The Aarhus Convention – a closed society in the name of openness?

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Abstract

This article has a double aim. First, it informs about the main conclusions that were drawn in a study on access to justice in information cases that was performed by the Task Force on Access to Justice under the Aarhus Convention. The conclusions in the study focused on 1) unproblematic issues, 2) barriers and challenges, and 3) good examples and interesting features in the countries studied. Second, a discussion follows about the controversies that preceded the publishing of the study. According to the author, the lengthy and contentious process until the study was allowed to be published shows some worrying tendencies against openness and a lively debate within the Aarhus Community. This controversy touched upon some issues of primary interest in relation to the Aarhus Convention. All three pillars of the Convention express the need for transparency and openness in the administration of environmental decision-making, thereby setting an international standard for "good governance" in this field of law. For obvious reasons, this standard should also be valid for the work within the internal administration of the Convention. If the neutrality of the UNECE bureaucracy can be questioned, it may have a negative effect on the general support for – and legitimacy of – the Aarhus Convention. A debate about the transparency and openness within the organization is of crucial importance in times when there is a growing tendency among the Parties to challenge the availability of access to justice for the public concerned in environmental matters.

1. The Task Force on Access to Justice and the Information Study

1.1 The Mandate of the Task Force

The Task Force on Access to Justice is a subsidiary body under the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The mandate for the Task Force reads as follows (abbreviated):[1]

> (a) To promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention, with a focus on the main barriers to effective access to justice and with special attention to:
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> (i) Information cases;
>
> (…)
>
> c) As resources allow, to prepare analytical, guidance and training materials to support the work detailed in subparagraphs (a) and (b) above;
>
> (d) To promote understanding and the use of the relevant findings of the Compliance Committee of a systemic nature, multi-stakeholder dialogues and e-justice initiatives, and the dissemination of information on access to review procedures, relevant case law and collections of relevant statistics;

[1] The mandate as set out in decision VII/3 on promoting effective access to justice; https://unece.org/env/pp/tfaj-mandate > accessed 2023-01-25.

I chaired the Task Force between 2008 and 2021 and my general experience of the work and activities of this body is overall very positive. The aim has been to provide a unique multi-stakeholder forum for experts from governments, civil society, members of the judiciary, legal professionals, international and regional organizations and other stakeholders. As the legal frameworks for judicial and administrative review in environmental matters vary among Parties, this sharing of experiences, learning from good practices and discussing different issues has been helpful in the understanding of the crucial importance of access to justice in environmental decision-making. The strength of the meetings of the Task Force has been the open atmosphere in which the delegates have been able to air all kinds of questions related to the third pillar of the Convention. This may also be the main reason for the positive outcome of the evaluation of our work that was performed within UNECE in 2013. There has also been a gradual increase in participation in the annual Task Force meetings over the years, which of course is very satisfactory.

In addition to setting up these meetings, the Task Force has focused on the development of analytical and support material on important issues under the Convention. To date, fifteen studies from different sub-regions are available on the Task Force webpage.[2] Six of these have been undertaken and managed by the Task Force directly or by assigned consultants.[3]

[2] https://unece.org/env/pp/analytical-studies-on-access-to-justice

[3] See letter to the Bureau, dated Stockholm 18 June 2019, posted on; www.jandarpo.se/ *In English/Articles & reports*.

1.2 Access to justice in information cases

Access to information plays a crucial role in environmental matters. Without information, the public cannot participate in decision-making procedures in any meaningful way. It is a vital ingredient in what is regarded as "good governance" in this field of law, aiming at keeping the public well informed and engaged in the procedures. This way, access to information improves transparency in decision-making and thereby secures the environmental interests protected in law. The involvement of many stakeholders from the very beginning in environmental proceedings also serves as a means for improving the quality of the decision-making and thereby reduces the need for court proceedings.

Against this background, it is quite surprising that access to justice in information cases has drawn relatively little attention in the Aarhus discourse over the years.[4] Cases concerning Article 9.1 and its implementation by the Parties to the Convention are rather few in number compared with those dealing with Articles 9.2 and 9.3. Out of a total of almost 150 cases, as of today the Aarhus Compliance Committee has decided only five cases concerning this issue.[5] Even if there are more cases now pending containing

[4] However, it has been highlighted in other fora, such as the Council of Europe in its 2002 Recommendation on Access to Official Documents and Principle IX therein, also OSCE's 2007 review of the right of access to information in the OSCE region. For further information, , see Oversight bodies for access to information | OECD iLibrary (oecd-ilibrary.org) > accessed 2023-01-25.

[5] Findings of the Aarhus Convention Compliance Committee on communications C/2004/1 *Kazakhstan*, C/2008/30 *Republic of Moldova*, C/2012/69 *Romania*, C/2013/93 *Norway* and C/2015/134 *Belgium* seem to be the most important cases on access to environmental information, however these cases mostly deal with the definition of environmental information, grounds for refusal, timeliness and weak enforcement. The documents and other information are available at: https://unece.org/env/pp/cc/communications-from-the-public > accessed 2023-01-25.

allegations concerning the implementation of Article 9.1 (e.g., see communications C/2018/161 and C/2019/173), it remains to be seen what comes out of those that may be of importance from an access to justice perspective. Also on the national level there are a limited number of court cases concerning access to justice in information cases. The same goes for infringement cases and requests for preliminary rulings in the CJEU, where the vast majority of some 50 Aarhus cases deal with the implementation of Articles 9.2 and 9.3. To a certain extent, however, this general picture is balanced by the fact that there are some very interesting cases regarding requests for environmental information from the EU institutions that have been brought by the ENGO community by way of direct action to CJEU according to Regulation 1049/2001 and Regulation 1367/2006.[6] But even so, the general impression is that access to justice in information cases has not been given the attention it merits in the public debate concerning Aarhus and its implementation in the UNECE region.

1.3 The information study

In order to compensate for this lack of attention and to start a wider debate on the implementation of Article 9.1 in the Parties to the Convention, the Task Force on Access to Justice was mandated to perform a study on access to justice in cases concerning environmental information in the inter-sessional period 2017–2021. Therefore we distributed a questionnaire to a regionally representative selection of countries, Parties to the Convention. A report of the responses was presented to the meeting of the Task Force in 2019, informing about the results and drawing some conclusions about main barriers and good examples. However, this report was met with objections from parts of the ENGO community, claiming that the Task Force's mandate was exceeded. This controversy grew long and contentious, involving both the secretariat and the Bureau – the executive body of the Convention between the Meetings of the Parties[7] – and the study was not published until the beginning of 2021.

Against this background, this article deals with two issues relating to the study on access to justice in information cases. First, the most important conclusions that can be drawn from the study are highlighted, and second, what lessons can be learned from the controversy about the room for debate allowed under the Convention?

2. The information study – conclusions of general interest

2.1 The design and performance of the study

The study covered access to justice in information cases according to Article 4, compared with Articles 9.1 and 9.4 of the Convention. The relevant sections of Article 4 require the Parties to ensure that public authorities make environmental information available on request from the public as soon as possible. A refusal can only be made referring to certain derogation grounds and is required to be in writing stating the reasons for the decision, and must be given within certain time limits. The requester must also be informed about available access to review procedures in accordance with Article 9. Article 9.1 states as follows (emphasis added):

> 1. Each Party shall, within the framework of its national legislation, ensure that *any person* who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part

[6] See C-673/13 P *European Commission v Stichting Greenpeace NL and PAN Europe* (2016), and C-57/16 P *ClientEarth v European Commission* (2018), both with references to CJEUs case-law.

[7] https://unece.org/env/pp/aarhus-convention-bureau > accessed 2023-01-25.

> or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, *has access to a review procedure before a court of law or another independent and impartial body established by law*.
>
> In the circumstances where a Party provides for such a *review by a court of law*, it shall ensure that such a person *also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*.
>
> Final decisions under this paragraph 1 shall be *binding on the public authority* holding the information. *Reasons* shall be stated *in writing*, at least where access to information *is refused* under this paragraph.

Further, Article 9.4 puts additional requirements on access to justice under Article 9.1, namely that the process for appeal *shall provide adequate and effective remedies, be fair, equitable, timely, and not prohibitively expensive*.

Thus, the study dealt with procedural issues concerning requests for environmental information and the possibilities open for members of the public to challenge the decision-making of the authorities and other public bodies holding such information by way of administrative appeal and judicial review in a court of law. A questionnaire was distributed to a number of key institutions, experts and non-governmental organizations from 13 Parties to the Convention as suggested by their National Focal Points. The aim was to cover a limited number of Parties, representing the differences among the Parties and sub-regions. The questions raised concerned issues such as time limits and form of administrative refusals to disclose information on request from the public, avenues for appeal, costs in the appeal procedure, enforcement of decisions on appeal from courts or other independent and impartial bodies, main barriers and good examples, as well as innovative approaches to access to justice in this field of law. During the autumn of 2018, completed questionnaires from 12 Parties were received.[8] Of course, the responses varied in coverage and quality. This was mainly due to the number of responses from each Party, ranging from 4 (Sweden), 3 (Ireland, Serbia and Slovakia), 2 (EU, Germany, Kazakhstan and Portugal) and down to 1 (Georgia, Moldova, Montenegro and Switzerland). The quality of the answers from a studied Party improved noticeably when there were many respondents from a variety of actors dealing with environmental information matters. In the final report, the responses from each Party to 12 questions were given, after which some general conclusions were drawn. A synthesis of these will follow next.

2.2 Unproblematic issues

To begin with, it is worth noting that several issues seem to be unproblematic from an access to justice perspective in environmental information cases in all 12 of the Parties studied. First and foremost, *standing* does not seem to be an issue in these cases, as anyone can ask for environmental information without having to state an interest in the matter. Also, other concerned persons and entities are commonly accepted as parties to the proceedings, such as those whose interests may be negatively impacted by the disclosure.

Further, *formal time frames* for the administrative decision-making and reconsideration procedures seem to be less of a problem. Something similar can probably be said about the re-

[8] The responses received are available at https://unece.org/environment-policy/public-participation/aarhus-convention/analytical-study-ajai-surveyresponses > accessed 2023-01-25.

view proceedings in the established information tribunals in the studied Parties. Having said that, this statement must also be distinguished from timeliness in practice, where the picture may be quite different.

Moreover, the requirement to provide *written reasoned decisions* in cases concerning environmental information seems to be met in the studied Parties. Further, there appear to be no *costs in the administrative phase of the appeal* of decisions on environmental information. Also, regarding the *availability of decisions and judgments*, there seems to be a general fulfilment of the Aarhus Convention requirements, at least concerning those from information tribunals and courts of last instance. The power to *impose administrative and even criminal sanctions for serious misconduct and maladministration* also seems to exist commonly in the studied Parties, at least in theory. Further, no clear cases of *harassment or defamation claims* against those who request environmental information were reported. Misuse and abuse of access to information rights seems to be slightly more common, although the evidence given in the study is mostly anecdotal. Be that as it may, it was interesting to note that some of the respondents informed that their authorities have developed specific procedures to avoid abuse and to handle wide-ranging requests ("fishing expeditions").

2.3 Barriers and challenges

Based on the responses, it is safe to say that the main barriers to access to justice in information cases are the *length of the procedure*, *weak enforcement* and – to a certain extent – *costs on judicial review*. The first issue can be illustrated by one of the responses, according to which the court procedure in that Party at first instance is expedient and effective, commonly lasting for no more than one month. On appeal, however, the procedure is slow, unpredictable and the appeal has no suspensive effect on the issue to which the environmental information relates. Examples are also given from other Parties of complex cases that have taken more than 4 years from the administrative decision to the final judgment, and sometimes even longer. One should also take into account that access to information can be urgent in environmental cases; for example, if the request is made in order to obtain information concerning an EIA on a permit application, the permit might already be issued at the time of the court order for disclosure. This is a typical example of what may be called a "case won in court, but lost on the ground". Against this background, the requirements for timeliness should be interpreted with extra care in relation to information cases.[9] Therefore, this issue needs to be further discussed as a major obstacle for access to justice in environmental information cases.

It is similarly evident that the failure to enforce orders for disclosure by information tribunals and courts is another important barrier to access to justice in information cases. Weak enforcement is widely reported in the study, occurring mainly in three situations. The first is when the information-holding authority fails to respond to the disclosure order, or tries to evade it with silence. The second is when the reviewing court's competence is confined to quashing the administrative decision, which necessitates the information applicant to make a renewed request. If then the authority finds another ground for refusal, the applicant must appeal once again to the court, which may quash the decision once again, etc. Such "ping-pong" seems to be quite common in some of the studied Parties. The third situation is when the enforcement lies in the hands of a body other than the court, or

[9] See Compliance Committee's statement in the last sentence of paragraph 88 in findings on communication ACCC/C/2013/93 (Norway), also C/2015/134 *Belgium* paragraphs 134–141.

in another procedure separated from the appeal process. By contrast, effective enforcement seems to be achieved when the court or tribunal deciding on the merits of the case also has the power to impose fines for disobedience, at least as far as this power is actually used in practice.

Costs are always mentioned as barriers to access to justice in environmental cases, and this picture is – at least to a certain extent – confirmed in our study. As such, information cases are indistinguishable from other kinds of environmental cases, although the costs in a number of studied countries are at a lower level in the access to information cases. On the other hand, litigation costs in some of the studied Parties can be quite substantial. This can partly be attributed to a mandatory requirement for litigants to be represented by a lawyer in court. For now, there is little to add to this general discussion, except to observe that costs do not seem to be an issue in the information tribunals which some of the studied Parties have set up. These bodies seem also to provide some solution for the other two barriers mentioned here, that is, lack of timeliness and weak enforcement.

2.4 Good examples and interesting features in the studied Parties

There were three features of particular interest in the reports from the Parties studied. To begin with, the establishment of information tribunals seems worth promoting, as they can provide the information-seeking public with an expeditious and inexpensive avenue for appeal of administrative decisions. Furthermore, as such bodies can be specialised in this field of law and may be equipped with a competence to undertake mediation (see below), they may provide sufficient experience and expertise to guarantee legal certainty and swiftness in the procedure. If they meet the criterion of being independent and impartial according to Article 6 of the European Convention on Human Rights (ECHR) and Article 267 in the Treaty on the Functioning of the European Union (TFEU), they can also ease the burden of the national court systems. The practice of having information tribunals is also a feature that has raised growing attention in international law due to the positive experiences with them. For example, the Organisation for Security and Cooperation in Europe Representative on Freedom of the Media recommended in 2007 to create such independent oversight bodies in its Member States.[10]

Further, in many of the legal systems, administrative silence is regarded as a negative decision when the deadline given in law has expired. This legal construct for dealing with administrative silence or administrative delay is in line with a general development in modern administrative law, not least in order to strengthen the application of EU law. The possibility for certain actors to bring a case to the CJEU in order to challenge failures to act by the institutions of the EU already exists in Article 265 TFEU. The result of such an action is that the Court declares the omission to be in breach of the EU Treaties. Also, secondary EU legislation contains a number of legal constructs in order to deal with administrative omissions or silence. According to Article 12 in Directive 2014/65 on markets in financial instruments, the consequence of silence from the competent authority on a notification from someone to undertake an acquisition is that the authority has no objection to the merger. This is an example of what is a called a "positive silence rule". Examples of the opposite – "negative si-

[10] See Report by the OSCE Representative on Freedom of the Media on access to information by the media in the OSCE region: trends and recommendations available (30 April 2007, p. 4) at https://www.osce.org/fom/24892 > accessed 2023-01-25.

lence rules"[11] – can be found in Article 10(6) of the EC Merger Regulation 139/2004. Even more relevant is Article 8(3) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, which states that the failure of the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings and/or make a complaint to the Ombudsman. Also, in Member State laws such negative silence rules have established roots and are today quite common.[12] A general conclusion is that this legal construct – which in essence means that silence is equal to an appealable refusal – shows an example of how to deal with administrative passivity as regards access to environmental information. Having said this, there can also be drawbacks to such a system; when the information-seeking public appeals "silence", the administration's arguments against disclosure may be unknown, something that may make the procedure in court unpredictable, complicated and – not least – lengthy. For this reason, such a system with "deemed refusals" does not comply with Article 4.2 of the Aarhus Convention, which states that when a request for environmental information is denied, the authorities must provide the applicant with a written decision, stating the reasons and informing about review possibilities.[13]

The final good example concerns mediation. As noted in the study, mediation possibilities are available in information cases in a number of the studied Parties, both in information tribunals and in courts. Respondents noted that agreements reached through mediation can be effectively implemented due to their status as executable documents. Further, mediation may be a useful tool in the initial phase of the proceedings, for getting the parties together to clarify the controversial issues and to see whether any settlement can be reached between them.

3. The controversy surrounding the study

3.1 The lengthy and contentious procedure before publishing

The decision to launch a study on access to justice in information cases was taken at the 11th meeting of the Task Force in February 2018, after which the questionnaire was disseminated. During the autumn of 2018, responses to the questionnaires from the Parties concerned were submitted to the secretariat, from which a report was developed to the 12th meeting of the Task Force in February 2019. Before the draft was sent to the delegates for their review, it was discussed with the secretariat. However, at the meeting of the Task Force, two ENGOs voiced concerns that the report was too negative in respect of the role of the Ombudsman institution in Communication C/2013/93 *Norway*. The ENGOs also claimed that the report exceeded the mandate of the Task Force, as it addressed the interpretation of the Convention and the findings of the Compliance Committee. These views were not echoed by any of the other delegates at the meeting. For my own part, I expressed regret that the text regarding the findings in C/2013/93 had been perceived as being too evaluative and undertook to address that issue in the next draft of the study. Further, it was confirmed that the ambition of the text was to remain faithful to the Convention and the findings of the Compliance Committee, while leaving room for analysis and the drawing of conclusions from those sources of law, all in accordance with the mandate. Lastly, it was noted that this had been a common approach for all of the analytic studies undertaken under the aus-

[11] Sometimes also called "implied dismissals" or "deemed refusals".

[12] See opinion by Advocate General Wahl in C-58/13 and C-59/13 *Torresi* (2014), at para 70.

[13] C/2013/93 *Norway* para 82 and C/2015/134 *Belgium* para 98.

pices of the Task Force since 2008, and that this wide room for discussion was essential for the functioning of our body. After having discussed the text with the secretariat after the meeting, we agreed that some of the observations in the report should be rephrased.

In version 2, the law as it stands today was explained, using ordinary sources of law such as the text of the Convention, decisions made by the Compliance Committee, and taking into account state practice and "soft law sources" such as the Implementation Guide 2014.[14] This version was checked with a group of friends of the Task Force – including the late Veit Koester, former chair of the Compliance Committee – and we agreed that the text was loyal to the Convention and the Compliance Committee's findings and did not draw any controversial conclusions. It was therefore quite surprising when the secretariat reacted strongly against the revised text, claiming that no body under the Convention, except the Compliance Committee, is mandated to express a view about the understanding of the Aarhus text and the practice created thereunder. The secretariat therefore suggested major revisions, erasing two thirds of the text in the analytic part and inserting observations of various proportions. As these revisions of the findings of the study were not acceptable to me, we finally agreed that we would "agree to differ" about the text and the mandate of the Task Force. As this issue engages the basic principles of transparency and openness under the Convention, a meeting was organised with the Bureau in June 2019 with the participation of the secretariat, the Swedish delegate and me.[15] However, the Bureau convened on the matter in a second meeting in September that year and thereafter again delegated the matter to the secretariat. The secretariat once again pressed for major revisions to the text, which I continued to oppose. This controversy continued during the autumn of 2019, but at the end of the day the secretariat gave up their objections. The study could therefore be concluded in January 2020 without any major revisions or changes in substance. This version was presented at the 13th meeting of the Task Force in February 2021 and thereafter published. The report and the controversy were obviously also mentioned in the "Note from the chair" to the 7th Meeting of the Parties in October that year.[16]

3.2 The controversial parts of the study

In addition to the mere reporting of the responses from the Parties and the above-mentioned sections containing general conclusions and interesting features in the study, the report had an introduction aiming at an analysis of how to understand the requirements in Article 9.1. The objections raised by the ENGOs about exceeding the mandate, and the controversy with the secretariat, concerned this section. In order to show the whole picture, an account is therefore given here of the analysis in that section of the study.

The headline to the introduction reads "Article 9.1 in text and practice". It emphasised that the aim of the study was not to give clear answers to certain issues raised, but rather to provide a platform for further discussion. Ambiguities in the text of the Convention were pointed out and

[14] The Aarhus Convention: An implementation guide, UNECE 2nd ed. 2014; https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition.

[15] A more comprehensive overview of the process of the study on access to justice in information cases and a description of the previous studies that have been performed by the Task Force is given in my letter to the Bureau on 18 June 2019 (see below).

[16] https://unece.org/environmental-policy/events/Aarhus_Convention_MoP7 > accessed 2023-01-25. The report to the meeting, my letter to the Bureau and the secretariat's edits in the controversial parts in the study are posted in a joint document on; http://jandarpo.se/articles-reports/

conclusions drawn from existing legal sources using a traditional method of law. It was also clearly stated that the responsibility for resolving any issues raised obviously lies in the hands of the Compliance Committee and the Meeting of the Parties to the Convention.

Thereafter, the text read as follows:

"As noted in the beginning (…), the first sentence of Article 9.1 requires Parties to the Convention to provide the person requesting environmental information with recourse to challenge the authority's decision on the matter *in a court of law or another independent and impartial body established by law*. The same expression can be found in Article 9.2 of the Convention and is reflected in the EU's implementation legislation on Article 9.1, namely Article 6 of the Environmental Information Directive (2003/4, EID[17]). It is widely believed that this expression equates to "any court or tribunal" in Article 267 TFEU, as well as "an independent and impartial tribunal established by law" in Article 6 European Convention of Human Rights and Fundamental Freedoms (ECHR), requiring a fair trial.[18] It also goes without saying that these expressions are "autonomous", meaning that the national label on the reviewing body is of little importance when evaluating its independence and impartiality.[19] As a consequence, the first sentence of Article 9.1 calls for a review mechanism performed by such a body, irrespective of how it is named in the national legal system.

Furthermore, Article 9.1 requires that *any person* has access to a court or tribunal in order to challenge a refusal on a request for environmental information. To date, the Compliance Committee has found non-compliance under Article 9.1 concerning who is entitled to make such a request in only one case and that was the early communication C/2004/1 *Kazakhstan*. This general picture was confirmed in the study as there were no issues reported concerning applicants for environmental information in this respect. In fact, as all members of the public irrespective of nationality, residence or other belonging are allowed to make such a request without stating an interest, one may note that "standing" according to Article 9.1 is very different from standing in a more traditional sense, meaning the delimitation of those who are concerned by a decision or omission. This distinction is reflected in the two definitions of the concepts "the public" and "the public concerned" in Article 2.4 and Article 2.5 respectively. Thus, when Article 4 refers to "the public", this means that all natural or legal persons and their associations, organisations and groups have the right to make a request for environmental information.[20]

Although not explicitly stated in the first sentence of Article 9.1, the review required here covers *both procedural and substantive issues* under Article 4.[21] As one cannot really draw a clear distinction between the two aspects, it is hard to imagine what a review covering only one of them would actually look like. Although this issue has not really been examined by the Compliance Committee, the Court of Justice of the European Union (CJEU) confirmed in case C-71/14 *East*

[17] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[18] See for example The Aarhus Convention – An Implementation Guide, UNECE 2nd ed. 2014 (cit. "Implementation Guide 2014") at page 189.

[19] For a discussion about the meaning of the expression *court of law or another independent and impartial body established by law*, see the Implementation Guide 2014, at pages 188–189, also Darpö, J: *Environmental Justice through the Courts*. From Environmental Law and Justice in Context (Eds. Ebbesson & Okowa). Cambridge University Press 2009, p. 176–194.

[20] The Implementation Guide 2014 at page 191.

[21] The Implementation Guide 2014 at page 191.

Sussex (2015) – which concerned the requirements for access to environmental information according to the EID (2003/4) – that judicial procedures in the Member States must enable the national court "*to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness*" of an administrative decision to deny such access.[22] Although this court has no direct competence to interpret the Aarhus Convention, its case-law on the implementation in the Member States provides us with "state practice" concerning the obligations therein.[23]

According to the second sentence of Article 9.1 of the Aarhus Convention, if the review under the first sentence of Article 9.1 is provided by a court of law, the unsuccessful applicant shall also have access to an expeditious procedure for *reconsidering by a public authority* or *review by an independent and impartial body other than a court of law*. The understanding of *what body* and *in what way* the alternative procedure shall be performed is thus of importance here. According to the text, it shall either consist of "reconsideration by a public authority" or a "review by an independent and impartial body other than a court of law". This issue was touched upon in Communication C/2013/93 *Norway*, where the Compliance Committee stated in its findings:

> The Committee considers that, under the legal framework of the Party concerned, the Parliamentary Ombudsman is an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under article 4 of the Convention. The Committee therefore finds that the Parliamentary Ombudsman of the Party concerned constitutes a review procedure within the scope of the second sentence of article 9, paragraph 1, of the Convention.[24]

Here, it can be noted that the recommendations by the Parliamentary Ombudsman are not binding, although normally respected by the authorities. In communication C/2013/93, the time taken for the Ombudsman's review was at issue. When deciding this, the Compliance Committee applied both the requirement for expediency in the second sentence of Article 9.1 and the general timeliness criterion in Article 9.4. All in all, the time span between the request to the Ombudsman for review of the Government's refusal to disclose the information and the final recommendation was two and a half years, which was found to be in breach of those requirements. In finding this, the Committee particularly noted that "nowhere in the documentation before it does the Ombudsman appear to have instructed the Ministry to respond within a certain time or even to request it to reply in a timely or expeditious manner".[25] However, while finding that the Party concerned had failed with the requirements to be expeditious and timely, the Committee did not make recommendations to the Party concerned, as there was no evidence that the non-compliance was due to a systematic error.[26] Even so, based on findings on communication C/2013/93, a reasonable conclusion is that an Ombudsman institution can be accepted as a review mechanism under the second sentence of Article 9.1.

The rationale for the Committee's standpoint seems to be that as long as the Party provides

[22] C-71/14 *East Sussex* (2015) para 58.

[23] Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT), see Wouters, J & Ryngaert, C & Ruys, T & De Baere, G: International law – A European perspective. Hart Publishing 2018, pp. 100–103.

[24] Findings of the Aarhus Convention Compliance Committee on communication C/2013/93 *Norway*, para 86.

[25] Ibid. para 89.

[26] Ibid. paras. 87–92.

the appellant with the possibility of appealing to a court or tribunal, the expeditious procedure according to the second sentence of Article 9.1 may well be performed by an independent body issuing recommendations. This reasoning is also in line with the fact that according to the text in this provision, it alternatively suffices for the Parties to provide the information seeking public with access to *administrative reconsideration* to meet the demand for an expeditious procedure. Such a procedure within the administration exists in many countries and is today recognised as "good governance" in administrative law. It may be undertaken by a higher level within the hierarchy of that authority or even by a special organ created for this purpose, but it is always done "within the administration". A certain demand for objectivity can be retrieved from the fact that Article 9.4 also applies to these alternative procedures. How far this will be drawn cannot be foreseen, as the Compliance Committee in findings on Communication C/2013/93 only elaborated on some of the criteria therein (timeliness), but not all (injunctive relief).

Against this background, it is somewhat surprising that the Implementation Guide 2014 seems to understand that the independence and impartiality requirement in the second sentence of Article 9.1 applies to both administrative reconsideration and review procedures. Under the headline "Alternative to court review", it is said that the additional review process can take several forms, including reconsideration by the public authority or review by an independent and impartial body other than a court of law. Thereafter, it is stated (emphasis added):[27]

> Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. *Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention*.

In my view, this statement in the Implementation Guide is not compatible with a straightforward reading of the text in Article 9.1, or in line with any findings of the Compliance Committee. Instead, a reasonable conclusion is that it suffices for the Parties to have a system where the authorities' decision to refuse the disclosure of environmental information is reconsidered within the administration, however under the condition that that procedure meets the Article 9.4 requirements. Thereafter the discontented applicant must be able to rely on the possibility to go to court or to an independent and impartial tribunal.

In the third sentence of Article 9.1, it says that final decisions under Article 9.1 shall be *binding on the public authority holding the information*. This raises the question if all kinds of decisions can be characterised as "final" as soon as the deadline for appeal has expired, irrespective of whether it is an administrative decision or a court judgment. According to the text in the third sentence, the binding requirement applies to all final decisions under Article 9.1, even those which result from a reconsideration procedure within the administration or a review by an independent body outside that administration. Thus, the wording indicates that it does not matter which body took the decision, and when, as all final decisions according to the established definition above must be binding on the authority. This is also how administrative reconsideration processes normally

[27] The Implementation Guide 2014 at page 192.

function, as the second decision replaces the first one from the information holding authority.

However, such a viewpoint does not seem to follow the Compliance Committee's findings on Communication C/2013/93, as recommendations by an Ombudsman were accepted. Instead, from that case one may conclude that the binding requirement only applies to final decisions under the first sentence of Article 9.1. This is also the impression when reading the findings of the Compliance Committee on Communication C/2008/30 *Moldova*, where it was stated (my emphasis):[28]

> If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given legal system. Taking into account article 9, paragraph 1, which implies that *the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities*, the failure of the public authority to fully execute the final decision of the court of law implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.

In the European Union as set out by Article 6 of EID (2003/4), the binding criteria also applies only to review decisions by a court of law or another independent and impartial body. The same line of reasoning is furthermore confirmed in the Implementation Guide 2014.[29] Based on the above, it can be concluded that the Ombudsman institution or an Information Commissioner may be regarded as review procedures according to the first sentence of Article 9.1, but only if its decisions are binding on the information holding authority. On the other hand, when these institutions can issue recommendations only, they still may well be accepted as alternative complaint procedures under the second sentence of that provision."

3.3 The objections to the analysis

As was mentioned in the beginning, the Task Force on access to justice is mandated to "*promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention with a focus on the main barriers to effective access to justice*" and, in order to facilitate this work, to "*prepare analytical, guidance and training materials*". Moreover, the mandate covers the responsibility to "*promote understanding and the use of the relevant findings of the Compliance Committee of a systemic nature, (…), and the dissemination of information on access to review procedures, relevant case law (…)*".

When the Aarhus secretariat protested against the introduction of the draft report, they argued that the text exceeded the mandate of the Task Force, stating that no body under the Convention – except the Compliance Committee – may express a view about the understanding of the Aarhus text and the practice created thereunder. They went on to say that the Task Force should not seek to interpret the Convention, nor to express a position on specific findings of the Compliance Committee. And finally they stated that the separation of tasks between the different bodies under the Convention must be respected to ensure consistency of the interpretation of the Convention and safeguard the authority of the Compliance Committee. As already noted, two thirds of the text in the introduction of the draft

[28] Findings of the Aarhus Convention Compliance Committee on communication C/2008/30 *Moldova*, para. 35.

[29] The Implementation Guide 2014 at page 189, see also at page 193 about the requirement according to Article 9.1 to provide with – in addition to any advisory processes – a possibility for the applicant to obtain a decision which is binding upon the information holding authority.

report was therefore removed by the secretariat. Conclusions on different findings of the Compliance Committee were not allowed, except for mere citations. The whole paragraph in the introduction where I pointed at an ambiguity in the Implementation Guide 2014[30] was erased by the secretariat as "*(t)he deleted text is clearly interpreting the requirements of the Convention, which is outside the scope of TF's mandate*". Instead, the secretariat argued that the controversial passage of the Guide should simply be cited. Alongside scores of minor comments on the text in the introduction, the secretariat also claimed that any conclusion about the position of EU law was outside the mandate, as "*that is for the EU's own institutions to decide*". The labelling of case-law of the CJEU as "state practice" according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) was also rejected, as being outside the mandate of the Task Force to focus "*on how the treaty should be interpreted*".

The protocol from the Bureau meeting in September 2019 was more cautious.[31] After some reasoning, the Bureau concluded that the Task Force through its activities such as analytic studies "*may describe how the Convention is implemented in the Parties, point to and cite relevant findings of the Compliance Committee and of courts of the Parties, point to unresolved issues should they exist and legal sources relevant to resolving such issues. There is, however, no legal basis provided through decision VI/3 for the Task Force to draw conclusions on how the Convention or findings of the Compliance Committee shall be interpreted"*. The Bureau stated that findings of the Compliance Committee should therefore only be cited, including the footnotes. Further, the Bureau wrote that views on interpretation of the Convention during meetings and in analytic studies should be reflected as the opinions of the spokespersons and authors, not as the views of the Task Force. It was also noted in the protocol that the draft report about access to justice in information cases "*would require only a few editorial remarks*" (sic!) in order to stay in line with the mandate.

3.4 Comments to the objections from the secretariat

Even if one see these objections in isolation, they seem strange from an international law perspective. When reading them as critical viewpoints on the draft text in the information study, they may – citing the late Veit Koester, former chair of the Compliance Committee – be regarded as nonsensical ("noget pjat").[32] In our communications about the draft, Veit continued to say that the secretariat's viewpoint on the Implementation Guide was unreasonable ("urimeligt") as this document never has been formally adopted by the Meeting of the Parties. According to him, the Parties were given the opportunity to comment upon the draft and accepted its printing and distribution, but the text stands for the authors only and cannot be described as an opinion of the Parties. Against this backdrop, Veit did not understand why one should not be able to express critical viewpoints on the Implementation Guide. Likewise, he did not comprehend why references to the case-law of CJEU should be deleted, as this is also a source for the understanding the law under the Aarhus Convention. In the same line of reasoning, he agreed that the reference to "state practice" was relevant in this context. In sum, Veit concluded that the draft gave good guidance ("fortræffelig vejledning") about the legal consequences of the findings of the Compliance Committee, although he lacked information on whether they had been adopted

[30] See above "Against this background, it is somewhat surprising that the Implementation Guide 2014 (…)".

[31] https://unece.org/fileadmin/DAM/env/pp/bureau/ACB-45_Report.pdf > accessed 2023-01-25.

[32] Cited with the permission of the author.

by the Meetings of the Parties or not. Finally, he was astonished by this discussion about the draft text in my report, as he had not seen such efforts to limit the debate under other conventions he had experienced.[33]

For my own part, I fail to see how one can be "analytic" without understanding what the law says. And, as all lawyers are aware, "the law" consists of the interaction between different legal sources of varying value, from the black letter provisions to different decisions and judgements and soft law instruments. From an Aarhus perspective, this entails working with the text of the Convention, the Compliance Committee's practice, together with case-law from the CJEU and national courts in the Parties. One cannot undertake any analysis or develop any training material about the Convention if one is not allowed to draw cautious conclusions from all these sources using traditional methods of legal scholarship. To give an example; if the Ombudsman in a legal system is not mandated to intervene in an ongoing case but only to issue recommendations in the aftermath of the case, a reasonable conclusion from the practice of the Compliance Committee is that this institution does not meet the effectiveness criteria in Article 9.2, 9.3 and 9.4. However, according to the secretariat, this conclusion must not be stated, as the Committee has only made this express statement in relation to Article 9.3, not to Article 9.2 or 9.4.[34] Thus, only citing the Committee's statement does not give an answer to this question, and the same can be said about almost any unresolved issue under the Convention. Such a restrictive attitude clearly does not follow from the mandate of the Task Force.

Concerning other remarks from the secretariat, one may add that guidance documents of different status are frequent in the field of environmental law. The Implementation Guide 2014 is one such document and is often referred to by the national and regional courts of the Parties. Its content is however not binding and must obviously be open for discussion, especially at points where it is ambiguous. Further, the information on how the autonomous expression "court or tribunal" has been interpreted in case-law under EU law and the European Convention of Human Rights is also interesting from an Aarhus perspective as the Convention uses similar expressions. Finally, it is common ground in international law that the VCLT is generally applicable to all international agreements, including the Aarhus Convention.

As for the critique from the Bureau, it seems to be based on a misunderstanding. The role of the Task Force on Access to Justice is not to provide authoritative interpretations, but to facilitate the discussion among the Parties about the understanding of the Convention. One of the most important tasks of this body is therefore to perform analytic studies about the implementation of the Aarhus Convention, something which is made clear in the mandate. Thus, between 2011 and 2017 we launched six reports on our own initiative covering subjects such as standing for the public concerned in national courts, remedies, costs, the loser pays principle and legal aid, as well as the possibility for ENGOs to claim damages on behalf of the environment.[35] As noted in the beginning, the discussion in all of these reports is rather wide, including references to national law, EU law and case-law of

[33] According to the communication, Veit Koester had been the chair of two other compliance committees and a member of a third, in addition to have taken part in many meetings under other international agreements.

[34] Concerning the Austrian Environmental Ombudsman, see C/2010/48, para 74 and C/2011/63, para 61.

[35] See letter to the Bureau, mentioned above in footnote 3.

the CJEU and the European Court of Human Rights, as well as the findings of the Compliance Committee. Commonly, they also include suggestions on how to improve the implementation legislation of the Parties and recommendations of a more general nature.[36] In fact, there has never been any discussion about the precise limitations of the studies, as the core idea of the work has only been to facilitate the discussion on key issues related to the third pillar of the Aarhus Convention. Further, all of the studies have been presented in the name of the authors to the meetings of the Task Force on Access to Justice. During these meetings, comments have been made and sometimes the discussions have been lively. Commonly, the debate is closed by stating that the Task Force "welcomes" the study. Sometimes certain conclusions have been drawn, all of which is reported to the Meeting of the Parties. A typical such conclusion in the report from a meeting is the following:[37]

> The Task Force welcomed the work conducted by the expert. The inclusion of the institution of ombudsman as part of the administrative system was appreciated, but it was noted that the institution could not be seen as a substitute to fill a gap of inadequate judicial remedies. It was agreed that comments should be sent to the expert during the next two weeks to complete the country sections and finalize the study.

Over the years, it has also become apparent that some of the issues raised are quite controversial and need to be debated further. And this is where the Task Force on Access to Justice has had a role to play as a platform for studies and meetings where all aspects of Aarhus can be discussed. This role as a mere facilitator for a wider debate without any formal significance is in fact the strength of this body under the Convention.

3.5 Aarhus – a closed society with a bureaucratic culture of its own?

In all kinds of administrative bodies, there is a risk of developing cultures of their own, due to bureaucratic traditions and amplified by a heavy workload and time pressure. My experiences with Aarhus and the UNECE secretariat between 2008 and 2021 showed that the cooperation ran smoothly, albeit from time to time with some delay as their resources are meagre. There have, over the years, been occasions when my view on matters has differed from those of the secretariat. Most of those issues have been solved in a positive atmosphere of mutual understanding. Sadly, the information study performed in 2018–2021 was an exception to this general experience. What is more, it is hard to see any clear explanation for the secretariat's efforts to censor the report. This attitude was new and had never before been applied to our studies. Furthermore, this approach appears to differ from those associated with other international environmental agreements, where the debate also can be quite lively.

This attitude of the secretariat may originate from a weak understanding of some basic principles of "good governance" within the Aarhus community. There have been situations when I

[36] See for example the final part in Epstein 2011:1 (page 90) and all of Darpö's report on costs (2011). Also Epstein 2011:2 discusses the law as it stands from different sources, among other cases from the Compliance Committee (see for example on page 6). As for Laevskaya & Skrylnikov 2012, it is full of recommendations (see pages 17–19). Skrylnikov 2014 is mainly about implementation, although it also contains recommendations (see for example page 9). Finally, Fasoli 2017 deals mostly with the possibilities to obtain damages under national law, but is concluded with recommendations (pages 12–13).

[37] Paragraph 28 in the report (ECE/MP.PP/2011/5) from the 4th meeting of the Task Force on access to justice in Geneva on 7–8 February 2011; https://unece.org/fileadmin/DAM/env/pp/a.to.j/TF4/ece_mp.pp_2011_5_eng.pdf > accessed 2023-01-25.

have reacted to this earlier, but during the controversy concerning the information study they became more apparent. It is hardly a secret that the responsible person in the secretariat who formulated most of the interventions in the text was one of the authors of the Implementation Guide 2014.[38] She is also responsible for case handling in the Compliance Committee. I do not believe for a second that the Committee members were personally involved in the controversy, but this distribution of responsibilities within the secretariat clearly was not appropriate. Moreover, one of the persons attending the Bureau meeting where the controversy was decided upon was the same person who made one of the objections to the study at the Task Force meeting in 2019. Even though he attended as an "observer", the appropriateness of this may be questioned. On top of this comes my general feeling that the secretariat sees itself as some kind of "crusader for environmental democracy", something that from time to time makes its perspectives a bit biased. In the remarks on my draft text to the report, one comment from the secretariat claimed that one cannot draw any conclusion about whether decisions from the Norwegian Parliamentary Ombudsman were final or not, as this issue was not raised by the Parties to that case. That standpoint is a bit surprising as it is common knowledge that almost all Parliamentary Ombudsmen in Europe are limited to non-legally-binding activities such as investigating, reporting, mediating, and the issuing of recommendations.[39] Also, most lawyers would agree that such a private law perspective on the findings of the Compliance Committee would be strange in relation to international law and would certainly put all decisions of that body in a new light. In fact, there is nothing to support such a standpoint and the promotion of it runs counter to the obligation to "*ensure the consistency of the interpretation of the Convention and safeguard the authority of the Compliance Committee*", to cite the secretariat.

In short, the secretariat failed to take a balanced position in the discussion between me and the ENGOs involved. But there are also reasons to criticize the ENGOs involved in this matter. To begin with, the ENGO community has never raised any objections about exceeding the mandate when conclusions in our studies have been "Aarhus friendly". On the contrary, they have over the years constantly pressed for the Task Force to issue more and sharper recommendations. The meetings of the Task Force have consistently declined to do so as this clearly would run counter to the mandate. Further, in the aftermath of the conflict, a representative of one of the ENGOs clarified that their objections were only related to the issue of whether critical viewpoints may be expressed in a study that has been performed by the chair of the Task Force, rather to the content of that study, as "*the statements in the report were indeed comparatively uncontroversial*".[40] This ENGO also regrets that "*in this case this led to an apparently rather protracted and complicated follow up procedure, which appears to have also concerned other elements than those that we had flagged originally*".[41] To this, one may cite the old Swedish saying that "he who takes the devil in the boat must row him ashore",[42] meaning that one must deal with the consequences of

[38] In this context, it may be noted that the majority of the authors of the Implementation Guide 2014 are closely related to the Compliance Committee, but that is another issue that merits a discussion.

[39] See *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*. European Commission 2013-10-11, section 2.5; https://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf.

[40] E-mail from ClientEarth 2021-11-15.

[41] E-mail from ClientEarth 2021-11-03.

[42] "Den som tar fan i båten får ro honom iland".

one's actions irrespective of any initial hope for something else to occur. In fact, the controversy concerned whether a concrete text in the first part of the study went outside the mandate of the Task Force, something that was clear to all during the procedure and when the study was published. Even so, the ENGO issued a formal protest at the Meeting of the Parties in 2021.[43] This document also indicates how parts of the ENGO community regard themselves, stating that "*It is also important to note that giving credence to NGO concerns when they are voiced in a clear and substantiated manner is good practice and should not be criticised by any of the Convention's bodies*". Aside from the fact that no one had criticised the ENGO community at that time, the statement may actually be read as meaning that the ENGOs regard themselves to be beyond any critique because they are "the good guys". This may be an attitude that is viable within an organisation but certainly should not be used as a standard for intervention by a secretariat to an international agreement.

Finally, it is left to the reader to evaluate the study on access to justice in information cases. In my view, the text and the analysis clearly is in line with the mandate of the Task Force. And finally, repeating what has been emphasised earlier, this ability of the Task Force to undertake analytic studies is vital in order to encourage debate within the Aarhus community – and such debate is healthy. After all, the Aarhus Convention is about transparency and environmental democracy, something which requires room for debate also within the Convention.

[43] See website of the 7th session of the Meetings of the Parties under statement by the EcoForum at page 12; European_ECO_Forum combined_0.pdf (unece.org).

4. C/2015/134 *Belgium*

For obvious reasons, the controversial part in this text (section 3.2) mirrors the understanding of the law as it stood in the beginning of 2021. In September of that year, another important case was decided by the Compliance Committee, namely C/2015/134 *Belgium*. I have already mentioned the case, but as it touches upon the discussion on how to understand Article 9.1 of the Aarhus Convention, it merits an additional comment.

In this case, the Compliance Committee evaluated whether a review by the Appeal Commission for the Right of Access to Environmental Information (CRAIE) in Belgium fulfilled the requirements of being a review procedure according to Article 9.1. Also, the applicants to the case claimed that their requests for environmental information had been dealt with by the authorities and courts in a manner that was in breach of Articles 4.2, 4.7 and 9.4 of the Aarhus Convention. Briefly described, the Compliance Committee found the system in the country compliant with the Convention as regards effectiveness and costs, but not concerning timeliness or the stating of written reasons for refusals. So far, the case is unproblematic. However, it is challenging to reconcile this decision with the findings in C/2013/93 *Norway*. As noted, the Compliance Committee in that case accepted the Parliamentary Ombudsman as a review procedure under the second subparagraph in Article 9.1. As mentioned above, it is clear from the facts of that case that the Ombudsman issues recommendations only, not binding decisions. However, in C/2015/134 *Belgium* the Compliance Committee makes three statements on how to understand the requirements of Article 9.1: 1) In each legal system there must always be at least one review procedure that is expeditious and either free of charge or inexpensive, 2) the CRAIE is an inde-

pendent and impartial body established by law and thus is a review procedure under Article 9.1, and 3) in order to fulfill the third subparagraph in Article 9.1, decisions of the CRAIE must be binding.

All in all, this is somewhat confusing. As the decisions of this review body must be binding – something which obviously was not required by the Norwegian Parliamentary Ombudsman – it seems that the Committee concludes that the CRAIE fulfills the requirements in the first subparagraph in Article 9.1, namely to be a tribunal equal to a court. But why then apply the requirements in the second subparagraph of Article 9.1 to provide an expeditious and inexpensive review procedure? For the review procedure in courts and tribunals according to the first subparagraph, only the effectiveness criterion according to Article 9.4 is applicable. Admittedly, there is an inherent incongruity in the provision itself, but even so it would be welcome if the Committee would explain how C/2013/93 *Norway* and C/2015/134 *Belgium* may be read together and how the different requirements in Article 9.1 relate to each other. It would finally also be valuable if the Compliance Committee elaborated further on how the Ombudsman institution is regarded more generally in an Article 9 perspective, as the attitudes of the Parties on this issue seem to differ.[44]

5. Final words

Clearly, this article is controversial. Those readers who are interested in environmental protection may wonder why one choses to write such a critical text in times when anti-Aarhus sentiments are gaining support within almost all Parties to the Convention, not least in the Member States to the EU. In a short time perspective, this may be a correct observation from a tactical viewpoint. But in the long run, I think we need to discuss tendencies against openness and transparency wherever they occur, even if that is within the Aarhus community. Such ideas of censorship – together with an attitude of infallibility – are disastrous to the overall aim of the Convention, namely to promote more information, better participation and effective access to justice in environmental matters. To be quiet about any such tendencies would be to invite the enemies of Aarhus to "score in an open goal", something which clearly would be detrimental for the ideas of environmental democracy in our societies.

[44] The wording "independent and impartial body" in Article 9 was introduced in the 1998 negotiations by the Scandinavian countries, wanting to maintain the Ombudsman procedure. However, it was never clarified whether this institution qualifies as impartial and independent. As of today, the attitudes seem to differ between the Nordic countries. The Swedish Justitieombudsmannen (JO) clearly has stated the authority does not regard itself to be a remedy under Article 9 of the Convention, see the report from the Governmental Commission on environmental liability (SOU 2006:39 at page 183) and the JOs consultation response to that report.