1. Public access to information on and participation in environmental issues

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I would like to begin by expressing my sincere thanks to the seminar's organisers and, in particular, to Yves Kreins and Martine Baguet of the Council of State of Belgium and to the European Commission for allowing us to stage the event here in the Berlaymont Building.

I would also like to thank all the judges for their efforts in preparing some very comprehensive and, in many cases, extremely extensive national reports. We received 20 reports from the 27 Member States, which is an excellent response[(1)]. I certainly appreciate how difficult it is to fit in such extra tasks alongside professional duties – I encountered the same difficulty in preparing my own presentation! I should also like to take this opportunity to issue a note of caution, though, and reiterate that since I am a practising member of the Council of State of France, my general report does not purport to be an academic or doctrinal work.

The role of general rapporteur can be somewhat of a balancing act: producing a thorough and comprehensive summary report based on individual national reports received but ensuring that the end result remains pertinent and succinct. My report therefore seeks to:

- summarise the main points of Community law concerning the issues in question;
- outline the main challenges; and
- give an overview of the difficulties encountered in applying Community law as reflected in the case law of the various Member States.

There are sure to be things I have omitted – but that means there will be issues for members of the panel to address and for all participants to discuss during the feedback sessions … and the other national rapporteurs will have an opportunity to address other issues not covered in my own report.

To start, then, I should like to underscore two points: firstly, the importance of viewing this topic within a wider context and, secondly, the need to sketch out a framework for the various pieces of applicable legislation.

1) Public access to information and participation is not specific to environmental legislation

Providing the public with access to information and giving them an opportunity to participate is a more general issue in terms of relations between government and citizens – and one which is highly relevant in all our democratic systems.

Delving more deeply into this concept of information and participation highlights the major changes which have taken place in this field over the past 30 years. In the past, the general approach taken was a

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(1) This report is also based on the article written by Matthieu Wemaëre, lawyer at the Paris and Brussels Bars, entitled *La jurisprudence de la CJCE sur l'accès à l'information en matière d'environnement* [ECJ case law on access to environmental information], published in the *Bulletin de droit de l'environnement industriel* (2004, special edition, p.17).

traditional one, shrouded in secrecy and seen as a necessary aspect of managing public – and indeed private – matters.

Today, however, we are seeing **new rights** emerge, rights sometimes referred to as "third generation" (following on from first civil and political rights and then economic and social rights): citizens' right to information and to participate in administrative decision-making. Other new concepts are also emerging: administrative transparency, good governance and, more generally, establishment of 'administrative democracy'. And this new landscape has dual benefits: for citizens, for whom democracy is reinforced, and for governors who are made more aware of the reality and concerns of those they govern and who can therefore make more informed public policy decisions.

These new rights have become particularly pertinent in **environmental law**, a field characterised by:

- a high level of potential secrecy: the Chernobyl disaster, for example, demonstrated that this risk was a very real one;
- unreliable environmental information (in many cases scientific information): the quality of environmental data is a real cause for concern;
- increasing interest on the part of the general public in environmental issues: decisions on the latter often impact directly – and in no uncertain terms – on citizens; they also affect a much broader public than other, more sector-based, public policy decisions.

Against this backdrop, environmental legislation has long set out general, broad-ranging principles with respect to environmental issues.

2) Brief overview of the main legislation

a) Non-binding text: **1992 Rio Declaration**, Principle 10 on participation and access to justice:

"*States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided*."

b) Legally binding text: the well-known **Åarhus Convention of 25 June 1998** on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

c) Under Community law, there are essentially two key directives:

- Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental **information**;
- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment of 27 June 1985, as amended by Directive 2000/35/EC of 26 May 2003 (**public participation** in drawing up certain plans and programmes relating to the environment).

In the past, there have been delays in transposing these directives into **domestic law**. As such, transposition of the directive of 27 June 1985 gave rise to several **actions for failure to fulfil obligations** brought by the Commission before the ECJ (in particular *Luxembourg*: ECJ, 13 April 1994, case no. 313/93, *Belgium*: ECJ, 2 May 1996, case no. 133/94, *Germany*: ECJ, 22 October 1998, case no. 301/95, *Ireland*: ECJ, 21 September 1999, case no. 292/96, and *France*: ECJ, 7 November 2002, case no. 348/01).

Since then, it would seem that the majority of national legislation has complied with Community requirements, with the exception of one or two difficulties experienced in Germany where the federal states (*Länder*) are, in part, responsible for transposing Community legislation.

Finally, virtually all national courts have acknowledged that the aforementioned directives have direct effect – in the Netherlands, for example, a specific ruling was issued to this effect. In general terms, then, it is clear that applying Community legislation poses no particular difficulty for national courts. The Council of State of France, though, has seen a change in its case law: initially, it held that the directives could only be relied upon in the context of statutory acts (*Cohn-Bendit* ruling of 1978) but it now relies on directives in the context of individual rulings by challenging the legality of the statutory acts the decisions in question are designed to enforce – and by criticising shortcomings in national legislation (*Tête* ruling of 1998).

To clarify the situation, we will look in turn at the two main issues: making information available to the general public and allowing them to participate actively in decision-making.

I – ENVIRONMENTAL INFORMATION

This first area is governed primarily by **Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003** on public access to environmental information.

You will recall that Directive 2003/4/EC repeals and replaces **Council Directive 90/313/EEC of 7 June 1990** on the freedom of access to information on the environment. The national courts mainly had to take cognisance of the former directive. The 2003 directive did not give rise to many disputes due to transposition times and ruling times.

According to Article 1 of Directive 2003/4/EC of 28 January 2003, its **two main objectives** are:

- firstly, to **guarantee the right of access** to environmental information held by or for the public authorities (...); and
- secondly, to ensure that, as a matter of course, environmental information is made available and **disseminated to the public** in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.

Here, we will focus on the **first** objective. Case law mainly focused on the issue of right of access.

Some general observations can be made immediately on a preliminary basis. Most countries have already enshrined the right of citizens to have access to *administrative* information in general. Consequently, enshrining the right to access *environmental* information in particular does not create any problem in principle. They all agree that it is necessary for the public to be informed. The issues remaining to be dealt with now are rather technical in nature. As we will see, they concern the interpretation of certain concepts but the legal apparatus seems relatively complete. Accordingly, the Great Britain report states that there have been no disputes, no doubt because national law is adequate. It cites the Freedom of Information Act 2000, which covers all kinds of information, including environmental information.

So, on the whole, the courts have easily adopted a very broad conception – drawn from Community law – of the right to have access to environmental information.

The latest difficulties – and therefore perhaps those areas where there would be room for improvement – may well involve the issue of legal action. Where access to information is denied, do the courts have the resources to intervene rapidly and efficiently and order that the information be provided? The answer to

that question varies from country to country. This seems to tally with what a previous speaker said about the need for a directive on access to justice in environmental matters.

Following on from these general observations, we will examine in greater detail the questions raised by the enforcement of this directive by grouping them under the following six points:

- the concept of environmental information;
- the concept of public authority;
- persons entitled to access;
- the forms of reporting information;
- exceptions to the principle of right of access;
- the effectiveness of legal recourse in this area.

1) Concept of environmental information

Here, the 2003 directive is **now very clear**: Article 2(1) gives a very detailed definition of the concept of environmental information, which, for instance, pertains to any information on:

- the state of the elements of the environment, such air and atmosphere, water and soil;
- policies, legislation and programmes that may impact on the environment.

It can be said here that this detailed **definition** is an innovation in the 2003 directive, and that it comes pursuant to case law of the **European Court of Justice**: in the *Mecklenburg* ruling, the ECJ stipulated the interpretation that had to be given to the concept of environmental information, and that this interpretation had a strong influence on the Community legislative body, which was inspired by it when adopting the 2003 directive (ECJ, 17 June 1998, *Mecklenburg*, case no. C-321/96).

A second decision by the **ECJ** is also worth pointing out: the ruling in the case of *Commission v France* of 26 June 2003 (ECJ, 26 June 2003, *Commission v France*, case no. C-233/00). The Court found that the **French law of 17 July 1978** did not suffice in transposing the requirements of the 1990 directive. The Court based its ruling on the fact that the French law, which only pertained to "administrative documents", had a more restricted scope than the directive; the directive covered all "information" – which goes beyond the concept of "document" – and all "environmental" information, be it "administrative" or otherwise. The Court found that the concept of environmental information includes documents that are not directly linked to the exercising of a public service.

Several national decisions can also be cited to illustrate this concept. **In Germany**, disputes arose involved the interpretation of the term "measure". According to Article 2(1)(c) of the directive, "measures" relating to the environment are a form of information that must be communicated. The federal court found that this term did not include projects which have already been dropped before implementation, ruling that abandoned projects are no longer able to have an impact on the environment (judgement of 1November 2007).

In Belgium, the Administrative Division of the Council of State held that information on town planning and regional development should be treated as information relating to the environment. In **Luxembourg**, too, the concept of environmental information has a very broad scope and includes information on the generation of electricity, such as the quantity of electricity supplied by a combinedcycle gas turbine to the company Arcelor.

2) <u>The concept of public authority</u>

Article 2 provides a broad definition of the concept of public authority, which covers not just any public administration, but also "*any natural or legal person having public responsibilities or functions*" or "*providing public services relating to the environment* [...]*.*"

In this context, the term "*public authority"* has been the subject of legal action in **Ireland**.

In **Germany**, the concept of information held "for a public authority" led to the ruling that the right to information includes information held by third parties. This is the case when a third party is obliged, for instance, to hold, at the disposal of the public authorities, information on its own polluting emission controls.

There is a possible question here: is it necessary to go beyond the public authorities and extend the obligation to provide information to include industrial companies when they hold information for the public authorities? This would give rise to the concept almost of "potentially public information."

3) <u>Persons entitled to access</u>

Article 3 of the directive describes the concept of beneficiary in broad terms, stipulating that environmental information be made available to "*any applicant at his request and without his having to state an interest*" (point 1). This is an important point and one which was covered largely in texts and case law.

This notion is sometimes taken up in national legislation. For instance, **in Bulgaria**, the law on environmental conservation expressly provides that anyone wishing to have access to information does not have to prove an interest.

In **Italy**, the report states that the court also uses a broad notion. Decisions have expressly emphasised that the request can come from any natural person or from any institution without having to prove an interest.

On the other hand, it would seem that in **Germany**, it was ruled that a municipal authority did not have the right of access, since access is only available to legal persons under civil law. But here I am speaking under the supervision of the German rapporteur, who can provide further details if necessary.

In **Belgium**, the concept of "applicant" has been interpreted in the light of the Åarhus Convention. According to the Council of State, it is not sufficient to grant right of access to information to "any natural or legal person", because the Åarhus Convention targets the "public", which is an even broader concept since it can include de facto groups.

4) <u>Forms of reporting information</u>

With regard to the time period for communicating information, Belgium raises an interesting problem having to do with the difference between two deadlines:

- firstly, the one-month deadline provided for in Article 3(2) to reply to a request for information – a deadline that can even be extended to two months when so justified by the volume and complexity of the information;
- secondly, the deadline for public investigations, which is often just 15 days.

So how can these two rules relating to public access to information on the one hand and public participation on the other be reconciled? Naturally, the two rules apply concurrently. However, the Legislative Division of the Council of State of Belgium highlighted a problem with regard to "effectiveness": if a request for access to information is connected with a public participation process already underway, in order to be of any use the party concerned must be in receipt of the requested information before the end of the investigation period.

The suggestion has been made that in such a scenario, the deadline for responding to requests for information be reduced where the applicant can demonstrate that the requested information is required for the purposes of participating in a public investigation.

Some decisions have also thrown up other difficulties in this area. In **Luxembourg**, where a public authority to which a request for information has been submitted does not possess the requested information, it must forward the request to the authority that does. A judgement in Finland addresses the issue of choosing between a paper or CD-based communication: the applicant had already obtained the requested information on paper but wished to have it on a CD – the court refused. This case therefore raises the issue of the freedom on the part of the applicant to choose the format in which s/he wishes to receive the requested information.

5) Exceptions to the principle of right of access

a) Grounds for refusing to make information available: Content

Article 4 of the directive also contains a **list of grounds** upon which public authorities may refuse to make information available.

Some such grounds pertain to the **manner** in which the request is made (point 1): for example, Member States may refuse an application which is manifestly unreasonable, is formulated in too general a manner or concerns material "in the course of completion."

Other requests for information may be refused on the grounds of the **content** of the latter (point 2): for example, a request may be refused if disclosure of the information would adversely affect "the confidentiality of the proceedings of the public authorities" (2a) or "the confidentiality of commercial or industrial information" (2d).

Finally, Article 4(2) states: "*The grounds for refusal (...) shall be* ***interpreted in a restrictive way****, taking into account for the particular case the public interest served by disclosure*." This paragraph is also cited in the established case law of the ECJ concerning the 1990 directive. It is interesting to note that this passage is a rare example of a text which stipulates its own rules as to how it should be interpreted.

With respect to applying these provisions, reference should be made to a ruling by the **European Court of Justice**: in the aforementioned case of *Commission v France* of 26 June 2003, the ECJ held that the scope of the French law of 17 July 1978 was too broad insofar as it allowed a request to be refused on the grounds that divulging information "*...might, in general terms, adversely affect confidential information protected by law*."

The reports contain very few references to rulings by national courts applying Article 4 – and this is perplexing: one would have thought that such concepts, which may be used to justify a refusal to grant access to information, would have prompted more disputes.

In **France**, the Council of State clarified the concept of a document "in the course of completion". The authorities had refused to make a document available on the grounds that it was of a "preliminary" nature, the document in question being a set of minutes of a meeting of a regional Sites Commission (*commission départementale des sites*), laying the groundwork for a future decision. At the time the request was refused, under French legislation an authority was permitted to refuse to make a document available where said document was considered "preliminary" with respect to an administrative decision. The Council of State ruled that this legislation was in breach of the directive. The court held that the requested document was not "unfinished" and that the fact that a document was "preliminary" with respect to a future ruling was not sufficient grounds upon which to classify it as a document "in the course of completion".

b) <u>Grounds for refusing to make information available: Form</u>

Article 4(5) of the directive stipulates that a refusal to make any information available "*...shall be notified to the applicant in writing*.." and that "*the notification shall state the reasons for the refusal*."

Hence the issue of the *implicit* decision to refuse access.

As we know, the implicit-decision mechanism opens up access to legal recourse, even in the event of negligence on the part of the authorities. I am referring here to the legal myth that silence on the part of the authorities implies that they are refusing the request, such a refusal meaning applicants are entitled to take legal action.

However, this mechanism poses a problem with regard to the principle of statement of reasons since by definition no reasons are ever given in the case of an implicit decision … So, how can the two concepts of access to justice and the duty to state reasons be reconciled?

The **ECJ** gave a response to this question in two rulings, namely the aforementioned judgement of 26 June 2003 in the case of *Commission v France* and, subsequently, in a judgement of 21 April 2005 handed down following a reference for a preliminary ruling by the Council of State of Belgium (21 April 2005, *Housieaux*, case no. C-186/04).

The ECJ held, on the one hand, that an implicit decision was not in itself unlawful purely on the grounds that it contained no statement of reasons as required under the provisions of the directive. However, on the other it, ruled that in order to comply with the directive, the reasons for the request being refused had somehow to be communicated to the applicant within the deadline stipulated in the directive.

Nevertheless, arbitrating in this manner between the two imperatives does not settle the matter definitively but instead raises a practical difficulty. Accordingly, the Belgian report highlights that the case law of the ECJ essentially condemns *de facto* the implicit-decision mechanism since there is no system by which to satisfactorily communicate *unsolicited* the reasons for an implicit decision. Perhaps the Belgian rapporteur might be able to give us more information on these difficulties. Indeed, maybe a specific provision should be drafted in relation to enforcement of the obligation to state reasons in the event of an implicit decision.

6) <u>The effectiveness of legal recourse in this area</u>

The issue of access to justice is addressed in Article 6 of Directive 2003/4/EC, which focuses on the effectiveness of legal recourse.

Some countries have **special appeals bodies** and where access to information is refused, the applicant may apply to an independent administrative authority which, depending on the circumstances of the case, will issue either an opinion or a decision on the refused request for access. In such countries, this body:

- either specialises in environmental information (such as in Wallonia in **Belgium**);
- or deals with access to administrative information on all topics: this is true in **France** and **Portugal**, where there is a Commission on Access to Administrative Documents (the *Commission d'accès aux documents administratifs* in France and the *Comissão de Acesso aos Documentos Administrativos* in Portugal), and in Flanders and the Brussels Capital Region in **Belgium**.

However, **in urgent cases**, in **France** applicants may approach a judge in chambers (*juge des référés*) without first appealing to the above-mentioned Commission: the Council of State ruled that communication of an administrative document could be classed as a "pertinent measure" which the judge in chambers may request (EC, 29 April 2002, *Société Baggerbedrijf de Boer*, no. 239466). However, this process is restricted and is to be applied only in circumstances where the request might reasonably give rise to a dispute.

The role of the **judge in chambers** is addressed in some national reports. The Luxembourg report, for example, states that the conditions under which a judge in chambers may be approached are more flexible as regards access to environmental information: the president of the court may be asked for a ruling directly, even if there is no substantive case pending. This potentially raises a further topic for discussion: Is provision made in your country for urgent action to obtain rapid access to environmental information?

The issue of ***locus standi*** of environmental protection associations has prompted several disputes, for example in **Belgium** and **Luxembourg**.

With regard to **review by the court of the grounds for the refusal**, most reports stated that the court's review powers were limited: the public authority has no discretion.

In terms of the **effects** of the court's ruling, if the court finds that the refusal to grant access to information is unjustified, it may **quash** the refusal decision. The court also has the power – one which it exercises more frequently – to **order** the authorities to release the requested information. In **Portugal**, there is a specific process known as an "injunction on communication of information". The Portuguese rapporteur might be able to provide further information on this process, which would seem to be quite effective.

Germany highlighted a particular difficulty (and one on which the German rapporteur could perhaps provide us with further details), namely the scenario in which two sets of proceedings are under way on two cases concurrently:
- a first case in respect of a refusal to grant access to environmental information;
- a concurrent case pertaining to an administrative ruling on an environmental matter.

The issue is whether the first case may influence the second. In principle, it should not since unless stipulated by law, there is no link between the two cases. However, the German administrative court ruled that in some instances, a link may be created between cases – the German rapporteur would be best able to clarify this scenario.

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In conclusion, then, to this first section, I will address one final issue which has not yet been discussed, namely **active dissemination of environmental information (Article 7).**

Active and systematic dissemination of information is the second stated objective of the directive.
Indeed the directive makes provision for **"active and systematic dissemination"** of environmental information by public authorities (**Article 7**).

This idea is also reflected in **Article 3(5)**, which requires the public authorities to ensure that the right of access to information can be exercised effectively, in particular via the designation of information **officers** and the provision of **registers** and **lists** detailing the environmental information held by the public authorities.

This issue has not given rise to many disputes, however, it should be noted in conclusion to this initial point that it is certainly a key challenge in the context of access to environmental information.

II – PUBLIC PARTICIPATION IN DRAWING UP CERTAIN PLANS AND PROGRAMMES RELATED TO THE ENVIRONMENT

This topic is closely linked to the issue of environmental impact assessment. In fact, it is often during studies conducted prior to an administrative decision that provision is made for public participation, the idea being to gauge public opinion on impact studies conducted prior to the decision being taken.

The main directive in this field is still **Council Directive 85/337/EEC of 27 June 1985** on the assessment of the effects of certain public and private projects on the environment.

This directive was amended most significantly by **Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003** providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. It should be noted that the directive of 26 May 2003 was drafted specifically with a view to harmonising Community legislation with the provisions of the **Åarhus Convention of 25 June 1998.**

The primary purpose of **Council Directive 85/337/EEC of 27 June 1985** is to set out a framework for environmental aspects to be taken into consideration in public decision-making. This principle is set out in **Article 2(1)**: "*Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment (…) are made subject to an assessment with regard to their effects."*

Provision is made for public participation during this assessment process in Article 6 of the directive. Accordingly, **Article 6(4)** stipulates that: "*The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) (...).*"

Five main issues are raised by the application of this directive:

- scope of participation;
- the concept of "public concerned";
- form of consultation;
- stage of consultation;
- legal recourse.

1) Scope of participation

What kinds of projects are covered by the obligation to make provision for public participation? This question extends beyond our subject area since it refers, in broader terms, to the general scope of the 1985 directive: projects in respect of which provision should be made for public participation are those which require an environmental impact assessment.

We shall therefore not dwell at length on this topic but the projects in question are detailed in Article 4 of the directive, which draws a distinction between:

- projects where assessment is mandatory (as listed in **Annex 1**);
- projects where assessment is optional (as listed in **Annex 2**).

Projects where assessment is mandatory pose no particular problems: the projects concerned are easily identifiable. For example, Annex 1 expressly cites decisions concerning nuclear power stations "including decommissioning of nuclear power stations": the Council of State of France therefore had no difficulty in ruling that a decision authorising the decommissioning of a nuclear power station was subject to prior public participation (judgement of 6 June 1987, *Association Le réseau sortir du nucléai*re, application no. 292 386).

Those cases where assessment is optional are more problematic. The **Belgian** report cites divergences between the case law of the Council of State of Belgium and that of the ECJ on cases in which a project may be exempt from conducting an environmental impact assessment.

In **Luxembourg**, the court ruled that work on a road and pavement did not fall within the scope of projects requiring public participation. The court also ruled on a case of expropriation in the public interest in respect of a road link with the Saarland: this case gave rise to several judgements which, it would seem, illustrate the difficulties involved in defining the scope of the 1985 directive.

2) <u>Concept of "public concerned"</u>

Article 6 of the directive requires the authorities to comply with two obligations:

- to inform the "**public**" (no further clarification given) that a public participation process has been launched;
- to make the "**public concerned**" aware of the process.

Should a distinction be drawn between these two obligations? Some countries, such as **Slovenia**, stated that the second concept was too narrow and required further clarification: Should a party have a "specific interest in participation" to be included in the category of "public concerned"? Is an "individual concerned" purely an individual who is directly affected by the decision?

In **Estonia**, the administrative chamber ruled on the place of local institutions. A local association was claiming that it should be regarded as representing the public concerned but the chamber refuted this argument, finding that a local association is a public authority and not a section of the public. The Estonian representative could perhaps provide further details on this.

In **France**, the court ruled that consulting a committee was not an adequate substitute for informing the "public concerned". In this particular case, the government had set up a body known as Nuclear Power Decommissioning Committee (*Observatoire du démantèlement de la centrale nucléaire*), which comprised, in particular, representatives from various associations. The authorities maintained that this body represented the "*public concerned*" and that consulting it was therefore sufficient. The Council of State dismissed this argument, finding that the provisions of the directive required direct consultation with the entire population concerned.

3) <u>Forms of consultation</u>

Turning now to the ways in which information is made available, a wide variety of methods are used in different Member States. Some countries have put in place public investigation mechanisms overseen

by an independent party – in France, for example, an "investigating commissioner" (*commissaire enquêteur*).

Also in connection with **France**, in addition to public investigations, mention should also be made of the National Commission for Public Debate (CNDP). In the context of larger projects of national significance, the CNDP organises discussions at the start of the process and continues to hold public meetings over a period of one to two months.

In **Austria**, public participation seems to follow a framework of original mechanisms, with the Austrian report making reference to a "public procurator for the environment" and a potential citizens' initiative on the environment.

A judgement in **Hungary** stated that in the case of a project involving several municipalities, it was not necessary to make the relevant environmental information available in the town hall of all said municipalities.

4) <u>Stage of consultation</u>

Article 6 states that consultation should take place "early in the [environmental] decision-making procedures [...]". It goes on to state that the public "*be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken*."

Information made available to the public only after the decision has been taken is clearly in breach of the directive: this was the ruling of the Council of State of France concerning a text which stipulated that information concerning an impact study be communicated to the public after the administrative decision had been taken. The court found that the regulatory provisions were contrary to the stated purpose of the directive.

However, Article 9 of the directive *does* stipulate that information be made available to the public after a decision has been taken. In **Greece**, the court ruled that failing to provide said information to the public after the decision had been taken did not affect the legality of the decision in question – since the decision was legal from the time at which it was taken. In **France**, the court held that this requirement to provide information after a decision has been taken did not entail an obligation to state the formal grounds for the decision itself.

The Council of State of **Belgium** took a very exacting view of this provision – or, rather, of the equivalent provisions contained in the Åarhus Convention. The Council of State was asked to rule on a system making provision for initial preliminary – and relatively limited – consultation restricted to certain specific organisations. It held that it was unlawful to make provision for "a consultation procedure, prior to a public investigation, in which the public is not involved."

This solution may seem surprising since the very purpose of a public investigation is to elicit public participation. One might think, therefore, that the directive was being complied with merely by virtue of the fact that provision was being made for a public investigation, since, naturally, this public investigation would be held prior to the decision being taken, i.e. at a stage at which the decision could be altered to reflect public opinion.

5) <u>Legal recourse</u>

On this topic, the discussion might generally focus **on the consequences** of failure to make adequate provision for public consultation. In most Member States, public consultation is considered an *essential* formality, hence a failure to make provision for public participation therefore results, in principle, in the administrative decision in question being *quashed*.

Nevertheless, in some cases the court finds that breaching this formality is of no consequence if it emerges that, given the circumstances of the case in question, the applicant did indeed have an opportunity to express his or her opinions. This is true in **Belgium**.

In conclusion, I shall refer to the **Åarhus Convention of 25 June 1998** on access to information, public participation in decision-making and access to justice in environmental matters.

In this context, the question of harmonising Community law with the provisions of the Åarhus Convention was raised as follows in the Belgian report:

"*There are differences between the Åarhus Convention and Community directives: on some issues, the terms of the convention are more precise, more comprehensive and more stringent than the provisions contained in Community law, while on others, the reverse is true. (…)*
The best solution, then, would be to apply both the Åarhus Convention and Community directives concurrently and where, as will inevitably be the case, differences emerge between the two texts, Member States should apply whichever text contains the most precise and most comprehensive provisions and whichever contains those provisions which most effectively safeguard the rights of environmental protection parties/associations."

This raises an interesting issue surrounding the concurrent application of several texts in which similar principles are enshrined … What approach should be taken in instances where international and Community texts differ? Since, traditionally, it is good to conclude a presentation by turning one's attention to the future, it is important to recognise that this is a vital question since it illustrates the role of the courts in reconciling both international and Community standards.

The defining aspect of our legal systems at the start of this, the 21st century is, of course, the increasingly international nature of legislation. More and more frequently, the same principles are being enshrined in treaties, Community directives and in national bodies of law in national constitutions and legislation. The courts' role is therefore a very important one since they are positioned right at the very heart of the legal system. They are faced with a profusion of – often contradictory – standards which they must unravel, interpret coordinate and reconcile.

Courts are no longer simply guardians of the law – they are also its architects.