bodies mainly have an advisory function. Both Committees have the right to issue opinions as part of the Community legislative process. They also have the right to initiate reports on any issue they consider relevant.

13. WHAT BINDING LEGAL INSTRUMENTS CAN BE ADOPTED IN THE FIELD OF ENVIRONMENTAL POLICY?

a) Regulations

Regulations have general application, are binding in their entirety and directly applicable in all Member States (Art. 249 of the EC Treaty). In other words, in order to have immediate effect at national level, they do not require Member States to adopt further legislation. This clearly means that all the rights that regulations confer on individuals, directly or as a consequence of duties imposed on other individuals or public authorities are immediately enforceable at Member State level before national courts. However, not all the provisions of the regulations have direct effect. Indeed, sometimes Member States are required to take specific action, such as defining national competent authorities, setting up specific certificates or taking certain executive provisions.

Due to their specific characteristics, regulations are normally adopted to provide legislation on issues requiring uniform provisions throughout the Community.

b) Directives

Directives are addressed to the Member States and impose upon them an obligation to achieve a specific result within a certain period of time. However, they leave it to the Member

States to decide how to achieve this result (Art. 249 of the EC Treaty). This means that directives are not, as a general rule, immediately applicable in the Member States. National measures transposing directives' provisions into domestic legal orders are thus needed, but it is up to each Member State to decide what kind of legislative act is more appropriate to achieve the imposed result. However, as will be clarified in more detail below (see question 25a), national legislation must transpose EC legislation 'completely' and 'correctly'.

Directives do not impose obligations on citizens, legal persons and their associations. However, as will be seen below (see question 19b), in case of non or incorrect transposition, where their provisions are concrete, precise and unconditional, they confer directly enforceable rights on individuals.

c) Decisions

Decisions differ from directives and regulations in that they are not legislative instruments aimed at the general public, unlike the regulations, and are binding in their entirety, unlike the directives. Decisions are, indeed, directed to particular individuals, undertakings or Member States and are, in their entirety, binding upon those to whom they are addressed (Art. 249 of the EC Treaty). Therefore, being directly applicable to their addressees, decisions can, incidentally, confer rights to the citizens.

14. WHERE IS COMMUNITY LAW PUBLISHED?

The Union's legal documents are published in the Official Journal of the European Communities. This consists of two main parts, the "L" series and the "C" series. Legal texts are published in the former series (L = legislation) while preparatory acts, information and notices, such as Commission Proposals and Communications, as well as abstracts of judgements of the ECJ, are published under the "C" series (C = communication). Also the opinions issued by the European Parliament on legislative proposals and the opinions of ECOSOC and the Committee of the Regions are published in the Official Journal. The same is true for parliamentary written questions to the Commission or the Council as well as for the answers given by the latter.

The Official Journal is easily accessible through the web site 'Europa', in the 'Portal to European Union law' at **http://europa.eu.int/eur-lex**.

II. EUROPEAN UNION ENVIRONMENTAL LEGISLATION

15. WHAT IS SPECIAL ABOUT COMMUNITY LAW?

The essential characteristic of Community law is that the EU and EC Treaties, upon which the Union as a whole is currently based, have created a legal system on their own, which has become an integral part of the legal systems of the various Member States. Where national law and EC law are in contradiction with each other, the EC law prevails. This principle even applies where the contrast regards a provision enshrined in a national constitution.

As regards the effects that Community law has on European citizens it is worthwhile quoting what the European Court of Justice pointed out in one of its landmark judgements (Van Gend & Loos, Case 26-62, 5 February 1963). The Court declared the following: "*Independently of the legislation of the Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes, in a clearly defined way, upon individuals as well as upon the Member States and upon the institutions of the community*".

In other words, by creating the European Union, the Member States have agreed to limit their sovereign rights, creating a body of law which binds themselves as well as their nationals. It is worthwhile stressing here that EU citizens have a right to expect that national authorities throughout the European Union will properly enforce the rights that Community law bestows upon them.

16. TO WHAT EXTENT IS COMMUNITY ENVIRONMENTAL LAW OBSERVED IN THE MEMBER STATES?

The environment is one of the sectors in which the implementation of Community legislation by Member States needs to be improved. In its XXth Annual report on monitoring the application of Community law the Commission points out that, in the

years 1998 - 2002, timely and correct implementation of Community environmental legislation witnessed growing difficulties. The data gathered by the Commission is clear. At 31.12.2002, almost 42% of the cases which were referred to the Court of Justice and one third of all cases for which infringement proceedings were begun related to environmental legislation. Among the proceedings arising from Article 228, an even higher percentage (53%) related to environmental issues.

(Full text of XXth Report on monitoring the application of Community law: **http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/rapport_annuel/20_rapport_annuel_en.htm**).

17. WHICH AREAS OF ENVIRONMENTAL PROTECTION HAS THE EUROPEAN COMMUNITY BEEN DEALING WITH UP TO NOW?

Community legislation on the protection of the environment (directives and regulations) deals mainly with the following areas or categories:

- Access to information
- Biotechnology
- Chemicals
- Clean air
- Climate change
- Eco-label
- Environmental liability
- Environmental impact assessment
- Health
- Nature and biodiversity
- Noise
- Public participation in decision-making
- Soil protection
- Urban environment
- Waste
- Water protection

The content of these directives mostly impose an obligation on the Member States to take the following measures or to make arrangements to protect the environment:

- Compulsory licensing procedure for certain emitting and environment-polluting industrial plants (maintenance of clean air);
- Notification or provision of information to the authorities concerned about the arrangements to protect the environment (genetic engineering and nuclear plants);

- Drawing up of clean-up and pollution-avoidance plans (waste, air, groundwater protection);
- Compliance with fixed thresholds (water, air);
- Performance of measurements and observations;
- Ban on release of particularly hazardous substances;
- Granting of approvals for certain periods;
- Provision of information to the Commission about the measures taken.

18. TO WHAT EXTENT DO MEMBER STATES INFRINGE COMMUNITY DIRECTIVES?

Over the years, the Member States have often failed to implement, or fully implement, directives in their national law by the due date.

The European Court of Justice lays down strict rules on how directives should be implemented. This is particularly true where the directive concerned is intended to grant rights to individuals, as is often the case with environmental directives. The Member States must convert these provisions into compulsory legal provisions, which are binding on the public. Converting directives with mere administrative rules, which are usually not published or are only binding on the administration itself, and which individual citizens cannot invoke, has been ruled out several times by the jurisprudence of the Court of Justice.

An infringement of environmental legislation also occurs when, although the provisions of the directive concerned are converted into national law, the administrative authorities or the courts do not use them in practice.

All infringements can be challenged by legal action (in the way described under Chapter III), depending on whether the provision of the legal documents adopted by the European Union on the environment can be directly invoked or not, and can be censured by the responsible European Union institutions.

III. CITIZENS' RIGHT TO ACT IN CASE OF INFRINGEMENT OF EU LAW

19. WHAT CAN INDIVIDUALS OR ENVIRONMENTAL CITIZENS' ORGANISATIONS DO, WHEN THEY OBSERVE THAT EUROPEAN UNION ENVIRONMENTAL LEGISLATION HAS BEEN INFRINGED?

Member States are obliged to comply with EC legislation. This follows from each individual piece of legislation and, more generally, from Article 10 of the EC Treaty. Normally, when European environment law is not respected, an individual person or an environmental group may bring the case before a national court, if the conditions which are laid down in national law for bringing such an action, are fulfilled. Whether this is the case depends on the legislation in each Member State. Each Member State has its own procedural rules, laying down different conditions as regards access to justice in environmental matters. In general terms, environmental organisations have limited access to administrative courts, while civil and, above all, criminal courts are even less accessible. Other differences which have a determining effect on access to courts include the remedies available, the possible outcomes of the review procedure and the related costs.

Unfortunately, under national law, lack of legal standing for individuals and environmental organisations is frequent, making it impossible for them to challenge violations of their rights before national courts.

However, as will be seen below, citizens and their organisations are given wide access to justice under the legal framework of the Århus Convention, which was signed by the EC and all the Member States and already ratified by the majority of them. This means that, in order to comply with the requirements of the Convention, several national legal systems have to adapt their legislation.

The possible options that individuals and environmental organisations have in taking action when Community environmental legislation is breached depend also on what kind of legislation has been infringed (i.e. whether it is a Regulation or a Directive).

a) Regulations

As already mentioned (question 13), regulations are directly applicable in all Member States (Art. 249 of the EC Treaty). National authorities, as well as natural or legal persons, are directly bound by Community regulations in the same way as by national law. Therefore, national courts also have to apply these provisions. This means that any citizen in the Union can invoke the content of a regulation directly before his national courts, or before the courts of another Member State.

b) Directives

Even though directives address Member States and, before their implementation, do not impose enforceable obligations on individuals or citizens' associations, the latter can invoke, before their national courts, those provisions that, directly or indirectly, confer upon them certain rights. Often, and particularly in the environmental field, Community directives oblige the Member States to grant rights to the citizens of the Union. However, individuals can invoke a directive only where its provisions are sufficiently **clear**, **precise** and **unconditional**, where the Member State concerned has failed to transpose the directive on time, or has done it incorrectly or incompletely. In that regard it is important to know (see also question 25a) that the Court of Justice has constantly ruled that Member States have to transpose all the directives' requirements addressed to them exclusively by binding provisions. Therefore, in the case of transposition of the directives' obligations by non-binding instruments, an individual would be allowed to take legal action.

20. ARE ENVIRONMENTAL CITIZENS' ORGANISATIONS ONLY ALLOWED TO COMPLAIN ABOUT INFRINGEMENTS IN THEIR OWN MEMBER STATES?

No. If an environmental citizens' organisation finds that there are infringements of environmental legislation in another Member State, it may also notify them to the Commission.

21. DO INDIVIDUALS AND ENVIRONMENTAL CITIZENS' ORGANISATIONS HAVE DIRECT ACCESS TO THE EUROPEAN COURT OF JUSTICE?

The answer depends on who is responsible for the infringement of Community environmental legislation.

a) Infringements by a Member State

In this case, there is no direct access to the Court of Justice. The only solution open to individuals and NGOs is to access the Court indirectly, through the procedure provided for by Article 324 of the EC Treaty. Under this article national courts 'may', and when are judging in the last instance 'have to', request the Court of Justice to give a preliminary ruling on questions concerning the interpretation of the Treaty or the validity or interpretation of acts of the European institutions. However, such indirect access is granted only to individuals and NGOs who, under their national law, already have access to domestic courts and tribunals. Moreover, as already mentioned, in most cases it is up to individual judges to decide whether to refer the question to the ECJ or not. In other words, such indirect access to the Court of Justice does not represent a very effective judicial tool for the public.

b) Infringements by European Union institutions

In the case of infringements committed by Community institutions, two provisions under the EC Treaty play a crucial role. Articles 230(4) and 232(3) grant natural or legal persons access to the European Court of Justice, if certain strict conditions are fulfilled. In particular, Article 230(4) establishes that any natural or legal person may institute proceedings before the Court:

- against decisions **addressed** to that person, or
- against decisions concerning "**directly and individually**" that person, even though the decisions are in the form of a regulation or a decision addressed to another person.

Complaints may also be lodged with the Court of Justice by any natural or legal person if a Community institution fails to address to that person any act other than a recommendation or an opinion (Article 232(3)). Proceedings initiated by individuals

under the mentioned articles fall within the jurisdiction of the Court of First Instance, as decided by the Council under Article 225(2).

Whether environmental NGOs are allowed to challenge the legality of acts of Community institutions, under Article 230(4), is a keenly debated and problematic issue. The interpretation given by the Court of Justice to this article is particularly narrow. According to the settled case-law of the Court, whenever a decision concerns the applicant in a general and abstract fashion, like any other person in the same situation, the applicant cannot claim to be directly and individually concerned (Case 25/62 Plauman v. Commission [1963] ECR 95). Of the two standing requirements, that of being "individually" concerned is the most problematic, especially for environmental organisations. It is clearly difficult, under such an interpretation, to define the protection of the environment as a matter which concerns an NGO 'individually'. In a case brought by Greenpeace International, the Court addressing this very issue, confirmed its previous case-law (Case C-321/95 Greenpeace International v. Commission [1998] ECR I-1651).

In 2002 the Court of First Instance ruled that the strict interpretation of the notion of individual concern followed by the Court of Justice needs to be revised and it should be held that claimants do not need to be differently affected by the measure they challenge. In this regard, all that is of relevance is that the legal position of the applicant is affected by the contested measure, and the number or position of other persons likewise affected by the measure is of no importance (Case T-177/01, Jego-Quere v. Commission, [2002] ECR II-2365). Unfortunately, the Court of Justice, in a more recent judgement, confirmed its restrictive position with regard to legal standing of individuals and organisations under Article 230(4) (Case C-50/00, Union de Pequenos Agricultores v. Council [2002] ECR I-6677).

As a consequence, no environmental NGO challenging a decision addressed to another person has ever been accorded legal standing before the Court of Justice under Article 230(4). In other words, the above-mentioned case-law, as well as the absence of a clear Treaty provision granting access to justice, leads to the conclusion that decisions taken by Community institutions adversely affecting the environment cannot be challenged before the Court of Justice or the Court of First Instance.

22. IS THE EUROPEAN UNION UNDER ANY OBLIGATION TO CHANGE SUCH A SITUATION?

Yes. The Community legal framework (as clearly shown by the case law of the Court of Justice that we have just analysed) is not consistent with the provisions of the Århus Convention, which entered into force on 30 October 2001.

The Convention, to which the EC and the Member States are Parties or will become Parties[2], consists of three 'pillars'. It is meant to ensure and foster 1) **public access to environmental information**, 2) **public participation in decision-making affecting the environment** and 3) **access to justice in environmental matters**.

Private individuals and legal persons as well as their associations and organisations are entitled to enjoy the rights recognised by it.

Being signatories to the Convention, the EU and the Member States are under obligation to align their legislation to its requirements. As far as access to justice is concerned, the Århus Convention is far more favourable towards environmental organisations than existing Community legislation, which means that this legislation has to be revised accordingly. Only in this way, would it be possible for the European Community to ratify the Convention itself.

23. WHAT DOES 'ACCESS TO JUSTICE' MEAN IN PRACTICAL TERMS UNDER THE ÅRHUS CONVENTION?

'Access to justice' under the Århus Convention means that individuals and NGOs have the right to challenge, before a court or another independent and impartial review body, **violations of the Convention provisions** on access to information and public participation as well as **violations of domestic environmental law**.

In particular, the first two paragraphs of Article 9 oblige the Contracting Parties to grant the public the right to challenge both requests for information not dealt with in accordance with the Convention provisions on access to information (Article 4) and decisions, acts or omissions violating provisions on public participation in environmental decision-making (Article 6). The inclusion of access to justice provisions in the first two

[2] *Eighteen Member States have ratified the Convention so far. The EC and other seven countries are not yet Parties, namely Austria, Germany, Greece, Ireland, Luxemburg, Sweden and the United Kingdom.*

'pillars' of the Convention is an extremely important feature since it considerably strengthens the measures they contain. These provisions, as well as the legislation consequently adopted by the EU, will be discussed in more detail below (Chapter IV).

The third paragraph of Article 9 provides that members of the public must be entitled to appeal to administrative or judicial bodies to challenge violations of national law relating to the environment. Such a right must be given to those members of the public that meet the criteria laid down in their national legislation and it relates to acts or omissions by both private persons and public authorities. Therefore, an environmental organisation meeting the national standing criteria must be allowed to challenge violations committed, for instance, by a private undertaking exceeding emission limits set by environmental legislation. It is also important to stress that, even though the Convention does not provide the Parties with a set of mandatory standing conditions, leaving it to the national legislators to determine their own criteria, it encourages a broad interpretation of these standing requirements. However, the reference made to the criteria laid down in national law, is interpreted as not requiring Member States to amend their national law and allowing the EC to maintain its actual Article 230.

The Convention also requires the Contracting Parties to provide adequate and effective judicial remedies. Attention is given in particular to **injunctive relief**, which is an order issued by a court, binding on its addressees, which is particularly useful when the risk of irreversible damage is at stake.

24. WHAT HAS THE EUROPEAN UNION DONE SO FAR TO IMPLEMENT THE ÅRHUS CONVENTION PROVISIONS ON ACCESS TO JUSTICE?

The implementation at Community level of the Convention provisions on access to justice is currently underway. Two legislative instruments have been proposed in relation to access to justice, the adoption of which, if they fulfil certain requirements, will complete the process of transposition of the Århus provisions into EU law and will therefore enable the Community to ratify the Convention:

- Proposal for a Regulation on the Application of the Århus provisions to EC Institutions and Bodies (COM(2003)622);
- Proposal for a Directive on Access to Justice in Environmental Matters (COM(2003)624);

The intention of the Commission was to finalise the adoption of these instruments in time for the next Meeting of the Parties, which will take place in May 2005. The Commission caused a first delay, followed by the Council.

As will be shown in further detail below (questions 34 and 45), provisions on access to justice can be also found in the recently adopted directives on public access to environmental information (Dir. 2003/4/EC) and on public participation in environmental decision-making (Dir. 2003/35/EC).

A. Regulation on the Application of the Århus provisions to EC Institutions and Bodies

The proposed regulation is meant to introduce the measures necessary to fully apply the requirements of the Århus Convention to the Community institutions and bodies. This includes the right of European citizens' organisations to challenge before a court the decisions taken by EU institutions and bodies in violation of environmental law. Unfortunately, it is not certain that the final text of the Regulation will contain all the provisions necessary to fully implement the Århus requirements. (for the full text of the proposal visit: **http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0622en01.pdf**).

Since the applicable decision-making procedure (co-decision) is still underway, it is not useful to carry out a detailed analysis of the proposed instrument. However, some basic considerations can be drawn.

The Regulation grants non-governmental organisations meeting certain criteria (expressly listed in a separate article) the right to make a request for an **internal review** of administrative acts or omissions by Community institutions or bodies. This means that an NGO can request that the institutions or bodies concerned reconsider the administrative acts or omissions attributable to them, when there is a violation of environmental legislation. The Community institution or body requested will have to decide whether to take measures ensuring compliance with environmental law or to refuse the request. Several criteria have been proposed so far but only some of them are likely to be listed in the final text of the Regulation. In general terms, to be granted such a right, an NGO should be a legally established non-profit-making organisation, which has been consistently active for at least two years in the promotion of its primary objective, environmental protection. If it is true that well known environ-

mental NGOs should be able to fulfil these criteria without any problem, the same cannot be said for smaller and more informal citizens groups that are often created ad hoc at local level to deal, for instance, with a specific environmental hazard. The argument used for limiting access to justice to only certain organisations which meet specific criteria is that by introducing an 'actio popularis' open to anybody, the Court of Justice and the Court of First Instance would be over-burdened. Such an argument is not substantiated by any reliable evidence and even if an 'actio popularis' would considerably increase the number of legal actions, limiting citizens access to justice does not seem to be the best solution.

The institution of an 'ad hoc' court or an appreciable increase in the human and budgetary resources of the existing Community courts would be better answers to this problem.

Several other shortcomings of the original draft would be effectively dealt with by the amendments proposed by the European Parliament, that would survive the further negotiation process. However, even in that case, some weaknesses still exist: notably the four week period given to the public to request a review of an administrative act or omission. Four weeks is an excessively short period, especially in the case of omissions.

The right to make such requests for internal review has a crucial consequence for environmental NGOs, as it will give them access to the Court of Justice. The draft Regulation currently contains a provision which expressly refers to this possibility. Article 11 states that where an NGO makes a request for an internal review, it will be entitled to institute proceedings before the Court of Justice in accordance with the provisions of the EC Treaty. On the basis of the analysis of Articles 230(4) and 232(3) of the Treaty carried out before (question 21b) it is clear that:

- under Article 230(4), environmental organisations will be entitled to institute proceedings before the Court of Justice in order to challenge decisions given by EU institutions in response to their requests for internal review. In this case there would be a 'decision' addressed to these organisations, as required by the Treaty[3].

[3] *Final negotiations at the first reading of the Council led to the replacement of the wording 'decisions' in Article 9(2) of the Regulation with the term 'written reply'. As a consequence it could be argued that the institutions and bodies concerned have only the duty to inform the complainant in a written reply, and not to take a 'decision' on the request. If this was the right interpretation, non-governmental organisations would not be allowed to institute proceedings before the Court of Justice, since Article 230(4) expressly refers to 'decisions', which are a specific kind of act under Community law and not just a general written reply.*

- under Article 232(3) NGOs will have the right to lodge a complaint with the Court of Justice when the Community institution or body to which they made a request for internal review fails to reach a decision. In this case, the standing requirements of Article 232(3) are met.

B. Directive on Access to Justice in Environmental Matters

The other instrument presented by the Commission is a proposal for a Directive on Access to Justice, addressed, like all directives, to the Member States. It is meant to establish a common framework of provisions on access to justice applicable to all Member States.

Such an instrument is essential if the implementation of the Århus Convention is to be completed at the national level. As already stressed, guaranteeing citizens and non-governmental organisations effective judicial mechanisms to challenge acts and omissions negatively affecting the environment is a necessary step for the Community if it wants to fulfil its obligations under the Århus Convention.

Furthermore, the proposal is extremely important because it contributes to better enforcement of Community environmental law. Currently, Member States have different provisions on access to justice in environmental matters. Consequently, individuals or organisations entitled to institute legal proceedings in one country may not have the same rights in another country, which clearly hinders enforcement of environmental provisions throughout the Union. Moreover, this can also have detrimental effects on the internal market due to different conditions of competition between economic operators.

As regards the timing of the adoption of such a proposal as well as its concrete content it is still impossible to make a reliable forecast. Experience shows that where sensitive issues are concerned, European legislation is always a particularly lengthy process and its final content is invariably a watered down version of the original. For instance, the recent Directive on environmental liability was only adopted after a legislative process which lasted more than ten years, greatly reducing the impact of the original proposal.

The current proposal is not entirely consistent with the Århus provisions and will not be sufficient therefore to fully implement the requirements of the Convention, in particular those which refer to the legal standing of individuals and environmental organ-

isations, which need to be sensibly broadened, and to the provisions concerning the notion of "qualified entities" that should be removed from the text.

As for the draft Regulation, most of the amendments proposed by the European Parliament at its first reading bring the text more in line with the Convention and it is, therefore, desirable that the Council give them serious consideration.

25. WHAT ELSE CAN BE DONE WHEN EUROPEAN UNION ENVIRONMENTAL LEGISLATION HAS BEEN INFRINGED, IN PARTICULAR WHEN IT IS NOT POSSIBLE TO INVOKE A REGULATION OR DIRECTIVE?

As mentioned above, not only is access to justice in environmental matters before the European Court of Justice practically unavailable for the time being, as it is exclusively limited to when national courts decide to refer to it the cases brought before them by members of the public (Article 234 EC Treaty), but access to justice before national courts is also often restricted by stringent procedural rules. Fortunately, other useful tools are available, even if they remain less effective than direct access to court. In cases where the pre-conditions for the direct application of Community directives are not met or when environmental organisations are aware of an infringement of Community environmental legislation without being directly affected, the following possibilities are available:

a) Commission complaint procedure

In the case of violation of European environmental law, Member States, individuals or environmental groups can also address the European Constitution.

The European Commission has the task of ensuring that the measures taken by the Council and/or the European Parliament or by the Commission or any other EC institution or body "are applied" (Article 211 EC Treaty). This means that the Commission must monitor the application of European legislation in and by the Member States. Normally, this task consists of three parts:

(1) The Commission must ensure that European legislation is transposed into national law. For a regulation, this is of course not often necessary, because regulations are directly applicable and need not be transposed into national law. However, many regulations contain provisions asking Member States to take certain steps or to adopt certain measures.

(2) National legislation transposing EC legislation into national law must transpose it completely and correctly. "Completely" means that the whole territory of a Member State must be covered by the transposing legislation. Where, for example, regions are responsible for legislation, all regions have to transpose the EC provisions. "Correctly" means that all provisions of the EC legislation must be transposed. It is not quite clear, whether such an obligation also applies, where, for example, an administration has to draw up a report for the Commission, as the Court of Justice has ruled that measures which exclusively concern the Member States' relations with the Commission's administration, need not be transposed. However, reports also help the public to assess whether the administration has fulfilled its obligations under EC legislation. They therefore also concern the external world and must be transposed. In one case against Belgium, for instance, the Court of Justice decided that the obligation for regional authorities to consult with regions of another Member State, with regard to air quality in frontier regions, did not only concern the internal organisation. The provision of the EC legislation thus had to be transposed into national law (Case C-186/90).

(3) EC legislation must also be effectively applied in each individual case. Member States are not allowed to have legislation in the statute book without applying it. However, this happens quite frequently.

If a person or an environmental group becomes aware of a situation where one of these three obligations is not complied with by a Member State, in part or in whole, or in a specific, individual situation, a letter of complaint can be written to the Commission, Directorate General Environment or Secretary General. (The Commission has published a complaint form, accessible on the European Union's Internet server **http://europa.eu.int/comm/sg/lexcomm**). The letter should indicate the facts and why, according to the complainant, there is a breach of EC environmental law. The more factual elements (documents, studies, letters from the administration, etc.) that are added to prove the case, the better. The complainant should indicate his address, state where he can be reached for further correspondence and where the Commission might find further evidence for the case. The more the case reveals a general practice, the better it is, because there is certain reluctance by the Commission to examine each isolated case.

Filing a complaint gives the complainant some procedural rights. The Commission has to acknowledge receipt of the complaint and, upon request, inform him of progress in the investigation. Before it reaches a final conclusion on the case, the complainant is

informed of the Commission's findings and asked to comment on them. The Commission might also ask him for further information or evidence.

However, by complaining, the complainant does not become a formal party to the procedure. Thus, complainants should consider informing the local media to ensure appropriate publicity for the case, as public support is always an important factor in measures to protect the environment.

As regards the practical impact of the complaints procedure it is important to underline some of its shortcomings. DG Environment has a constant lack of human resources if compared to the considerable volume of complaints it receives. This clearly makes it difficult for the Commission to deal with complaints effectively and within a reasonable time frame. Moreover, such a drawback is worsened by the very structure of the procedure which is divided in several phases that makes it even slower. In general, depending on the complexity of the case, it takes the Commission between six months and two years to deal with a complaint. It is therefore clear that in cases of possible irreversible damage to the environment, a faster and more effective procedure should be available.

b) Petition to the European Parliament

The right to bring petitions before the European Parliament is granted by the EC Treaty (Article 194). Details of the applicable procedure are provided for by the Rules of Procedure of the European Parliament (Title VIII, Articles 191 – 193). The text of these Rules may be found on the Internet at: **http://www.europarl.eu.int/home/default_en.htm**.

Any citizen of the European Union as well as any natural or legal person residing or having its registered office in a Member State is entitled to address a petition to the Parliament. The issue has to fall within the Community's fields of activity and it has to affect him or her directly. Practice has shown that the relevant Committee of the European Parliament adopts a rather lenient approach. In other words, this is a very useful instrument for the enforcement of Community law because it is fairly easy to satisfy its requirements and because it applies to a very large range of issues. A petition can refer to complaints about infringements of EC law or to proposals for amendments of existing legislation.

If a petition contains the name, nationality and permanent address of the petitioner it is entered in a register and then forwarded to the committee responsible, which ascertains whether the petition falls within the sphere of activities of the European Union and, therefore, whether it is admissible or not. The committee responsible may decide to draw up a report or otherwise express its opinion, which the Parliament can decide to forward to the Commission and the Council. In any case, the petitioner has the right to be informed about all the decisions taken and the reasons thereof. In practice the Commission has been consulted on almost all petitions addressed to the Parliament.

Petitions do not have binding character, therefore whether they represent an effective instrument still have to be seen. However, to date, notwithstanding their limited impact, petitions have proved to be worthwhile, in particular in the environmental field. The powers available to the relevant committees to gather information on the spot means that the European Parliament is able to gain information about infringements of Community environmental legislation that the Commission is unable to gather, due to its limited staff resources.

Further information on how to submit a petition (petition form) may be found on the Internet at: **http://www.europarl.eu.int/petition/petition_en.htm**

c) Ombudsman's procedure

A more recent institution to which members of the public can address their complaints is the European Ombudsman, introduced in 1993 by the Treaty of Maastricht. Article 195 of the EC Treaty empowers the Ombudsman to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State. This means that it is not necessary for the complainant to be personally concerned by the claimed abuse. Complaints can be also lodged, under the same procedure, by associations and organisations of citizens.

Complaints must concern instances of 'maladministration' in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. It is important to point out that the institutions or bodies concerned by the complaint must be 'Community' institutions or bodies, with the consequence that cases of maladministration in the Member States cannot be brought before the Ombudsman. In other words, the Ombudsman is entitled to receive complaints concerning both, breaches of legal provisions and cases in

which an institution has deviated from good administrative behaviour. Significantly, the right to good administration is also enshrined in the Charter of Fundamental Rights of the European Union (Article 41), a charter that will become part of the Constitutional Treaty once ratified.

According to the Statute of the Ombudsman (full text can be found at: **http://www.euro-ombudsman.eu.int/lbasis/en/statute.htm**) which provides detailed rules of procedure, complainants have to respect a time limit of two years, starting from the date on which the object of the complaint came to their attention.

The role of the Ombudsman is to remedy cases of maladministration by communicating directly with the institutions concerned. If it establishes that there has been maladministration, it has to refer the matter to the institution or body concerned, which has three months to give its opinion. The Ombudsman may also address draft recommendations to these institutions and bodies.

Unfortunately, a principal feature of this institution is its lack of enforcing powers which can render its involvement useless. However, in the annual report of the Ombudsman for the year 2003, as submitted to the European Parliament, some positive indications can be found. In March 2003, for instance, more than 11,000 citizens had found redress thanks to the Ombudsman. Moreover, in many cases European authorities addressed by the Ombudsman have taken action to settle the complaint. Finally, the number of complaints has witnessed a substantial increase, which shows that citizens are more aware of their rights vis-à-vis European institutions. However, it would seem that there remains a lot of confusion among the public on the precise mandate of this institution when we consider that in 2003 almost 75% of the complaints lodged were deemed to be outside the mandate.

Since the European Commission is the institution that is responsible for most decisions affecting citizens it is not surprising that a large amount of complaints concern its behaviour. Similarly, a significant number of complaints concern difficulties in obtaining access to Community institution documents.

Following a resolution of the European Parliament adopted on 6 September 2001, a **Code of Good Administrative Behaviour** was approved laying down rules of conduct that EU institutions and bodies as well as their administrations and officials should respect in their relations with the public. The Code gives to the citizens of the Union

the right to expect from European institutions and bodies a good administration based on defined rules and principles making it much easier for the public to understand when they have the right to lodge a complaint with the European Ombudsman.

However, recourse to the Ombudsman is not the only possible course of action available. Where the European Commission fails to comply with the principles set out in the Code, the public can file a complaint to the Commission's Secretariat-General. In such a case the complaint can be filed by a written letter (there is also a special form that can be found on the Internet at: **http://www.euro-ombudsman.eu.int/form/en/default.htm**). The complaint is then sent to the officials responsible in the various departments who will investigate the substance of the complaint and answer in writing within two months. Moreover, in the case of a negative outcome, the complainant has the right to apply to the Secretary-General to have his complaint reviewed (see question 35).

Further information on the Ombudsman can be found on the Internet at: **http://www.euro-ombudsman.eu.int.**

26. DO CITIZENS AND ENVIRONMENTAL CITIZENS' ORGANISATIONS PLAY AN IMPORTANT ROLE IN THE ENFORCEMENT OF COMMUNITY ENVIRONMENTAL LAW?

As seen above, the role played by the public is extremely important in the enforcement of European environmental legislation. This is self evident as regards the Ombudsman and the European Parliament's petition procedure, whose function is exclusively linked to the active participation of the public, but it is also true as regards the Commission's infringement procedure. Data gathered in the Reports on the Implementation of Community Law shows that almost 60% of infringement proceedings opened so far by the Commission are based on complaints.

Notwithstanding these positive considerations, it is worthwhile stressing again that in order to have Community environmental law truly enforced throughout the Union, the role of the public, and in particular that of environmental NGOs, must be strengthened, by providing the latter with wider access to justice, as also required by the provisions of the Århus Convention. In practical terms this means that Member States have to remove all procedural barriers limiting NGOs' access to national courts and that direct access to the Court of Justice must be recognised at European level.

However, despite the limited access to justice granted to individuals and NGOs before national courts, the level at which they can play the most relevant role remains the local, regional and national one, where they can use environmental law as an effective weapon.

27. HOW CAN THE COURT OF JUSTICE PUNISH INFRINGEMENTS OF ENVIRONMENTAL LEGISLATION COMMITTED BY MEMBER STATES?

Before the entry into force of the Treaty of Maastricht, if a Member State failed to comply with a judgment of the Court of Justice, the latter, notwithstanding the binding character of its judgements, could only confirm that the Member State had infringed Community law. Therefore, due to the lack of coercive powers, the only possibility was to rely on the negative impact that an ECJ judgement could have on public opinion, in the hope that it would lead the Member State to comply with Community legislation.

As already mentioned (see question 12d), the new text of Article 228 gives the Court of Justice the power to impose a lump sum or penalty payment on those Member States that fail to take the necessary measures to comply with a previous judgement of the Court. The procedure, almost identical to the standard procedure laid down by Article 226, is divided in two phases and the pivotal role is played by the Commission. During the first phase, the Commission issues a reasoned opinion, specifying the points on which that State has not complied with the judgement at stake and gives to the Member State concerned the opportunity to submit observations. The second phase, which takes place before the Court of Justice, is also initiated by the Commission which may decide to bring the case before the Court if the Member State concerned fails to take the measures envisaged by the Commission itself.

Application of Article 228 is very exceptional. The overall procedure, from the first complaint to the final judgement under this Article, takes about nine years. In July 2000, Greece was the first Member State to receive a fine on the basis of this provision. Greece had failed to take the necessary measures to comply with a previous judgement of the Court of Justice which had ordered the state to fully implement Community legislation on waste (Case C-387/97). Interestingly, the second judgement of the Court in which a financial penalty was imposed on a Member State for having breached Community law also related to EU environmental legislation. In November 2003, the Court of Justice imposed fines on Spain for not meeting the quality standards set in the Bathing Water Directive (Case C-278/01).

IV. ACCESS TO INFORMATION AND PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS

28. DO INDIVIDUALS OR ENVIRONMENTAL CITIZENS' ORGANISATIONS HAVE SPECIFIC RIGHTS WITH REGARD TO ACCESS TO INFORMATION AND PUBLIC PARTICIPATION IN ENVIRONMENTAL MATTERS?

As already noted (see Chapter III) important environmental rights for the public have been introduced by the Århus Convention: access to information, public participation in decision-making and access to justice in environmental matters.

A. Access to environmental information held by public authorities.

As regards access to information, the Århus Convention lays down detailed rights for the public and corresponding duties for authorities holding environmental information. Under the Convention any applicant has the right to receive environmental information from public authorities and, public authorities are obliged to provide the required information within tight deadlines.

29. HAS THE COMMUNITY ADOPTED SPECIFIC LEGISLATION DEALING WITH ACCESS TO INFORMATION?

At Community level, legislation directed to the Member States has been passed with the aim of implementing the Århus Convention and meeting its requirements. As regards Community institutions, Regulation 1049/2001, which will be analysed in question 35, and the Regulation mentioned in question 24a, which is currently under discussion, are the relevant legislation.

In 2003 the European Parliament and the Council adopted Directive 2003/4/EC implementing the provisions of the Århus Convention on access to environmental information and replacing the existing directive, which had been in place since 1993 (Directive 90/313/EEC). Deadline for the implementation at national level of the pro-

visions of the Directive is 14 February 2005. (Full text of the Directive can be found at: **http://europa.eu.int/eur-lex/en/dat/2003/l041/l_04120030214en00260032.pdf**).

30. ARE THERE LIMITATIONS TO THIS RIGHT?

The right to have access to environmental information can be exercised by any applicant in any Member State and applicants do not have to justify their request with reference to a particular interest. In other words, individuals or environmental citizens' organisations can demand information from the authorities of any Member State without having to prove that they are in any way directly affected by a specific case. A French NGO, for instance, can contact the Spanish authorities holding information on the emissions levels of an industrial plant in Spain and, to justify such a request, does not have to prove that it is directly affected by the plant's emissions.

31. WHAT ARE THE DUTIES OF EACH MEMBER STATE?

The new Directive requires Member States to make available to the public environmental information, obliging national authorities to provide this service within a short period of time (one or two months after the receipt of the request, depending on the volume and the complexity of the information required). Member States are also required to promote the use of computer telecommunication and electronic technology (for instance keeping electronic databases), in order to make it easier for the public to enjoy its rights. Moreover, they shall ensure that lists of public authorities are publicly accessible and that specific arrangements are established in practice, in order to guarantee effective access to information.

32. WHAT DOES 'ENVIRONMENTAL INFORMATION' INCLUDE?

'Environmental information', as defined in the Directive, entails:

- any information regarding the state of the environment (such as quality of air, water, soil, land, natural sites and biological diversity);
- 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 environment;

- any policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the environment as well as measures or activities designed to protect the environment;
- reports on the implementation of environmental legislation;
- the state of human health and safety.

33. WHEN CAN A REQUEST FOR INFORMATION BE REFUSED?

The Directive, transposing the Convention's provisions, also lays down grounds upon which requests can be refused:

- when the information is not held by the addressed authority (which has the duty to transfer the request to the authority holding the information);
- when it is manifestly unreasonable or formulated in a too general manner;
- when the request concerns internal communications or materials that are not yet completed;
- when the disclosure of information would adversely affect international relations, public security, national defence, the course of justice or intellectual property rights;
- when the disclosure affects the confidentiality of proceedings of public authorities, of commercial or industrial information, of personal data relating to a natural person, the interests or protection of any person who voluntarily supplied the information requested and the protection of the environment to which such information relates (such as the location of rare species).

However, when the request relates to information on emissions into the environment, grounds relating to protection of confidentiality cannot be relied upon to justify a refusal.

In order to avoid possible abuses, the Directive prescribes that these grounds for refusal must be subject to strict interpretation, so that public authorities can not use them as mere pretexts to deny access to the public. Moreover, in cases where an authority refuses to give access to information, it has to provide the applicant with a detailed description of the reasons justifying such a refusal.

34. WHAT CAN BE DONE IN CASES WHERE A REFUSAL IS NOT JUSTIFIED?

As already mentioned in Chapter III, provisions on access to justice are also laid down in the Directive at stake as well as in the one on public participation. The reason is clear: granting access to review procedures is the most effective way of strengthening the rights that these Directives give to the public.

Under these provisions the Member States are required to ensure that any applicant whose request had been unreasonably ignored, wrongfully refused, inadequately answered or otherwise not dealt with in accordance with the provisions of the Directive:

- has access to an expeditious and inexpensive or free of charge administrative review procedure, before an independent and impartial body established by law or,
- has the acts or omissions of the refusing public authority reconsidered by another public authority.

In addition, Member States have to grant applicants access to a review procedure before a court of law or another independent and impartial body, which will take a final decision on the issue, which is binding on the public authority holding the information.

35. ARE THE INSTITUTIONS OF THE EUROPEAN UNION SUBJECT TO THESE DUTIES?

As far as Community institutions are concerned, the legislation currently applicable is Regulation 1049/2001, regarding public access to European Parliament, Council and Commission documents. (Full text of the Regulation can be found in the Internet at: **http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf**). The Regulation gives the public the right to access, *inter alia*, environmental information held by Community institutions and bodies.

Under such legislation the requested institution has 15 working days to provide access to the requested documents or to state, in writing, the reasons for the refusal. In the latter case, the institution shall inform the applicant of the remedies available, namely instituting a proceeding before the ECJ (under the conditions laid down in Article 230 ECT), or making a complaint to the Ombudsman (under Article 195 ECT).

Moreover, Community institutions and bodies shall systematically make accessible to the public their documents, favouring in particular the use of electronic databases and registers of documents, including legislation, either Community or national, as well as documents relating to the development of policies or strategies.

Registers of documents in electronic form have been created by the Commission, the European Parliament and the Council and are accessible trough the web page **http://www.europa.eu.int/documents/registers/index_en.htm**. The Commission document register can be also found on the web site of its Secretariat-General (**http://europa.eu.int/comm/secretariat_general/index_en.htm**). The Register of documents of the Council can be found at: **http://register.consilium.eu.int/**. To better assist citizens in exercising their rights a users' guide to access to European Parliament, Council and Commission documents has been drafted and is currently available at: **http://www4.europarl.eu.int/registre/recherche/Aide/Guide_EN.pdf**.

In the effort to implement Community legislation on access to information, the Commission has recently developed another web site with the title 'Openness and access to documents', which is meant to guide EU citizens in their search for its documents. (**http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm**).

Interesting data on the practical application of the Regulation provisions can be found in the report on the implementation of the principles enshrined in Regulation 1049/2001, published by the Commission on January 30th 2004. (Full text of the Report can be found on the Internet at: **http://europa.eu.int/eur-lex/en/com/rpt/2004/com2004_0045en01.pdf**).

36. CAN COMMUNITY INSTITUTIONS REFUSE A REQUEST FOR INFORMATION?

Under this legislation it is **compulsory** for Community institutions to refuse access to documents when it affects individuals' privacy as well as public interests regarding public security, defence and military matters, international relations, and financial, monetary or economic policy of the Community or a Member State. Moreover, Member States have a right of veto against access to documents originating from them.

Refusal is also **mandatory** in the case of documents the disclosure of which would undermine commercial interests of a natural or legal person, court proceedings or the

purpose of inspections, investigations and audits, provided that there is no overriding public interest in their disclosure. When documents containing opinions for internal use are at stake, access can be refused if its disclosure would 'seriously undermine' the institution's decision-making process.

It is important to stress that by making the above-mentioned grounds for refusal **mandatory,** the EU has failed to correctly implement the requirements of the Århus Convention, which in cases where an exception is involved, leaves it up to the public authorities concerned to decide whether or not to refuse disclosure of information.

37. ARE THERE NEW LEGISLATIVE DEVELOPMENTS AT COMMUNITY LEVEL?

As regards access to information, the recently proposed Regulation on the application of the Århus Convention to EC institutions and bodies introduces some provisions deemed necessary to fully align Regulation 1049/2001 with the Århus Convention. In other words, Regulation 1049/2001 will remain in force but integrated by the provisions of the draft legislation.

The proposal clarifies that Regulation (EC) No 1049/2001 applies to any applicant, notwithstanding his citizenship, nationality, domicile or, in the case of a legal person, his registered office or centre of activities. It also introduces provisions on the quality of the information to be supplied, stating that it should be up to date, accurate and comparable. Moreover, it establishes that in the case of an imminent threat to human health or the environment, Community institutions have the duty to collaborate with those public authorities that request it, in order for the latter to disseminate immediately all the necessary environmental information which could enable the public to prevent or mitigate any possible harm arising from the given threat.

Besides that, the draft Regulation adopts a broader definition of Community institutions and bodies. It refers to "*any public institution, body, office or agency established by, or on the basis of, the EC Treaty*" and not only to the Commission, Council and European Parliament, to which Regulation 1049/2001 is exclusively addressed.

Unfortunately, the proposal at stake fails to address what is probably the most important shortcoming of Regulation 1049/2001, namely the treatment of exceptions. Indeed, as already stressed, this legislation, diverging from the Århus Convention,

makes it compulsory for Community institutions to refuse access to information when an exception is involved. In addition, it widens the scope of these exceptions beyond what is permitted under the Convention.

Another shortcoming of the draft Regulation concerns the list of 'environmental information' that Community institutions have to make available to the public. Indeed, as also proposed by the European Parliament, such a list should include "*the state of progress of proceedings for infringements of Community law*". Granting the public access to this kind of information would strengthen the enforcement of Community environmental law throughout the Union. We will see in 2005 what the final text of this Regulation will be.

38. ARE THERE OTHER COMMUNITY DIRECTIVES OR REGULATIONS PROVIDING ACCESS TO ENVIRONMENTAL INFORMATION?

A number of other sectoral environmental directives contain provisions on access to information, such as:

- Directive 96/82/EC of 9 December 1996, on the control of major-accident hazards, so-called 'Seveso II', (Article 13). This Directive provides the public with specific rights regarding access to information and public consultation. Operators and public authorities are obliged to maintain the public informed, either by ensuring permanent availability of information or informing the public directly (i.e. by distributing information about the behaviour that should be taken in case of accidents).
- Directive 1999/30/EC of 22 April 1999, relating to limit values for sulphur dioxide, nitrogen dioxide, and oxides of nitrogen, particulate matter and lead in ambient air; (Art. 8).
- Directive 2000/60/EC of 23 October 2000, establishing a framework for Community action in the field of water policy; (Art. 14).
- Directive 2000/69/EC of 16 November 2000, relating to limit values for benzene and carbon monoxide in ambient air; (Art.7).
- Directive 2000/76/EC of 12 February 2002, on the incineration of waste; (Art. 12).
- Directive 2002/3/EC of 12 February 2002, relating to ozone in ambient air; (Art. 6).

B. Public participation in environmental decision-making

39. HOW CAN ENVIRONMENTAL CITIZENS' ORGANISATIONS INFLUENCE THE EUROPEAN UNION'S LEGISLATIVE PROCESS?

The 'second pillar' of the Århus Convention concerns public participation in decision-making in environmental matters. The instrument adopted by the EU to align itself to the Århus Convention's provisions on public participation is Directive 2003/35/EC of 26 May 2003, which amends Directives 85/337/EEC and 96/61/EC. Member States have to implement at national level the provisions of the Directive by 25 June 2005 at the latest. (Full text of the Directive can be found in the Internet at: **http://europa.eu.int/eur-lex/pri/en/ oj/dat/2003/l_156/l_15620030625en00170024.pdf**).

40. WHAT ARE THE FIELDS IN WHICH PUBLIC PARTICIPATION IS GRANTED?

The Directive makes it compulsory for the Member States to give the public the opportunity to participate, from an early stage, in the preparation, modification or review of the environmental plans and programmes concerning waste, batteries, packaging, air pollution and protection of waters against nitrate pollution.

41. WHAT, IN PRACTICE, ARE THE RIGHTS GIVEN TO THE PUBLIC?

Under the Directive the public has the right:

- to be informed, within a reasonable timeframe, of any new proposals for environmental plans and programmes;
- to be informed about its right to participate in decision-making as well as about the public authority to which comments and questions may be submitted;
- to express comments and opinions before any decision is taken;
- to have its comments and opinions taken into due account in the final decision;
- to be informed about all the decisions taken and the grounds upon which the latter are based.

42. WHO IS ENTITLED TO PARTICIPATE?

It is for the Member States to define the 'public' entitled to participate in the drafting of these plans and programmes, and, in particular, to identify the non-governmental organisations allowed to do so.

43. ARE THERE OTHER ENVIRONMENTAL MATTERS IN WHICH PUBLIC PARTICIPATION IS GRANTED?

The Directive also amends Community legislation on environmental impact assessment (EIA) as well as on integrated pollution prevention and control (IPPC) by providing the public with the right to participate in the permitting procedures set forth at national level under these directives.

Public participation under the EIA and IPPC directives.

Under the EIA Directive (85/337/EEC, amended by Directive 97/11/EC) (For the full text see: **http://europa.eu.int/comm/environment/eia/full-legal-text/85337.htm**), Member States have to carry out an environmental impact assessment before approving public or private projects likely to have significant effects on the environment, such as:

- Crude-oil refineries and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day;
- Thermal power stations and other combustion installations with a heat output of 300 megawatts and nuclear power stations and other nuclear reactors;
- Installations for the permanent storage or final disposal of radioactive waste;
- Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos;
- Integrated chemical installations;
- Construction of motorways and other fast roads, long-distance railway lines and airports with a basic runway length of 2 .1 km;
- Waste-disposal installations for the incineration, chemical treatment or land fill of toxic and dangerous wastes.

In all these cases the public has the right to be informed of any request for consent coming from public or private applicants. In addition, the 'public concerned', a narrower group of people constituted by those who are affected or likely to be affected by such projects or who have a specific interest in it, must be given the opportunity to participate in the decision-making procedures by expressing comments and opinions at an early stage of the procedure. In order to grant effective participation, Member States have to provide a reasonable timeframe for all the different phases of the process.

The same rules apply when, in the case of activities covered by Directive 96/61/EC on integrated pollution prevention and control (IPPC) (Full text of the Directive can be found at: **http://europa.eu.int/comm/environment/ippc**.), an application for a permit to operate a new installation, or to substantially change existing ones, is submitted to the competent authorities. Among the industrial activities included in the IPPC Directive there are chemical, mineral and energy activities, waste management plants, as well as plants producing and processing metals.

44. ARE ENVIRONMENTAL NGOS PART OF THE 'PUBLIC CONCERNED'?

Non-governmental organisations promoting environmental protection and meeting any requirements under national legislation are deemed to have a specific interest in the above-mentioned issues. This means that such environmental NGOs are given the right to participate in the aforesaid permitting procedures.

45. WHAT CAN BE DONE TO CHALLENGE THE LEGALITY OF A DECISION VIOLATING PUBLIC RIGHTS TO PARTICIPATE IN ENVIRONMENTAL DECISION-MAKING?

Where a decision, act or omission, related to the issues subject to the Directive at stake, infringes one of the Directive's provisions, those who have a sufficient interest or who maintain the impairment of a right, must be allowed to have access to review procedures before a court or another independent and impartial body. To this end, environmental NGOs meeting the requirements set forth under national legislation are considered to have access to the review procedures.

46. ARE THERE OTHER COMMUNITY PROVISIONS ESTABLISHING RIGHTS FOR THE PUBLIC TO PARTICIPATE IN ENVIRONMENTAL DECISION-MAKING?

A number of other sectoral environmental directives contain provisions on public participation in environmental decision-making. Here are some examples:

- Directive 96/82/EC of 9 December 1996, on the control of major-accident hazards (OJ No L 10 of 14 January 1997) so-called 'Seveso II' (Article 13);
- Directive 2000/60/EC of 23 October 2000, establishing a framework for Community action in the field of water policy (Art. 14);
- Directive 2000/76/EC of 12 February 2002, on the incineration of waste, (Art. 12).
- Directive 2001/42/EC of 27 June 2001, on the assessment of certain plans and programmes on the environment, (SEA Directive). Thanks to this directive, which is effective from July 2004, an environmental assessment has to be undertaken during the preparation and before the adoption of certain plans, programmes and policies which are likely to have significant effects on the environment. Under this Directive the public, including relevant environmental NGOs, must be given the opportunity to express its opinion regarding these plans or programmes, as well as on the accompanying environmental reports, before their adoption. Moreover, the results of the consultation must be duly taken into account in the adoption of the plans or programmes.

It is important to clarify that participation in these cases refers to the permitting only, not to the operation of the installations concerned.

47. DO COMMUNITY INSTITUTIONS AND BODIES HAVE THE DUTY TO GRANT THE PUBLIC OPPORTUNITIES TO PARTICIPATE IN ENVIRONMENTAL DECISION MAKING?

The recently proposed Community Regulation on the application of the Århus Convention to EC institutions and bodies (see questions 37 and 24A) contains some provisions on public participation in environmental decision making. It requires Community institutions to set up practical provisions necessary for the public to par-

ticipate during the preparation and modification of plans and programmes relating to the environment.

Unfortunately, several of the proposed provisions are not sufficient to fully align Community provisions to the requirements set by the Århus Convention.

Firstly, under the draft Regulation the public is not granted a 'right' to public participation, which is, conversely, granted explicitly by the Convention. Emphasis is given only to the establishment of obligations towards EC institutions.

Moreover, Community institutions and bodies are under obligation to grant public participation exclusively with regard to plans and programmes relating to the environment. No reference is made to polices or legislation. Consequently, the public can be excluded from an extremely important part of Community decision-making, and thus the Regulation fails to achieve its primary objective, which is to enhance participatory democracy in the European Union.

Nor is the proposal consistent with the Århus Convention in that it excludes from the definition of plans and programmes subject to its provisions "*financial or budget plans and programmes*". Discussions on such issues are currently going on, with some Member States and the European Parliament trying to limit this exception.

48. ARE THERE OTHER INSTRUMENTS ADOPTED BY COMMUNITY INSTITUTIONS TO FOSTER PUBLIC PARTICIPATION?

In December 2002 the Commission adopted the Communication 'Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission', COM(2002)704. Such a communication, applicable since January 2003, aims at establishing a common approach valid for all different Commission's departments on how to undertake consultations of interested parties. It lays down a series of general principles (participation, openness, accountability, effectiveness and coherence) that must govern the relations between the Commission and interested parties and set up a number of minimum standards shaping the Commission's consultation processes.

Other examples of measures undertaken by the Commission with the aim of fostering the involvement of interested parties are the Communication on Interactive Policy

Making COM(2001)1014, and CONECCS, the database for 'Consultation, the European Commission and Civil Society' (**http://europa.eu.int/comm/civil_society/coneccs/index_en.htm**). The latter in particular provides information about the Commission's consultative bodies in which civil society organisations participate and contains a directory of non-profit making civil society organisations active at European level.

The Commission's public consultations on general and institutional affairs can be found at the web site of the Secretariat General (**http://europa.eu.int/comm/secretariat-general/consultation/index_en.htm**), while consultations on other policy activity areas are accessible through the web site 'Your Voice in Europe', which is the Commission's 'single access point' for consultation (**http://europa.eu.int/yourvoice/index_en.htm**). This web portal has been set up in the context of the Interactive Policy Making initiative and is part of the Commission's Communication on General principles and minimum standards for consultation. It gives the public access to several consultations and discussions on Community matters, promoting public participation in the European policy-making process.

LIST OF USEFUL WEBSITES

- Committee for the Regions (COR): http://cor.eu.int/en/index.html
- Council of the European Union: http://ue.eu.int
- Court of Justice of the European Communities: http://curia.eu.int
- Database for Consultation, the European Commission and Civil Society (CONECCS): http://europa.eu.int/comm/civil_society/coneccs/index_en.htm
- Dialogue with citizens (provides practical information on citizens' rights and opportunities in the EU and its Internal Market): http://europa.eu.int/citizens/index_en.html
- Direct Europe - Your direct line to the EU: http://europa.eu.int/europedirect/index_en.htm
- EUR-Lex – The portal to European Union Law (full text of Official Journals from 1998, Treaties texts, legislation in preparation, case-law): http://europa.eu.int/eur-lex/en/index.html
- EUROPA – Gateway to the European Union: http://europa.eu.int
- European Commission: http://europa.eu.int/comm/index_en.htm
- European Commission, DG Environment: http://europa.eu.int/comm/environment/index_en.htm
- European Commission - Documents: http://europa.eu.int/documents/comm/index_en.htm
- European Commission - Openness and Access to Documents: http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm
- European Commission, standard form for complaints: http://europa.eu.int/comm/sg/lexcomm
- European Commission's Secretariat General: http://europa.eu.int/comm/secretariat-general/consultation/index_en.htm
- European Economic and Social Committee (EESC):

http://www.esc.eu.int/pages/en/home.htm

- European Environmental Agency: http://www.eea.eu.int
- European Environmental Bureau : www.eeb.org
- European Ombudsman: http://www.euro-ombudsman.eu.int
- European Parliament: http://www.europarl.eu.int
- European Parliament Legislative Observatory - OEIL: http://wwwdb.europarl.eu.int/dors/oeil/en/default.htm
- European Publications Office: http://publications.eu.int/index_en.html
- European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL): http://europa.eu.int/comm/environment/impel/
- Europe Direct - Your direct line to the European Union: http://europa.eu.int/europedirect/index_en.htm
- PreLex (Monitoring of the decision-making process between institutions): http://europa.eu.int/prelex/apcnet.cfm?CL=en
- Register of documents of the European Commission: http://europa.eu.int/comm/secretariat_general/index_en.htm
- Register of documents of the Council of the EU: http://register.consilium.eu.int/
- RAPID - Press releases: http://europa.eu.int/rapid/setLanguage.do?language=en
- SCADPlus (Summaries of legislation): http://europa.eu.int/scadplus/scad_en.htm
- Your Voice in Europe: http://europa.eu.int/yourvoice/index_en.htm
- UNECE - Århus Convention: http://www.unece.org/env/pp/documents/cep43e.pdf

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2004/005 **EEB Annual Report 2003 (July)**
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