Manual of European Environmental Policy

The following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.

The Manual was published by Earthscan/Routledge from 2010 to 2012. It was designed as an on on-line interactive reference work and annual printed versions were also produced.

This section is the text of the Manual as published in 2012. It is therefore important to note the following:

- The contents have not been updated since 2012 and no guarantee is given of the accuracy of the contents given potential subsequent developments.
- The sections include linThe following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.
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- This section is the text of the Manual as published in 2012. It is therefore important to note the following:ks to external websites (e.g. to legal texts). These links continue to work as long as those links are not broken by those websites.
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The Manual should be cited as follows:

Farmer, A.M. (2012) (Editor). Manual of European Environmental Policy. 1043pp. Routledge, London.

Access to Community institutions and bodies

Formal references	
Regulation (EC) No 1367/2006 (OJ L264 25.9.2006)	Regulation on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters to Community institutions and bodies
Proposed 24.10.2003 COM(2003)624	
Legal base	Article 192 TFEU (originally Article 175 TEC)
Binding dates	
Entry into force	28 September 2006
Applies from	17 July 2007
Commission Decision 2008/50/EC lays down detailed rules for the application of Regulation (EC) No 1367/2006.	
As part of its application of Regulation (EC) No 1367/2006 the Commission adapted its rules of procedure through Decision 2008/401/EC, EURATOM.	

Purpose of the Regulation

The objective of Regulation (EC) No 1367/2006 is to contribute to the implementation of the obligations arising under the Århus Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters by laying down rules to apply the provisions of The Convention to Community institutions and bodies. In doing so, it complements Directives 2003/4/EC (see section on access to information) and 2003/35/EC (see section on public participation), which lay down rules for the application of the provisions of The Convention on, respectively, access to environmental information and public participation in Decision making at the level of the Member States.

Commission Decision 2008/50/EC lays down detailed rules for the application of Regulation (EC) No 1367/2006. As part of its application of Regulation (EC) No 1367/2006, the Commission adapted its rules of procedure through Decision 2008/401/EC, EURATOM.

Summary of the Regulation

Mirroring the structure of the Århus Convention, the Regulation consists of three ‘pillars’. The first, and main one, contains provisions guaranteeing the right of public access to

environmental information received or produced by Community institutions or bodies and held by them (Title II). The second pillar provides for a form of public participation in the preparation of plans and programmes relating to the environment by Community institutions and bodies (Title III). The third pillar establishes rules granting access to review procedures in connection with acts or omissions of Community institutions and bodies within the scope of environmental law (Title IV).

Access to environmental information

For the purposes of the Regulation, 'environmental information' is defined in exactly the same terms as in Article 2(1) of Directive 2003/4/EC on public participation (see section on public participation). In accordance with the provisions of The Convention, Community institutions and bodies, like public authorities in the Member States, have the obligation both actively to collect and disseminate environmental information, and to make available such information upon request to any member of the public. Community institutions and bodies are defined as 'any public institution, body, office or agency established by, or on the basis of, the Treaty'. For the purposes of the access to information provisions of the Regulation only, they include institutions or bodies acting in a judicial or legislative capacity.

Article 4 of the Regulation specifies the obligations with respect to collection and dissemination of environmental information. Community institutions and bodies have a duty to organise the environmental information relevant to their functions and held by them 'with a view to its active and systematic dissemination to the public' and to update this information as appropriate. They shall place such information in databases that are easily accessible to the public through public telecommunication networks and 'equip these with search aids and other forms of software designed to assist the public in locating the information they require'. Where appropriate, this obligation may be satisfied 'by creating links to Internet sites where the information can be found'. In addition to legislative documents and documents relating to the development of policies and strategies, the environmental information accessible through databases shall include:

- Texts of international treaties, conventions or agreements, and of Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment.
- Progress reports on the implementation of these items.
- Steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion.
- Data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment.
- Authorizations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed.
- Environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.

The Commission is given the specific task to 'ensure that, at regular intervals not exceeding four years, a report on the state of the environment, including information on the quality of, and pressures on, the environment is published and disseminated'. This report must also be made available electronically. All Community institutions and bodies shall 'insofar as is

within their power, ensure that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable'.

Before Regulation (EC) No 1367/2006 was adopted or even proposed, general rules regarding public access to documents of the institutions had already been laid down by Regulation (EC) No 1049/2001 pursuant to Article 255(2) of the Treaty (Article 15 TFEU). In its proposal for what became Regulation (EC) No 1367/2006, the Commission aimed at ensuring maximum consistency between these general rules and the specific rules to be established for access to environmental information. Special rules for environmental information were, however, necessary because the requirements of the Århus Convention go beyond the general access regime of Regulation (EC) No 1049/2001. The latter applies only to the European Parliament, the Council and Commission. Article 3 of Regulation (EC) No 1367/2006 provides that the provisions of Regulation (EC) No 1049/2001 shall apply to requests for access to environmental information held by Community institutions or bodies, as defined in Article 2(1)(c), thus extending the scope of the general Regulation beyond the three main institutions in so far as environmental information is concerned. It also provides, in accordance with Article 3(9) of the Århus Convention, that access to environmental information shall be provided to any applicant 'without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities', whereas Regulation (EC) No 1049/2001 restricts the right of access to documents to citizens of the EU.

There are also differences between the exceptions to the right of access laid down in the general Regulation and the grounds on which the Århus Convention allows Parties to refuse requests for access to environmental information. To address this problem, Article 6 of Regulation (EC) No 1367/2006 provides for a number of special rules. The exceptions set out in Article 4 of Regulation (EC) No 1049/2001 shall apply to environmental information, but 'shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment'. In the latter case, 'an overriding public interest in disclosure shall be deemed to exist' which prevails over the protection of commercial interests and the protection of the purpose of inspections and audits, though not investigations, 'in particular those concerning possible infringements of Community law'. In addition to the exceptions set out in Article 4 of the general Regulation, Community institutions and bodies may also refuse access to environmental information 'where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species', which is consistent with similar provisions in the Åhus Convention and Directive 2003/4/EC.

Finally, the Regulation contains provisions requiring Community institutions and bodies receiving a request for environmental information, they do not hold to help the applicant identify the institution, body or even national public authority which may hold the information requested (Article 7), and directing them to cooperate with national public authorities to enable them to disseminate particular environmental information in the event of an imminent threat to human health, life or the environment, as required by Article 5(1)(c) of the Århus Convention (Article 8).

Public participation concerning plans and programmes

The Regulation introduces a requirement for Community institutions and bodies to provide opportunities for public participation in the preparation of plans and programmes relating to the environment, in accordance with Article 7 of the Århus Convention. This requirement is modelled on the provisions of Directive 2003/35/EC (see section on public participation) applying to plans and programmes of Member State authorities. The concept of 'plans and programmes relating to the environment' is defined in Article 2(1)(e) as referring to plans and programmes which:

- Are subject to preparation and, as appropriate, adoption by a Community institution or body.
- Are required under legislative, regulatory or administrative provisions.
- Contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community environment action programme, or in any subsequent general environmental action programme.

The general action programmes referred to in Article 175(3) of the Treaty (192 TFEU) also fall within the scope of the public participation requirements of the Regulation, but not financial or budget plans and programmes 'laying down how particular projects or activities should be financed or those related to the proposed annual budgets', internal work programmes, or emergency plans and programmes designed for the sole purpose of civil protection. Unlike Directive 2003/35/EC, Regulation (EC) No 1367/2006 does not include an annex listing the relevant legislative provisions. Whether its requirements apply depends on a factual appraisal: is the plan or programme designed to contribute to environmental policy objectives or is it likely to have significant effects on those objectives? If so, the requirements of Article 9 of the Regulation will apply to the preparation, modification or review of the relevant plan or programme.

The Community institution or body responsible shall provide 'early and effective opportunities for the public to participate' and shall do so 'when all options are still open'. When the Commission prepares a proposal for a plan or programme for submission to other Community institutions or bodies for Decision, public participation shall be organized at the preparatory stage. The procedure provides for the following steps:

- The responsible institution or body shall 'identify the public affected or likely to be affected by, or having an interest in' the plan or programme.
- It shall ensure that the relevant public is informed of the draft proposal, where available, of any environmental information or assessment relevant to the plan or programme under preparation, and of the practical arrangements for participation, including 'reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process'.
- The relevant public shall be given a period of at least eight weeks for submitting comments, opinions or questions, and where meetings or hearings are organized, prior notice of at least four weeks shall be given, though these time limits may be shortened in certain cases.
- In taking a Decision on the plan or programme, the institution or body in charge 'shall take due account of the outcome of the public participation' and shall inform the public of its Decision, including the reasons and considerations upon which it is based.

Article 2 of Regulation (EC) No 2008/401/EC provides that the Commission shall ensure public participation in accordance with the Commission's Communication ‘General principles and minimum standards for consultation of interested parties by the Commission (COM(2002)704)’.

Internal review and access to justice

Title IV of the Regulation is designed to implement the provisions of Article 9(3) of the Århus Convention, which requires Parties to provide members of the public with access to 'administrative or judicial procedures' to challenge acts and omissions by *inter alia* public authorities which contravene provisions of their law relating to the environment. The Convention's definition of public authorities includes Community institutions. Such access to review procedures may be made subject to legal criteria.

In order to meet this requirement, the Regulation establishes a new procedure for 'internal review' by Community institutions and bodies of 'administrative acts under environmental law'. Implementing rules on Decisions concerning the admissibility of requests for internal review are laid down by Decision 2008/401/EC. The procedure for internal review is accessible to any NGO which meets the following 'criteria for entitlement' laid down in Article 11 of the Regulation:

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

The Commission later adopted the 'provisions which are necessary to ensure transparent and consistent application of the criteria' laid down in Article 11 in Commission Decision 2008/50/EC.

The scope of application of the internal review procedure is determined by the notions of 'administrative act' and 'environmental law' as defined, respectively, in Article 2(1)(g) and (h) of the Regulation. An administrative act is 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'. Environmental law is defined as 'Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty'. The definition then quotes verbatim the objectives laid down in Article 174(1) of the Treaty (Article 191 TFEU). Consequently, for the purposes of Regulation (EC) No 1367/2006, environmental law is not limited to legislation based on Article 175 of the Treaty (Article 192 TFEU).

The review procedure can be triggered by a written request for internal review, stating the grounds for the review and submitted by an NGO meeting the above-mentioned criteria to the Community institution or body responsible within six weeks of the date of adoption, notification or publication of the administrative act, whichever is the latest. If the request concerns an administrative omission, the relevant date is the date on which the required administrative act should have been adopted. The purpose of the internal review procedure is to force reconsideration of the act or omission in question. The institution or body to which the request is addressed shall have an obligation to consider it and to send the applicant NGO a written reply stating its reasons, unless the request is 'clearly unsubstantiated'. The time limit for sending a reply is 12 weeks after receipt of the request, but if the institution or body is 'unable, despite exercising due diligence' to meet this deadline, it may extend the time

limit to a maximum of 18 weeks by informing the applicant ‘of the reasons for its failure to act and when it intends to do so’ within the original 12-week period.

Article 12 of the Regulation provides that the organization which made the request for internal review ‘may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty’ where the Community institution or body concerned fails to deal with the request in accordance with the provisions of Article 10(2) or (3). The relevant Treaty provision referred to is Article 230, whose third indent provides that any natural or legal person may ‘institute proceedings against a Decision addressed to that person or against a Decision which, although in the form of a Regulation or a Decision addressed to another person, is of direct and individual concern to the former’. The European Court of Justice shall review the legality of the contested act and may declare it void ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers’. It is unclear whether judicial review pursuant to Article 12 of Regulation (EC) No 1367/2006 can address the legality of the initial administrative act or omission which was the subject of the request for internal review, or only that of the Community institution or body's reply to this request, or lack thereof. In the former case, the Regulation would effectively open access to justice for environmental NGOs meeting its entitlement criteria, allowing them, following preliminary recourse to the internal review procedure, to challenge the legality of ‘administrative acts under environmental law’ adopted by Community institutions or bodies before the European Court of Justice where they previously lacked standing to do so because of the ‘direct and individual concern’ test of Article 230. It is, however, more likely that the Court will opt for the latter, more restrictive interpretation, limiting the scope of its judicial review to the formal outcome of the internal review procedure.

Development of the Regulation

The Regulation is part of a package of measures proposed by the Commission for the purpose of implementation, in Community law, of the provisions of the Århus Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters. This Convention, which entered into force on 30 October 2001, was negotiated within the framework of the United Nations Economic Commission for Europe and has been signed by 44 States, and ratified by the European Community and all EU Member States except Ireland. The European Community ratified The Convention on 17 February 2005.

Directives 2003/4/EC and 2003/35/EC were adopted before the EC became a Party to ensure implementation of The Convention's provisions on, respectively, access to information and public participation in the Member States. At the same time as it proposed a Council Decision on the approval of the Århus Convention by the EC, the Commission also submitted its proposal for what became Regulation (EC) No 1367/2006 as well as a proposal for a Directive on access to justice (COM(2003)624), which has not been adopted so far.

During the negotiation of The Convention, the Community made clear its intention of becoming a Contracting Party and argued that its institutions should legally be treated in the same way as national public authorities under The Convention. The definition of ‘public authority’ in Article 2(2) of The Convention was specially crafted to include Community institutions. Upon signing The Convention in Århus on 25 June 1998, the EC made the following declaration:

‘Fully supporting the objectives pursued by The Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to The Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply The Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by The Convention.

The Community will consider whether any further declarations will be necessary when ratifying The Convention for the purpose of its application to Community institutions’.

The legal and institutional implications of the application of The Convention's provisions to the institutions required detailed consideration, as appears from the wording of this statement. Eventually, the Commission decided that a Regulation simultaneously addressing the three ‘pillars’ of The Convention was the most appropriate instrument to ensure this application. Certain aspects of the proposal turned out to be quite controversial, and eventually a conciliation between the European Parliament and the Council was necessary to reach agreement on the final version of the Regulation.

Regarding access to environmental information held by Community institutions and bodies, the main political issue was that of the scope of acceptable restrictions to the freedom of access. As mentioned above and alluded to in the Community's declaration, general provisions on public access to European Parliament, Council and Commission documents were laid down in May 2001, before the Community became a party to The Convention. These provisions allow for more derogations from the public right of access than the corresponding provisions of The Convention, which were transposed into EC law for the Member States by Directive 2003/4/EC on public access to environmental information. The Council's common position referred to the general regime of Regulation (EC) No 1049/2001, with only a minor variation to ensure that the exception relating to industrial secrecy is not unduly invoked to refuse disclosure of information on emissions. The Parliament wanted these provisions replaced by a reference to the more liberal rules of Directive 2003/4/EC, to ensure equal access to environmental information held by the EU institutions and public authorities in the Member States. Within the Council, Belgium pointed out that the general regime of Regulation (EC) No 1049/2001 was not fully consistent with The Convention. Eventually, the Council's common position on this issue prevailed with only minor amendments.

As regards the public participation provisions, the Parliament proposed to extend participation rights to the public in general public rather than only the public ‘affected’ by or ‘having an interest’ in such plans or programmes and to limit the exemption for financial plans by including all plans and programmes subject to funding by the EU within the scope of the procedure, though those relating to particular projects would still be excluded. These amendments were also successfully resisted by the Council. However, the time limit for the submission of comments by the public was extended, and Parliament also succeeded in introducing language requiring Community institutions and bodies to ‘take due account of the

outcome of the public participation' in their final Decisions on relevant plans and programmes.

The provisions on 'internal review and access to justice' in the Commission's original proposal were watered down by the Council in its common position which merely refers to 'the relevant provisions of the Treaty', whereas the Commission had formulated the provisions on access to the Court of Justice for NGOs more explicitly in its proposal, in an attempt to circumvent the Court's restrictive case-law on 'direct and individual concern'. The Parliament's Environment Committee had proposed an amendment that would have reinstated the provisions on judicial review as originally proposed by the Commission, but this was not endorsed by the plenary.

In the final vote in the Council, Belgium abstained and made a formal declaration for the minutes in which it stated its view that 'some provisions of the Regulation are not in conformity with it or are inadequate to ensure compliance with the Århus Convention as a whole'. In particular, according to the Belgian declaration, the Regulation 'does not scrupulously transpose the Århus Convention as far as the series of exceptions' to the public's right of access to information is concerned. Belgium also 'regrets that the provisions of Title IV of the Regulation concerning the procedure for internal review and access to justice, as adopted by the Council in amending the initial Commission proposal, are drafted so restrictively and do not allow members of the public broad access to the legal remedies which the institutions are, however, obliged to guarantee in accordance with the Århus Convention'.

Implementation of the Regulation

Since the Regulation is directly applicable and applies only to Community institutions and bodies, no implementing measures are required in the Member States.

The lack of access to justice at EU level for environmental NGOs is considered by many observers as a barrier to effective enforcement of EU environmental law. It is a matter of fact that environmental NGOs are hardly involved in ECJ cases. If they are involved, these cases concern the request from national courts for a preliminary ruling. In practice, access to EU courts is not possible for environmental NGOs which have seen all their actions in the past declared inadmissible as they were considered not to be directly and individually concerned. The narrow construction by the ECJ of direct and individual concern has therefore shut the door in practice for private enforcement in direct actions at EU level.

This was expected to change with the Community's ratification of the Århus Convention, but according to observers such as Krämer[1] and Wennerås[2] Regulation (EC) No 1367/2006 which intends to implement the Convention at EU level falls short in this in several respects and is therefore not in compliance with the requirements on access to justice of the Århus Convention.

Enforcement and court cases

No cases have been concluded by the European Court of Justice relevant to the Regulation.

Further developments

As the EU is a party to the Århus Convention, it is required to submit a report to each Meeting of Parties (MoP) on the legislative, regulatory and other measures taken to implement the Convention, and their practical application. Acting upon this requirement the European Commission prepared a draft report on EU implementation of the Århus Convention to be submitted to the 4th MoP in Moldova in June 2011.[3] This draft report had been put to consultation from 17 November 2010 to 26 January 2011. Major issues referred to in the report related to the first and third pillar of the Convention. As to access to environmental information (first pillar), the report discussed some of the Ombudsman's clarifications of access to information provisions and to a lawsuit issued by ClientEarth. As to access to justice in environmental matters (third pillar), it concluded that there remains lots of room for improvement at national level.

Related legislation

There are a number of other EU legislative pieces which are closely related to Regulation (EC) No 1367/2006. These are:

- Directive on public access to environmental information (2003/4/EC) (see section on access to information).
- Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (2003/35/EC) (see section on public participation).
- Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

Whereas Regulation (EC) No 1367/2006 contributes to the implementation of the obligations arising under the Århus Convention at EU level, these two Directives implement those obligations at Member State level. Whereas Regulation (EC) No 1049/2001 lays down general rules regarding public access to documents of the three institutions, Regulation (EC) No 1367/2006 lays down specific rules for access to environmental information from all EU institutions and bodies.

References

1. Krämer, Ludwig (2008) Environmental judgments by the Court of Justice and their duration. *Research Papers in Law*. European Legal Studies. College of Europe. Bruges.

2. Wennerås, Pal (2007) *The Enforcement of EC Environmental Law*. Oxford University Press.

3. European Commission (2010) Consultation on the Implementation Report of the Århus Convention submitted by the European Union to the Århus Secretariat, http://ec.europa.eu/environment/consultations/aarhus.htm.