



College of Europe
Collège d'Europe



European Legal Studies
Etudes Européennes Juridiques

RESEARCH PAPERS IN LAW

5/2003

Ludwig Krämer

Access to Environmental Information in an Open European Society - Directive 2003/4

© *Ludwig Krämer, 2003*

Access to Environmental Information in an Open European Society - Directive 2003/4

Ludwig Krämer^(*)

Table of Contents:

- I. Introduction: Access to Environmental Information in the European Union
- II. The Elaboration of Directive 2003/4
 - II.1 The Aarhus Convention
 - II.2 The Commission's proposal for a directive
 - II.3 Economic and Social Committee; Committee of the Regions
 - II.4 European Parliament
 - II.5 Council
- III. The main provisions of Directive 2003/4
 - III.1 Access to information or to environmental information?
 - III.2 A right of access to environmental information
 - III.3 'Environmental information'
 - III.4 Public authorities
 - (a) 'Government'
 - (b) Persons having public responsibilities or functions
 - (c) Private bodies and privatised industries
 - (d) Judicial and legislative bodies
 - III.5 Grounds for refusal
 - (a) Material in the course of completion or unfinished documents
 - (b) Internal documents
 - (c) Emissions into the environment
 - III.6 Modalities of access to information
 - (a) Delay for reaction
 - (b) Proving an interest
 - (c) Delay for responding
 - (d) Forms and formats
 - (e) Refusal to make information available
 - III.7 Charges
 - III.8 Access to justice
 - III.9 Active information
- IV. Concluding remarks
 - IV.1 Transparency in EC law-making
 - IV.2 Compliance with the Aarhus-Convention
 - IV.3 High level of protection
 - IV.4 Practical application

^(*) The author expresses his personal opinion only.

1. Introduction: Access to Environmental Information in the European Union

Information gives knowledge and knowledge gives power. Though in all EC Member States, the task to protect the environment is given to the administration, it is obvious that the administration is not the owner of the environment. The environment is everybody's. It is for this reason that administrative decisions which affect the environment must be transparent, open and must strike a balance between the general interest to preserve, protect and improve the quality of the environment on the one hand, the satisfying of specific private or public interests on the other hand. In order to allow at least a certain control of whether the administration strikes the right balance between the need to protect the environment and other legitimate or less legitimate needs, it appears normal and self-evident that information on the environment which is in the hands of public authorities, be also made available to the public and to citizens.

The European Union is conceived as an open society "in which decisions are taken as openly as possible and as closely as possible to the citizens"^[1]. The concept of open decision-making presupposes that public authorities lay open the facts and data, studies and findings, research and monitoring results on which they intend to base their decisions - including their decisions to remain passive. As neither the environment nor future generations have a voice, such an openness enables citizens and organisations to participate in the decision-making on the environment which means to discuss the facts, the necessity as well as the opportunity to take this or that decision and to give, if any possible, a voice to the environment and to future generations^[2].

In order to improve access to information on the environment, the European Community adopted, in 1990, Directive 90/313 with the objective to "ensure freedom of access to, and information of, information on the environment held by public authorities"^[3]. It established EC-wide basic terms and conditions on which such information was to be made available, defined in particular the terms "information on the environment" and "public authorities", laid down an exhaustive list of grounds on which the authorities could exceptionally refuse access to information, stated that against a refusal a judicial decision could be

sought and provided for some rules for active information on the environment to be made available to the public by Member States.

According to Article 9 of the Directive, Member States had to transpose Directive 90/313 into national law by end 1992. They all did so, though sometimes with delay and not in a complete or a correct way. In its report on the application of Directive 90/313, the Commission listed 131 legislative and regulatory instruments which Member States had notified as national and regional transposition measures^[4]. Furthermore, Member States had to report on the Directive's application by end 1996. They all did so, though, with the exception of Luxemburg, with delay^[5].

II. The Elaboration of Directive 2003/4

II.1 The Aarhus Convention

In June 1998, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the so-called Aarhus Convention, was opened for signature in Aarhus/Denmark, and signed by all EC Member States and the EC itself; Germany signed the Convention end 1998. Its provisions regarding access to information sometimes deviated from the wording of Directive 90/313, on which it had built to a large extent. This meant that Directive 90/313 had to be amended in order to be in full compliance with the requirements of the Aarhus Convention. In 2000, the Commission reported on the experience gained in the application of Directive 90/313. This report was based on (a) the fifteen national reports from Member States, mentioned above; (b) the examination of 156 complaints which had been submitted to the Commission, arguing non-compliance with the requirements of Directive 90/313; (c) two judgments of the Court of Justice^[6] and (d) two reports which represented the view of non-governmental organisations and other experts^[7].

II.2 The Commission's proposal for a directive

On the basis of this documentation, the Commission submitted a proposal for a new directive on access to information on the environment^[8]. The proposal had

three objectives: (1) to correct the shortcomings identified in the practical application of Directive 90/313; the Commission underlined that the wording of the Aarhus Convention had already largely taken up such shortcomings; (2) to pave the way to the ratification of the Aarhus Convention and (3) to adapt Directive 90/313 to developments in information technologies. The Commission underlined that it preferred, in the interest of increased transparency and legal certainty, to replace Directive 90/313 by a new Directive rather than to amend it, but stressed that "the existing *acquis* is not open for discussion". As the proposal thus built on the provisions of the Aarhus Convention which in turn had been based on Directive 90/313, it came as no surprise that the proposal very largely maintained the structure and even the wording of Directive 90/313 and only fine-tuned the different provisions, adapting them to the wording of the Aarhus Convention and eliminating ambiguities which had caused concern.

The proposal took up a very limited number of innovations. The most important one concerned the privatised industry. The Commission suggested to give access to information also to "any legal person entrusted..with the operation of services of general economic interest which affect or are likely to affect the state of elements of the environment", and expressly mentioned gas, electricity, water and transport. It explained that a different treatment of services by public administrations or utilities and privatised companies was not justified where services of general economic interest were at stake. Other changes in the proposal concerned the shortening of the delay for answering an application from two months to one month and a considerable extension of the obligation to deliver active information on the environment; in both these aspects, the proposal followed the Aarhus Convention.

Other innovations which Member States had introduced into their national legislation were not taken up by the Commission, such as the provision that access to information on the environment should, in principle, be free of charge or the provisions in Austrian legislation that private companies with a duty to measure and record emission data had regularly to publish these data.^[9]

II.3 Economic and Social Committee; Committee of the Regions

The Economic and Social Committee welcomed the Commission's proposal, including the provision on privatised industries^[10]. It suggested a number of minor amendments which were, in the final version of the Directive, almost all left unconsidered. More successful with its Opinion was the Committee of the Regions^[11]; about two thirds of its suggestions for amendments were reflected in the final text of the Directive, though it is true that most of them were of drafting or otherwise less important nature. The Opinion reflected - for instance on criteria for the transfer or the refusal of requests, on charges or the dissemination of environmental information - the experience which local or regional authorities had gained with questions around the access to information.

II.4 European Parliament

The European Parliament(EP) adopted, in its first reading, 30 amendments^[12]. However, this figure dissimulates that amendments normally referred to a specific article and asked for several changes of the wording of that article. For example, the EP suggested not less than 11 amendments to the wording of Article 2 on definitions, 13 amendments to Article 3 and 15 amendments to Article 4.

The political parties in the EP very largely agreed among themselves: only five of the amending proposals suggested by the rapporteur, Mrs.E.Korhola (PPE-DE/Finland) were voted separately, for of them being put to vote by the rapporteur's own political party^[13]. These amendments concerned in particular the reduction of the answering time to two weeks instead of one month as suggested by the Commission; a minimum content for practical arrangements; free access to information for educational purposes; the ban of advance payment; and the possibility to introduce sanctions against officials for clearly wrongful refusal of a request for environmental information. All votes were lost by the PPE, but none of these amendments was retained in the final text of the Directive.

EP's consensus was demonstrated in the final vote, where the Korhola report was adopted with 505 votes in favour, two abstentions and no vote against it^[14]. The Commission then amended its proposal^[15]; it accepted one EP amendment in full, 12 in part and declared unacceptable 17 amendments. The main reasons

given were that the directive was a framework directive, that the EP tried to fix excessive details and that, for reasons of subsidiarity, Member States should have greater flexibility in fixing details^[16].

II.5 Council

The discussions in Council were marked by the determination of practically all Member States, to adapt the upcoming Community legislation to the Aarhus Convention, but not to go beyond the requirements of that Convention. This last aspect was mentioned twice in the statement of reasons in the Council Common Position which was reached in early 2002^[17]. The Common Position accepted one EP amendment in full, two amendments in different form and 8 amendments in part. It rejected the remaining 18 amendments.

Induced by the almost unanimous vote during the first reading, EP reintroduced, for the second reading, practically all the amendments which it had suggested at the first reading, this time split up in 47 amendments^[18]. As the Council did not wish to deviate in any significant way from its Common Position, a Conciliation procedure was started. In December 2002, an agreement was reached which was rather close to the Common Position. This allowed the Directive to be finally adopted on 28 January 2003 and published as "Directive 2003/4 of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313"^[19]. Member States will have to transpose the Directive into national law by 14 February 2005; Directive 90/313 will be repealed with effect of the same day.

If one looks back at the some 30 months of discussion of the proposal for a directive, one can find a very large consensus among all institutions on the principle of free access to information on the environment. Differences of opinion appeared, as soon as details were discussed. Generally, the provisions of the Aarhus Convention were the guiding line for the new legislation. Only exceptionally were the Council and the Commission prepared to go beyond the requirements of that Convention. The EP tried, on a considerable number of points, to provide for more elaborate rights for citizens than guaranteed by the Aarhus Convention and to reduce the administrative discretion, but remained largely unsuccessful. During the conciliation procedure, the greater experience, efficiency and greater professionalism of the Council secretariat, backed in particular by the Danish Council Presidency's staff and also by Member States'

administrations in the fifteen capitals, prevailed over the EP which had less human resources, less profound knowledge of the topic and less drafting capacities than the Council.

III. The main provisions of Directive 2003/4

III.1 Access to information or to environmental information?

At no instance was there any discussion in the EP or in the Council, whether there should not be an EC legislation on the right of access to information. If one considers the principles of open society, shortly mentioned above, there is no reason to limit the right of access to information to the environmental sector. And Article 1 of the Treaty on European Union is not limited either to environmental issues. Finally, Article 255 EC Treaty states that "every citizen of the Union..shall have the right of access to European Parliament, Council and Commission documents..", a provision which is repeated almost word by word by Article 42 of the Charter of Fundamental Rights^[20]. This right of access to documents^[21] is general, but is limited to the European level. There is no EC legislation establishing such a right of access to documents or to information for Member States.

The reason for the absence of such general legislation seems clear. Article 42 of the Charter of Fundamental Rights is placed in the Chapter of "Citizens Rights", and Article 255 EC Treaty belongs to the chapter "Provisions common to several institutions". EC institutions do not systematically try to develop the rights of citizens in the European Union and the European Commission does not have a specific administration which specially looks into the question of citizens rights. There is thus no administrative unit to take the initiative and make the proposal for a general directive on access to information.

This conclusion remains regrettable and to some extent arbitrary. Why should there not be a right of a citizen to obtain access to the information which the administration holds on genetically modified food, on the results of food contamination controls, on the quality of drinking water or even on data of trucks which exceeded the speed limits for trucks? No other justification for this can be seen than the fact that more knowledge gives more power and that the administrations do not wish to share this with the citizens: in a democratic

society, where administrations exist to serve the citizen, this ideology is extremely conservative, even reactionary. There are enough exceptions to the rule of free access to preserve the legitimate interests of policy-makers, private persons or economic operators - provided, these interests are really legitimate. Also the interpretation difficulties whether a specific information must be considered "environmental information" and may thus be subsumed under Directive 2003/4 or not, demonstrate how arbitrary the borderline between "information" and "environmental information" is.

III.2 A right of access to environmental information

The Commission stated in its proposal for Directive 2003/4 that Directive 90/313 "only ensured freedom of access to environmental information"^[22] and suggested to establish, in the new directive, a right of access to environmental information. This proposal which aligned Community legislation with the Aarhus Convention, did not meet objections and was adopted.

However, the Commission's argument that Directive 90/313 did not establish a right of access to environmental information, is not correct. Indeed, Recital 6 of Directive 90/313 declared that "it is necessary to *guarantee* to any natural or legal person..free access to available information on the environment"(emphasis added). Recital 7 allowed to refuse a request for information "in certain specific and clearly defined cases"; however, such a refusal "must be justified (Recital 8). The applicant had the possibility to appeal against the refusal to grant access (Recital 9 and Article 4). All these provisions describe well the existence of a right, not only an obligation for the administration. The only part which lacked in this system was the mention of the word "right". This understanding was also followed by the Court of Justice which stated that "the purpose of the directive is to confer a right on individuals which assures the freedom of access to information on the environment"^[23].

However, this legal explanation must not forget us the reality. Where a citizen is confronted with a local, regional or national administration, not only dealing with the environment, but rather dealing, for example, with transport, economic or energy questions, it will be helpful for the applicant to be able to point out that he has a "right" of access to information. It is for reason of such application in

practice that it is important to find the word "right to access to environmental information" back in the transposing national legislation, though this aspect should not be exaggerated: the devil is in the detail of granting or refusing access to information on the environment.

III.3 'Environmental information'

Directive 90/313 had given a rather extensive definition of "information relating to the environment"^[24]. Practical application of this provision showed, however, that the enumeration of details made the administration question whether an information which was not explicitly mentioned in the enumeration, really belonged to the information that was covered by Directive 90/313.

The Commission's proposal for Directive 2003/4^[25] tried to reduce restrictive interpretations and to be more explicit. Therefore it included in particular information on emissions and other releases into the environment, genetically modified organisms, cost-benefit and other economic analyses; all these elements had already been mentioned in the corresponding definition of the Aarhus Convention, except the mention of releases into the environment

The European Parliament wanted to also see wetlands, coastal and marine areas mentioned in the definition, an amendment which the Council accepted. In contrast to that, the Council did not accept that "energy" be specified by "including nuclear fuel and energy", because these elements "do not appear in Aarhus and..are covered by 'energy radiation and radioactive waste'"^[26]. There was thus consensus that such information was part of "information on the environment".

EP also wanted to see "reports on the implementation of environmental legislation" mentioned which the Council accepted during the conciliation procedure, though such reports were not mentioned in the Aarhus Convention's definition.

More contentious was the European Parliament's request to mention, next to "the state of health and safety" also "food safety" which was not mentioned in the Aarhus Convention. The Commission opposed this amendment, as it was not laid down in the Aarhus Convention^[27]. Also the Council opposed the amendment, with the argument that it was not mentioned in Aarhus and "would

too much widen the scope of the Directive"^[28]. During the conciliation procedure, the formula "the contamination of the food chain, where relevant" was found which means that information on food contamination which is caused by pesticides, heavy metals or other contaminants is covered by the Directive. Again, it is not quite clear, why the public should not have access to available information on other contamination of the food chain.

III.4 Public authorities

Directive 90/313 defined as "public authorities" any public administration at national, regional or local level, with responsibilities, and possessing information, relating to the environment. This included, according to Article 6 "bodies with public responsibilities for the environment and under control of public authorities".

The Commission proposed the following amendments: (a) the mentioning of 'government'; (b) persons having public responsibilities or functions, or providing public services, relating to the environment under a public administration; (c) any person entrusted with the operation of services of general economic interest which affect the environment. The exception for courts and Parliaments was also discussed (d).

(a) 'Government'

The inclusion of government into the notion of "public authorities" was never in dispute. Under Directive 90/313, some problems had occurred in the United Kingdom, whether central government would also be covered by "public authorities"^[29].

The European Parliament wanted to have "advisory bodies" included in the definition of public authorities^[30]. The Commission opposed this amendment, as the Aarhus Convention did not mention it. In its Common Position, also the Council opposed the amendment, "as this would expand too much the scope of the Directive and would give rise to the serious problem of designating those bodies"^[31]. In the second reading, EP repeated its proposal which the Council finally accepted in the form of "public advisory bodies".

Reading the notion of "public authorities", it seems a strange interpretation to consider that advisory bodies should not come under "any administration"

(Directive 90/313). The purpose of Directive 90/313 - as well as of Directive 2003/4 - is to give broad access to available information which is held by public authorities. And where public advisory bodies hold information on the state of the environment - for instance a study, an examination of impact of any envisaged measure, results of monitoring data etc - it appears normal that such information is made available to the citizens: it cannot be repeated often enough that the administration is not the owner of the environment and it is therefore reasonable that such information is shared.

(b) Persons having public responsibilities or functions

The Commission explained its proposal with the argument that some bodies, for instance in the transport or energy area, had been excluded from the scope of application of Directive 90/313 with the argument that they had responsibilities not for the environment, but for transport or energy. The new proposal therefore should include also such transport or energy bodies; this also respected the integration principle of Article 6 EC Treaty.

The European Parliament accepted this explanation and the new wording. The Council slightly changed the proposed wording, so that Article 2(2.b) of the final version of Directive 2003/4 referred to "any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment".

(c) Private bodies and privatised industries

The Commission had suggested to include in the notion of "public authorities" any person that was entrusted by law, or under arrangements with a public authority "services of general economic interest which affect or are likely to affect the state of elements of the environment". It had explained that some services, such as gas, electricity, water or transport, were in some Member States performed by public authorities or utilities while in other member States, they were performed by private bodies. An unequal treatment of access to information was, however, not justified as these services were essentially the same, all the more as such differentiation between private and public services could occur within the same Member State. The Commission therefore considered it necessary to go beyond the wording of the Aarhus Convention and to include all bodies which provided general interest services in the definition of "public authorities".

The Economic and Social Committee^[32] and the Committee of the Regions^[33] agreed to the Commission's proposal, but the European Parliament rejected it. The Greens in the European Parliament tried, during the First Reading, to maintain the Commission's proposal, but remained unsuccessful^[34]. The Council declared that it did not wish to follow the Commission's proposal, "sharing Parliament's reluctance to assimilate to a public authority services of general economic interest such as transport, waterworks or telephone"^[35]. The Commission did not fight for its proposal which was thus incorporated into the final version of Directive 2003/4.

In general, I agree with the basic decision that there should be a differentiation between public administration and private bodies. The notion of "services of general economic interest" is used in Articles 16 and Article 86(2) EC Treaty without this notion being precise^[36]. In the environmental sector, public transport, urban waste management, nuclear and other energy services, drinking water and waste water management are examples of services which maybe considered as of general economic interest. Where a Member State allows a specific sector to organise itself privately, there is not much reason to ask for access to environmental information which is held by such private companies: the profit-making normally distinguishes the private from the public service, though it is readily recognised that the difference between a public body and a private body depends on more criteria than the profit-making aspect. Certainly, the fact that some services had been, in the past, organised as public services and were then privatised, cannot be a decisive factor: at least in continental Europe, some two hundred years ago all economic activities were public and were only progressively privatised.

Why non-public bodies should be obliged to grant access to available information on the environment, is not quite clear. Public bodies have general interests to take care of, while private bodies have in principle their own interests to consider. Obliging private bodies to grant access to information on the environment would just create new difficulties between private bodies which act in the general economic interest and private bodies which do not -and this differentiation is even less easily to operate.

Austria has a rather interesting provision in its national Environmental Information Act, obliging private companies, which are legally obliged to

measure releases into the environment from their installations and to keep records on them, to publish them regularly in a manner which is easily accessible and understandable^[37]. Though the Commission mentioned this provision, it did not consider to make a corresponding proposal for the whole of the EC^[38] and neither the Council nor the European Parliament took any initiative into the direction of granting access to environmental information held by private companies.

(d) Judicial and legislative bodies

Directive 90/313 had excluded access to information held by bodies "acting in a judicial and legislative capacity". When the Commission took legal action against Germany, because Germany had generally exempted courts, criminal prosecution authorities and disciplinary courts, the Court of Justice judged that the Commission had not proven that these bodies had information on the environment obtained outside their judicial activities^[39]. This judgment caused the Commission to suggest the wording that judicial and legislative bodies should be excluded from the definition of public authorities "when and to the extent that they act in a judicial or legislative capacity". The Council originally returned to the wording of the Aarhus Convention ("bodies or institutions acting in a judicial or legislative capacity"): As in the second reading, the EP insisted on the wording originally proposed by the Commission, agreement was finally found on the wording "when acting in a judicial or legislative capacity".

This controversy seems to have been caused by the Court's judgment which does not convince me. Indeed, it is quite interesting for the public to know, for instance, how many environmental crimes or other offences were brought to the knowledge of a public prosecutor, how many of these cases were actually pursued, how many judgments were delivered, other sanctions pronounced, how many acquittals occurred - and how often a polluter has actually gone to jail. All this information is not obtained "in a judicial capacity", but is statistical information and should therefore generally be accessible. The Commission had expressly mentioned statistical data^[40], but was not able to persuade the Court. In view of this judgment, it may be doubted, whether the new wording of Directive 2003/4 will really constitute a change.

III.5 Grounds for refusal

Directive 90/313 enumerated, in Article 3(2) 12 grounds, on which public authorities were entitled to oppose the right of access to information, and in Article 3(3) 4 more grounds. The Aarhus Convention contained the same number of exceptions. Directive 2003/4 maintains once more the same number and even the substance of the grounds for refusal, but finetunes their wording and, furthermore, adds statistical confidentiality and tax secrecy. Following the Aarhus Convention, the Directive also indicates that the grounds for refusal have to be interpreted in a restrictive way, a rather exceptional provision for an EC Directive. Furthermore, Article 4(2) mentions that in each particular case the public interest served by disclosure "shall be weighed against the interest served by the refusal". It will thus less be the Directive or the future transposing legislation which will decide, whether access to information will be granted in a specific case or not. The discretion of the public authority will be determining. For that reason, much of the practical application of Directive 2003/4 will depend on the basic decision whether an administration is prepared to share its knowledge on the environment with applicants or not. In any way, the two provisions of Article 4 about a restrictive interpretation of the exceptions and of the weighing of the respective interests, together with the general establishment of a "right" of access to environmental information in Article 1, clearly indicate the Directive's basic decision in favour of openness and transparency. Whenever public authorities weigh diverging interests under Directive 2003/4 or its implementing national provisions, they will have to take into account this basic decision of the EC legislation in favour of free access to environmental information.

Among the numerous exceptions to the right of access to information, the following might deserve a closer comment:

(a) Material in the course of completion or unfinished documents

Article 3(3) of Directive 90/313 allowed Member States to refuse a request for information where it would involve the supply of unfinished documents or data. The Aarhus Convention provided that access could be refused for material in the course of completion; the same wording was taken over by the Commission's proposal for Directive 2003/4. EP did not ask for an amendment,

but the Council thought it wise to accumulate these formula and provided for an exception for unfinished documents as well as for documents or data in the course of completion. In the second reading, EP tried to mitigate the reach of this provision, requesting that in the statement of refusal the name of the person or authority preparing the material and the estimated time of completion be indicated^[441]. The Council accepted this only for material in the course of completion and only with regard to the name of the authority that prepared the material^[442]. The result is that the refusal may be based on the argument that the documents or data are unfinished, without any information being released when the documents or data would be finished.

It might be worthwhile mentioning that the Commission itself reported that environmental organisations and experts had asked that "unfinished documents" should be deleted altogether from the grounds for refusal, as the notion that data can be withheld pending processing was difficult to defend; furthermore, such documents should not be capable of being withheld if they have been considered by a public authority in arriving at a decision^[443].

(b) Internal documents

Article 3(3) of Directive 90/313 allowed Member States to refuse access to "internal communications"; the same wording was used in Article 4(3.c) of the Aarhus Convention and in the Commission's proposal for Directive 2003/4. The European Parliament wanted this exception to be deleted^[444] which the Commission considered unacceptable^[445] and also the Council rejected^[446]. The European Parliament repeated its suggestion in the second reading. In the conciliation procedure, the exception was formulated in Article 4(1.e) as allowing to refuse access to environmental information, where "the request concerns internal communications, taking into account the public interest served by disclosure".

Whether this formula will change the administrative reality that internal communications are not released, remains to be seen. What is interesting is the parallel development of access to information held by the EC institutions Council, Commission and European Parliament. The Commission's proposal for a regulation to implement Article 255 EC Treaty provided that internal documents did not come under those documents which had to be released^[447]. However, the European Parliament and the Council did not agree. The final

wording of Regulation 1049/2001^[48] included internal documents into the field of application of the Regulation and stated:

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

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

Member States have thus a considerably larger possibility to refuse access to internal communications than the EC institutions. And one might wonder, whether similar provisions under national law would not be more appropriate in order to address the concern of some Member States.

(c) Emissions into the environment

Article 3(2) of Directive 90/313 allowed Member States to refuse access to information where such access could affect "commercial and industrial confidentiality, including intellectual property, the confidentiality of personal data and/or files". Article 4(4) of the Aarhus Convention stated: "A request for environmental information may be refused, if the disclosure would adversely affect:...(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed".

The Commission's proposal for Directive 2003/4, without giving any justification, reformulated the last phrase of the Aarhus Convention formula as follows: "Member States may not, by virtue of this paragraph, provide for a request to be refused where the request relates to information on emissions, discharges or other releases into the environment which are subject to provisions of Community legislation"^[49].

The European Parliament made of this phrase on emissions a separate subparagraph so that it related to all ground of refusal mentioned in Article 4(2)

and formulated: "Member States may not, by virtue of this paragraph, provide for a request to be refused where the request relates to information on emissions, discharges or other releases into the environment"^[50]. The Commission was of the opinion that this derogation went too far and that, in certain cases, public authorities should be allowed to refuse access to such information^[51]. The Council, then, tried another compromise: it replaced the last phrase of Article 4(4.d) of the Commission's proposal in the section on commercial or industrial information of Article 4(2.d), but added at the end of Article 4(2) that all the grounds for refusal should be interpreted in a restrictive way, "taking into account whether the information requested related to emissions into the environment"^[52] and justified this by the wording of the Aarhus Convention.

The European Parliament did not accept this compromise and repeated its proposal from the first reading. The final compromise which went into the text of Directive 2003/4 consisted in prohibiting to refuse information on emissions in the cases of proceedings of public authorities, commercial or industrial information, personal data and/or files, information supplied on a voluntary basis and information pertaining to the protection of the environment.

The provision that access to information on emissions, discharges and other releases into the environment may not be refused because of the confidentiality of commercial and industrial information is very important. All too often, economic operators argue that competitors could, through the chemical composition of emissions or releases, obtain information on the production methods and that therefore the emissions should be kept confidential. This argument was never convincing. Indeed, in the same way as a producer who puts a product into circulation or on the market may not invoke commercial or industrial confidentiality, has he to accept that emissions which he puts into the environment, may no longer be kept confidential. The environment is not the producer's property. If he wants to keep the composition of his emissions confidential, then he should capture them within his installation and prevent them from going public. But he should not be entitled to have both, emissions into the public domain/the environment and the maintenance of commercial secrecy. As regards the placing of products on the market, this principle is recognised since long and patent law offers sufficient protection to the interests

of producers. It was high time that this principle be also recognised for emissions into the environment. The wording of the Aarhus Convention which paved the way for Directive 2003/4 is therefore more than welcome.

In my opinion, releases, discharges and emissions into the environment should, in principle, always be made public. I therefore sympathise with the Norwegian Act on Environmental Information of February 2003 which states in Article 12 that access to information shall always be given on (a) pollution damaging to health or pollution which may cause serious damage to the environment, (b) measures to prevent or reduce damage and (c) illegal intervention or illegal damage to the environment. In this line of thinking is also Article 16 which states that "everybody is entitled to information from enterprises and activities.. concerning factors related to the enterprise and activity, including production factors and products, which may have noticeable effect on the environment. The right to environmental information.. also applies to information abouts effects on the environment from production or distribution of a product taking place outside Norwegian borders, to the extent that such information is available..".

It is likely that greater environmental transparency will, in future, considerably be influenced by this new provision and its underlying concept. A first and very important step was taken, when in 2000, the EC set up, after long years of discussion, a European Pollution Emission Register (EPER)^[53], which requires Member States to report, for some 20.000 individual industrial installations^[54] emissions into the air and the water of some 50 pollutants and which will allow for better knowledge about the pollution hot spots within the EC. First figures of EPER should be available in 2003.

III.6 Modalities of access to information

Article 3 of Directive 2003/4 organises the modalities of granting access to environmental information. It does not really contain new provisions with regards to Directive 90/313, but specifies the issues in more detail. The most relevant innovations are

(a) Delay for reaction

Directive 90/313 granted Member States two months, but the Aarhus Convention had already provided for a period of one month. Decisions on requests for access to documents held by the EC institutions must normally be taken within 15 working days^[55] and the European Parliament had in vain requested a regular period of two weeks for the application of Directive 2003/4. The Commission considered two weeks too short and this opinion was shared by the Council which declared that it is often "impossible - in particular in smaller services" to reduce the answering time to two months. This became the final text; in voluminous or complex cases, the period may be prolonged to two months.

(b) Proving an interest

Directive 90/313 stated that the applicant of a request for information did not have to "prove" an interest. The Commission suggested to change this and not to oblige the applicant to "state" an interest, as the applicant did not have to explain why he was interested in the information requested and the word "prove" had given rise to some difficulties. This amendment was not questioned and thus introduced in the final version of the Directive.

(c) Delay for responding

Article 3(4) of Directive 90/313 obliged public authorities to "respond" to a request for access to information within two months. Some Member States had understood this provision as allowing authorities to give, for instance, an intermediary reaction within two months after receiving the request; the substantive answer to the request could be given much later^[56]. The new wording proposed by the Commission indicated that the answer "shall be made available" within one month. This wording was accepted without problems and become, with a slight change, the wording of Directive 2003/4.

(d) Forms and formats

Directive 90/313 left it to Member States to decide in which form the information had to be made available to the applicant. Article 4(1) of the Aarhus Convention was more specific, requesting that the information be made available in the form requested, including copies of the actual documentation which contained or comprised the information, unless the information was already publicly available in another form or it was reasonable to make it available in another form. The Commission's proposal for Directive 2003/4 followed the Aarhus Convention,

but added that the public availability of the information had to be easily accessible to the applicant; this addition intended to cope with situations where, for instance, an applicant did not have access to the internet.

The European Parliament was of the opinion that the applicant should always obtain the information in the requested form, provided it was readily reproducible in that form or format^[57]. The Commission rejected this amendment, as it was not sufficiently flexible and could be too burdensome for public authorities^[58]; in its Common Position, the Council followed the Commission. At the insistence of the European Parliament, the final version of Article 3(4) of Directive 2003/4 allowed the public authorities to refer an applicant only to other forms of publicly available forms, if these were easily accessible by the applicant. Furthermore, some non-binding wording was added in order to promote electronic communication.

(e) Refusal to make informations available

There could have been little doubt under Article 3(4) of Directive 90/313^[59] that an applicant was entitled to receive a - positive or negative - answer within two months of his application. Nevertheless, the Court of Justice had to condemn France for having provided for a provision in French law according to which the applicant had expressly to request to learn the grounds of a refusal, where the administration had remained silent^[60]. The Court found that the applicant was entitled to learn the grounds for the administration's refusal without having to ask for it, though that information did not necessarily have to be delivered within the two months. In substance, the Court recognised that an administration, remaining silent for two months, could tacitly refuse an application.

The new wording of Directive 2003/4 avoids this ambiguity, as Article 3(4) now provides that the reasons for a refusal to make information available shall be provided to the applicant within the time of one month, exceptionally within two months.

III.7 Charges

The question of administrative charges was particularly contested. Article 5 of Directive 90/313 was relatively succinct in this regard, stating that "Member States may make a charge for supplying the information, but such charge may

not exceed a reasonable cost". Article 4(8) of the Aarhus Convention followed this line, but also asked for a schedule of charges to be made available to the applicant which contained the details of the charges.

The Commission's proposal for Directive 2003/4 specified in more detail the question of charges. The principle remained that reasonable charges should be allowed, though no advance payment should be permitted. Examinations in situ of the information requested and access to public registers or list should be free of charge. Finally, the public authorities were to publish and make available to applicants a schedule of charges^[61].

The European Parliament agreed to the principle of reasonable charges. However, besides the areas where the Commission had suggested no charge, EP suggested that requests for information for educational purposes should be free of charges. The actual cost of reproducing material should be able to be charged, but not the cost of staff time spent on searches, for searching for or compiling of information^[62]. The Commission rejected the amendment on educational material, but accepted the other amendments^[63]. In its Common position, the Council only accepted that the consultation in situ should not lead to raising *additional* charges, but rejected all other amendments. It explained that "searches may very time-consuming and costly, freedom of charge may give raise to frivolous requests for information and the notion of 'education' is very vague"^[64].

In the second reading, the European Parliament did not ask for the staff time to be explicitly mentioned, but suggested that "a charge shall be reasonable and shall not exceed the actual cost of reproducing the material requested"^[65]. However, except the statement that examination in situ of the information requested should be free of charge, all Parliament amendments were rejected. Recital 16 of Directive 2003/4 even laid down that advance payment may be required, though instances of advance payment should be limited; that, as a general rule, charges "may not exceed actual costs of reproducing"; and that "where public authorities make available environmental information on a commercial basis and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable".

Whether these provisions will help to stop past uses and abuses of the provision on charges which was used to deter persons from requesting access to environmental information, is doubtful. Environmental organisations and private persons often complained on the high amount of charges and asked, among others that there should be no charge for a set initial amount of search time and that there should at least be a possibility for not charging costs, if the information was requested for non-commercial purposes. Charges of 1€ per photocopy are apparently rather common. Germany (Hessen) charges between 11 and 16€ per 15 minutes of an official's time^[66]. Representative figures on charges that are actually raised are difficult to obtain^[67]; no study seems ever to have been made in this regard.

III.8 Access to justice

As mentioned above, Directive 90/313 provided in its Article 4 that a person who considered that his request for information had unreasonably refused or ignored or had been inadequately answered, had the right to seek judicial or administrative review of the decision. This provision left the details of the judicial procedure to the national legal systems. The Aarhus Convention provided in Article 9(1) for a review procedure before a court or "another independent and impartial body established by law". Where a court procedure was foreseen, the Aarhus Convention required in addition a review procedure by a public authority or an independent and impartial body "other than a court of law".

In its proposal for Directive 2003/4, the Commission very closely followed the provisions of the Aarhus Convention. To this decision may also have contributed the fact that the Commission, when making its proposal, had not planned to present a separate proposal for a directive on access to justice, but had thought that it could satisfy the requirements of the Aarhus Convention by inserting provisions on access to justice into Directive 2003/4 and the parallel Directive 2003/35 on participation in environmental decision-making^[68]. The Commission's proposal first repeated the provisions of Directive 90/313 and added a provision according to which, in addition, an applicant could have the administrative decision reviewed "by that public authority or reviewed administratively by another body established by law"^[69]; such a procedure had

to be expeditious and either inexpensive or free of charge. The Commission explained that this procedure was suggested, because "judicial appeal procedures often involve high costs or long delays"^[70].

The Economic and Social Committee approved of the proposal, but suggested an extra cooling off period of 30 days before an applicant could ask for an administrative review^[71]. The Committee of the Regions was lukewarm on the proposal^[72]. The European Parliament wanted to add to the Commission's proposal that different administrative bodies had to be independent and impartial, that the Directive's ground for refusal would not be applicable to requests from a court and that Member States should be obliged to consider the introduction of provisions on the recovery of legal costs as well as sanctions against authorities or officials for clearly wrongful refusals^[73].

The Commission accepted that the different administrative bodies had to be independent and impartial, but considered the other amendments to be of excessive detail and not compatible with the subsidiarity principle. This position was repeated by the Council in its Common Position which, for the rest, changed the order of the provisions: an applicant could have a negative administrative answer checked by either the rejecting authority or reviewed administratively by an independent and impartial body established by law. In addition, the applicant had access to a review procedure before a court of law or another independent and impartial body established by law. Member States were also given the possibility to allow third parties incriminated by the disclosure of information to have access to legal recourse - a possibility which, of course, Member States already had before. This text then became the final version of Article 6.

In line with the Aarhus Convention, the new element in the procedure is thus that there is first an administrative review procedure and then a procedure before a court of law or another administrative body. Whether this will help reducing costs for the applicant, the declared objective of the innovation, remains doubtful.

III.9 Active information

Article 7 of Directive 90/313 asked Member States to provide general information to the public on the state of environment. The Aarhus Convention suggested very extensive active information, among others by reports on the state of environment, publication of legislative texts, plans and programmes etc. The Commission followed that line and suggested that Member States disseminate detailed informations on the environment, including legislative texts, policies, plans and programmes, implementation reports, reports on the state of the environment and monitoring data^[74].

The European Parliament sharpened these proposals to a certain degree and added an amendment on the quality of the active information on the environment, which had to be, if possible, up-to-date, clear and comprehensible and scientifically sound in terms of accuracy and comparability. It also asked the Commission to submit a draft for harmonisation of emission measurement procedures^[75]. The Commission considered this request "unduly burdensome on public authorities" and rejected it^[76]. The Council opposed, in its Common Position, the amendment to add an article on the quality of active environmental information and considered Parliament's amendments to be unduly burdensome; furthermore, the harmonisation of emission measurement procedures would fall outside the scope of the Directive^[77]. As Parliament repeated practical all of its amendments in the second reading, the matter went into the conciliation procedure. Here the Council accepted an Article 8 on the quality of information which asked Member States to ensure "so far as is within their power" that information be up to date, accurate and comparable. Furthermore, on request, Member State should inform applicants "on the place" where information on measurement procedures could be found.

The different additions "if possible", "if available", "as appropriate" etc. will make sure that public authorities are not unduly burdened by the obligation to disseminate information. The provisions on active information and its quality are hardly enforceable and it will be seen, to what extent they will change the reality of environmental transparency within the European Union, in particular at local or regional level, where citizens are mostly affected and interested.

Two practical examples might illustrate the difficulties: Article 7(2.g) of Directive 2003/4 requires Member States to make available and disseminate environmental impact studies. However, in Directive 85/337 on environment impact assessment^[78], the word "studies" does not appear. Normally, one considers as "studies" the factual information which an operator is obliged to submit, under Article 5 of Directive 85/337, together with his application for planning permission. Much more relevant is the administrative environmental impact assessment of a project. In this regard, Article 3, Directive 85/337 requires to "identify, describe and assess" the effects of a project on the environment. However, Directive 85/337 does not stipulate that such an assessment has to be made in writing - though it is not clear how one can "describe" effects other than in writing. And Article 7 of Directive 2003/4 does not require that the assessment of the environmental impact of a project be made available or disseminated - or even that such an assessment be laid down in writing.

The second example concerns information on the quality of drinking water. There is EC legislation on this subject since 1980^[79], though no obligation existed to publish data on the quality of drinking water which would have allowed individual persons to decide to use tap water or recur to bottled water. The European Commission has not either published any report on drinking water, an approach that is different, for example, to the approach regarding the quality of bathing water, where an annual report is published which indicates the quality of almost 20.000 bathing waters in the EC. A directive of 1991 on the improvement of environmental reporting^[80] led to the publication of a report on water issues which included information on the drinking water directive^[81]; however, the report contained no data on the quality of drinking water within the EC.

Article 7(2.c) of Directive 2003/4 requires Member States to make available and publish progress reports on the implementation of, among others, Community legislation, "when prepared or held in electronic form by public authorities". This provision thus does not require the dissemination of information on the quality of drinking water. Rather, it depends on the determination and will of the public authorities, whether they will disseminate such data. It is comforting, though, that Article 13 of the new Directive 98/83^[82] requires Member States to publish,

as of 2005, reports on the quality of drinking water; but it is significant that this added value in transparency does not come from Directive 2003/4 which could have provided for precise horizontal provisions regarding data publication. As (drinking) water is not the only sector, where data that are relevant and interesting for the citizen, lack, one would have wished to see clearer provisions in this regard in Directive 2003/4 which allows or makes possible the active information on environmental relevant data - if there is the corresponding political will and determination to do so; but which also allows not to change the existing publication practice - if politically it is considered better to continue the present practice without changes.

IV. Concluding remarks

IV.1 Transparency in EC lawmaking

If one looks at the legislative process, it is striking to see how much the European legislative process itself has become transparent since 1990, when Directive 90/313 was adopted. Published are now the two readings of the European Parliament, the publication of the Council Common Position with the statement of reasons on each of the EP's amendments and the content of the Commission's amending proposal which follows EP's first reading and which also explains why the Commission accepts or rejects EP's amendments. What is not published is the Council's decision to follow or not EP's amendments of the second reading which constitutes the point of departure for the conciliation procedure. Taken together, the published documents allow a rather detailed following of the legislative process, though this occurs, obviously with several weeks or months after the event. This ex-post transparency of the legislative process cannot, therefore, substitute public debate and vote as it exists in national, regional or local legislative decision-making bodies.

IV.2 Compliance with the Aarhus-Convention

The next question is, whether Directive 2003/4 fully transposes the provisions of the Aarhus Convention into EC law. As regards EC institutions - including ECOSOC, Committee of the Regions, European Environmental Agency and

European Investment Bank which are all public authorities in the sense of the Aarhus Convention - this is not the case, as there are no provisions on access to information which apply at present to them. Regulation 1049/2001 is limited to the European Parliament, Council and Commission and contains a number of elements which are not in line with the Aarhus Convention.

In contrast to that, Directive 2003/4 is a rather true reflected image of the provisions of the Aarhus Convention. I did not discover any significant transparency between the information provisions of the Aarhus Convention and Directive 2003/4.

However, this is only part of the problem, as under Article 10 of Directive 2003/4 will have to adapt their legislation to the requirements of the Directive by 1 February 2005. Only when the transposing national and regional legislation is available, can any final statement be made. It should be remembered that implementing legislation under Article 10 also covers regional legislation which is of particular importance to Member States with a regional or federal structure, in particular United Kingdom (Scotland, Wales, Northern Ireland, Gibraltar), Belgium, Spain, Italy, Austria and Germany.

IV.3 High level of protection

Article 174 EC Treaty requires Community policy and law to aim at a high level of environmental protection and one might wonder, whether Directive 2003/4 reaches this objective. The details of the legislative procedure, described above, demonstrate that numerous formulations of the European Parliament which aimed at reducing the administrative discretion, were not taken up in the final text; as the case is, this can only be due to the Council's attitude. Other options of drafting were thus available, had there been a deliberate attempt to attain such a reduction of the administration's discretion.

In other aspects, the concept of open society was only half-heartedly realised. This concerns, for instance, the limitation of access to information on the environment and not on access to all information on factual circumstances which are in the hands of the administration; the principle that citizens have a right to know what emissions and other releases go into the environment, not only vis-à-vis public authorities, but also vis-à-vis private enterprises; that

access to environmental information should, as a principle, be free of charges which go beyond reproduction costs; that there should be no advance payment requirement and other means to deter citizens from exercising their right of access to information.

The argument that subsidiarity prevented more precise provisions, so often invoked during the legislative procedure, is not a really convincing argument. Indeed, if the subsidiarity principle does not oppose, for example, the mentioning that advance payment is allowed, it would also have been possible to mention that advance payment is not allowed. If the subsidiarity principle does not oppose the provision that some forms of access to information are free of charge (Article 7(1)), it would also have been possible to make a general statement that, in principle, no charges should be raised.

In defence of the actual text, it should be realised that in most EC Member States the concept of an open society is still far from being fully accepted. Knowledge gives power and the administrations-public authorities, the ruling political parties or economic operators and other vested interests have normally not great interest in transparency of public administration. Seen from this angle, and comparing the environmental sector with other sectors such as food or health administrations, transport, state aid or energy authorities, it remains remarkable that Directive 2003/4 achieves, in the follow-up of the Aarhus Convention, this amount of openness of public administrations. I therefore consider that this legislation complies with the objective of a high level of environmental protection as laid down in Article 174 EC Treaty.

IV.4 Practical application

It became clear from the different provisions of Directive 2003/4 which were analysed above that the Directive, as much as its predecessor, Directive 90/313, to a large degree lays down frame provisions, but leaves a large discretion to the local and regional administrations how to put the provisions into practice. This leads once more to the conclusion that the practical application of the Directive will be the decisive criterion for assessing its efficiency. Where public authorities have the will to approach the model of an open society in environmental matters, the Directive will constitute a useful guideline; where this

will does not exist, there will continue to exist numerous possibilities not to grant access to information on the environment.

Looking at the issue of access to environmental information from the point of view of the citizen, it becomes clear that improved access presupposes a more active citizen. It is known from the peoples' democracies of the past Eastern Europe systems that the external structures of a society are not the decisive criterion for assessing a society's character. In the same way the legislation on access to information will only fulfil its useful function where citizens use it and progressively reach transparency in environmental issues. This concerns planning permissions for infrastructure or urbanisation projects and hundreds of other administrative decisions which impact on the environment without this impact being made visible. Of course, citizens are mainly interested in issues which concern their direct neighbourhood, food and shelter, energy and transport, water, waste and air pollution aspects. Citizens and citizen initiatives, environmental groups and associations and other groups of society should systematically use the possibilities offered by Directive 2003/4 and the legislation which transposes that Directive into national law, in order to ask for the conditions of the daily state of the environment in their local neighbourhood, the quality of drinking water as well as the noise levels, the contamination of the air by SO₂, NO_x or lead, the emissions of the industrial installation next door, the use of pesticides in the urban parc etc. Why can daily information on air pollution made public in Austrian, but not in Spanish or Greek cities? Why do public authorities not inform their citizens as soon as the parameters of the drinking water directive - for instance for lead, pesticides or nitrates - are exceeded, so that citizens may decide themselves, whether to drink or use tap water or buy bottled water? These examples could be multiplied.

Also journalists and the academic profession have a particular role to play, as they serve as multipliers. For example, a local discussion about the existing air pollution and its potential effects on the respiratory system of persons, in particular of small children, may lead to the fixing of new local priorities such as roads reserved for passengers, bypasses for cars or changes in the public transport system. Scientific research might well examine, what the causes and sources of a specific environmental impairment are and how similar problems were tackled in other parts of the world. The activity of researchers might go

much further: in 2003, a German dissertation examined the number and content of requests for access to environmental information in a region of some eleven million persons and found that in three years, only 214 such requests had been submitted^[83]. While the results of the survey might be in parts questionable, it would be interesting to see whether the number of requests in other EC Member States is more or less similar, as nine of the present and nine of the ten new EC Member States have a population of less than eleven million persons^[84]. Other research initiatives might examine the influence of paying charges, prepayments, the delays, the accuracy of information given, differences between environmental and, for example, transport administrations, between small communities and large agglomerations etc.

These observations suggest some professionalisation of environmental organisations, academic researchers and journalists. An open society needs open, active citizens. Environmental organisations should try to systematically make more transparent sources of environmental impairment, omissions in monitoring, impairment of nature and clarify in this way the price which the environment has to pay for the lifestyle which we practise at present. Present communication technologies allow networking across national boundaries and thus increase transparency within the European Union. And research, instead of examining for the twentieth time what might have been meant by the notion of sustainable development or whether the polluter shall, should or does not pay, might well profit from being more down to earth, closer to the citizen and more relevant for him. The slogan of thinking globally, but acting locally which was used, in the past, by the environmental organisations, has well deserved to also be applied by researchers.

In general, it may well be that Directive 2003/4 represents the present state of the art on access to environmental information in Europe. Significant legislative progress towards more openness, more transparency and less discretionary power of the administration, if ever this is aimed at, is likely to be achieved only, where evidence can be produced that the present rules are applied in a way which is contrary to the concept of an open, democratic and transparent society. Such evidence will only be capable of being produced by factual research and examination of administrative practice. However, there should be no doubt that the full application of Directive 2003/4 according to its words and to its spirit, in

all parts of the enlarged European Union would already constitute an important achievement on the long and difficult way towards an open European society.

[1] Treaty on European Union, (2002) OJ C325/5, Article 1.

[2] See also L.Krämer, *The Open Society, its Lawyers and its Environment*, (1989) *Journal of Environmental Law*, 1.

[3] Directive 90/313 on the Freedom of Access to Information on the Environment, (1990) OJ L158/56; see also L.Krämer, 'Directive 90/313 on the Freedom of Access to Information on the Environment: Origins and Prospects for Implementation' in L.Krämer, *Focus on European Environmental Law* (London: Sweet and Maxwell, 1992), 290-309.

[4] Commission, Report on the experience gained in the application of Council Directive 90/313 of 7 June 1990, on freedom of access to information on the environment. COM (2000) 400 of 29 June 2000.

[5] Commission, COM(2000) 400, n.3 above, Annex B. Luxembourg sent its report in September 1996, Portugal in April 1999; the other Member States sent their reports between February and July 1997.

[6] Court of Justice, Case C-321/96 *Mecklenburg v. Kreis Pinneberg - Der Landrat* (1998) ECR I-3809; Case C-217/97 *Commission v. Germany* (1999) ECR I-5087.

[7] Stichting Natuur en Milieu, Utrecht: *Access to Environmental Information: The Review and further Development of Directive 90/313*, Workshop Report (1998); Stichting Natuur en Milieu, Utrecht: *Recommendations for the Review and Revision of Directive 90/313 on the Freedom of Access to Information on the Environment* (1998). Both Reports are mentioned as sources in Commission (2000) 400, n.3 above.

[8] Commission, Proposal for a directive on public access to environmental information, (2000) OJ C337E/156; Explanatory Memorandum in COM(2000) 402 of 29 June 2000.

[9] Austria, Bundesgesetz über den Zugang zu Informationen über die Umwelt, Article 13: "Wer..verpflichtet ist, Emissionen aus seiner Betriebsanlage zu messen und darüber Aufzeichnungen zu führen, hat..(diese) Aufzeichnungen in allgemein verständlicher Form an einer allgemein leicht zugänglichen Stelle (monatlich und jährlich) bekanntzumachen.."(A person who is..obliged to measure emissions from his or her installation and to record them, shall be obliged to publish these recors in an easily comprehensible form in an easily accessible way (once per month or per year))

[10] Economic and Social Committee, Opinion of 15 Nov.2000, (2001) OJ C 116/43.

[11] Committee of the Regions, Opinion of 14 Feb.2001, (2001) OJ C 148/9.

[12] European Parliament, Legislative Resolution of 14 March 2001,(2001) OJ C 343/165.

[13] See (2001) OJ C 343/104.

[14] See (2001) OJ C 343/134.

[15] Commission, amended proposal, (2001) OJ C 240E/289.

- ^[16] Each of the four key words "framework directive", "excessive details", "subsidiarity" and "flexibility" was used four times in the Commission's text.
- ^[17] Council, Common Position of 28 January 2002 (2002) OJ C 113E/1.
- ^[18] European Parliament, Position of 30 May 2002 (2003) OJ C 187E/118.
- ^[19] Directive 2003/4 (2003) OJ L 41/26.
- ^[20] The Charter of Fundamental Rights of the European Union (2000) OJ C 364/1, repeats this provision in Article 42, but also limits itself to the European level.
- ^[21] See also Reg.1049/2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43.
- ^[22] Commission, COM(2000) 402,n.8 above.
- ^[23] Court of Justice, Case C-217/97, *Commission v.Germany*, n.6 above, para. 47; see also Case G-321/96, n.6 above, para 28; Case G233/00 *Commission v.France*, Judgment of 26 June 2003, not yet reported.
- ^[24] Directive 90/313, n.4 above, Article 2(a): "'information relating to the environment' shall mean: any available information in written, visual, aural or data-base form on the state of water, air, soil fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes"
- ^[25] Commission, n.8 above.
- ^[26] Council, Common Position, n.17 above, para.VI.3
- ^[27] Commission, Amended proposal, n.15 above, para.3.4.
- ^[28] Council, Common Position, n.17 above, para VI.3.
- ^[29] See P.Roderick, 'United Kingdom' in R.Hallo (ed.), *Access to Environmental Information in Europe. The Implementation and Implications of Directive 90/313/EEC* (London-The Hague-Boston: Kluwer International 1996), 249-276
- ^[30] European Parliament, Legislative Resolution, n.12 above, amendment 15.
- ^[31] Council, Common Position, n.17 above, para VI.3.
- ^[32] Economic and Social Committee, Opinion, n.10 above para.2.4.1.
- ^[33] Committee of the Regions, Opinion, n.11 above, para.4.
- ^[34] (2001) OJ C 343/105.
- ^[35] Council, Common Position, n.17 above, para.VI.3.
- ^[36] See also Commission, Report on Services of General Interest, COM(2001) 598 of 17 Oct.2001; Commission, Communication: A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest, COM(2002) 331 of 18 June 2002.
- ^[37] Bundesgesetz über den Zugang zu Informationen über die Umwelt, Article 13.
- ^[38] See also the discussion on emissions into the environment, para III.5.c below.
- ^[39] Court of Justice, Case C-127/97, n.6 above, para.24.
- ^[40] Court of Justice, Case C-127/97, n.6 above, para.20.
- ^[41] EP, Position, n.18 above, Amendment 27.
- ^[42] Directive 2003/4, n.19 above, Article 4(1), last subparagraph.

- [\[43\]](#) Commission, Report, n.4 above, Annex C.
- [\[44\]](#) European Parliament, Legislative Resolution, n.12 above, amendment 20.
- [\[45\]](#) Commission, Amended proposal, n.15, para.3.4.
- [\[46\]](#) Council, Common Position, n.17 above, para.VI.5.
- [\[47\]](#) Commission, (2000) OJ C177E/70.
- [\[48\]](#) Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43.
- [\[49\]](#) Commission, n.8 above, Article 4(2.d).
- [\[50\]](#) European Parliament, Legislative Resolution, n.12 above, Amendment 21.
- [\[51\]](#) Commission, Amended proposal, n.15 above, para.3.4.
- [\[52\]](#) Council, Common Position, n.17 above.
- [\[53\]](#) Dec.2000/479 on the implementation of a European pollutant emission register (EPER), (2000) OJ L192/36.
- [\[54\]](#) This is the estimated number of installations which come under Directive 96/61 concerning integrated pollution prevention and control (1996) OJ L 257/26, under which EPER was set up..
- [\[55\]](#) Regulation 1049/2001, n.48 above, Article 7.
- [\[56\]](#) See T.Schomerus,C.Schrader and B.Wegener, Umweltinformationsgesetz; Handkommentar, 2nd.ed. (Baden-Baden: Nomos Verlag, 2002) n.20 to Article 5. Germany amended its legislation in 2001
- [\[57\]](#) European Parliament, Legislative Resolution, n.12 above, Amendment 18
- [\[58\]](#) Commission, amended proposal, n.15 above, para.3.4.
- [\[59\]](#) Directive 90/313, n.3 above, Article 3(4): "A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given".
- [\[60\]](#) Court of Justice, Case C-233/00, n.23 above, paras 88-119.
- [\[61\]](#) Commission Proposal, n.8, Article 5.
- [\[62\]](#) European Parliament, Legislative Resolution, n.12 above, Amendment 24.
- [\[63\]](#) Commission, Amended proposal, n.15 above, para.3.2 and 3.3.
- [\[64\]](#) Council, Common Position, n.17 above, para.VII.15.
- [\[65\]](#) European Parliament, Position, n.18 above, Article 5.
- [\[66\]](#) M.Schmillen, Das Umweltinformationsrecht zwischen Anspruch und Wirklichkeit (Berlin: Erich Schmidt Verlag 2003), 47. The cost regulations of the German Länder were not notified to the Commission, see Commission, Report, n.4, Annex A.
- [\[67\]](#) See Commission, Report, n.4 above para 3: "In some cases, unreasonable charges have been demanded"
- [\[68\]](#) Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Directives 85/337 and 96/61 (2003) OJ L 156/17.
- [\[69\]](#) Commission, Proposal, n.18 above, Article 6(2).
- [\[70\]](#) Commission, Explanatory Memorandum, n.8 above.
- [\[71\]](#) Economic and Social Committee, n.10 above, para. 2.12.1.

- [\[72\]](#) Committee of the Regions, n.11 above, para.6: "The COR stresses the importance of an effective access to justice(timely, transparent, affordable and comprehensive); the practical arrangements for this should be based on national law: The process should not entail such high costs that the right of appeal cannot be effectively used".
- [\[73\]](#) European Parliament, Legislative Resolution, n.12 above, Amendment 25.
- [\[74\]](#) Commission, Proposal, n.8 above, Article 7.
- [\[75\]](#) European Parliament, Legislative Resolution, n.12 above, Amendments 26 and 27.
- [\[76\]](#) Commission, Amended Proposal, n.15 above, para. 3.4.
- [\[77\]](#) Council, Common Position, n.17, para.VII.16 and 17.
- [\[78\]](#) Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (1985) OJ L 175/40, amended by Directive 97/11 (1997) OJ L 73/5.
- [\[79\]](#) Directive 80/778 relating to the quality of water intended for human consumption (1980) OJ L 229/11. In 2003, this Directive will be replaced by Directive 98/83 (1998) OJ L 330/32.
- [\[80\]](#) Directive 91/692 on the standardisation and rationalisation of environmental reports (1991) OJ L 377/48.
- [\[81\]](#) Commission, the reporting directive: first report on the application of reports from Member States (1993-1995); (2000) Luxembourg.
- [\[82\]](#) Directive 98/83, n.79 above.
- [\[83\]](#) M.Schmillen, n.66 above.
- [\[84\]](#) Denmark, Sweden, Finland, Ireland, Belgium, Luxembourg, Austria, Greece and Portugal; all new EC Member States except Poland.

RESEARCH PAPERS IN LAW

1. Dominik Hanf et Tristan Baumé, “Vers une clarification de la répartition des compétences entre l'Union et ses Etats Membres? Une analyse du projet d'articles du Présidium de la Convention”, 2003.
2. Dominik Hanf, “Der Prozess der europäischen Integration in Belgien. Voraussetzung und Rahmen der Föderalisierung eines ehemaligen Einheitsstaats”, 2003.
3. Dominik Hanf, “Talking with the “pouvoir constituant” in times of constitutional reform: The European Court of Justice on Private Applicants’ Access to Justice”, 2003.
4. Horst Dippel, “Conventions in Comparative Constitutional Law”, 2003.
5. Ludwig Krämer, “Access to Environmental Information in an Open European Society - Directive 2003/4”, 2003.
6. Ludwig Krämer, “Überlegungen zu Ressourceneffizienz und Recycling”, 2003.
7. Ludwig Krämer, “The Genesis of EC Environmental Principles”, 2003.
8. Takis Tridimas, “The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?”, 2003.