

## Colophon

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## From the Secretary-General's desk

The seminar held on 28 January 2008 under the auspices of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union and with scientific support from the Council of State of France focussed on national administrative courts and Community environmental law<sup>1</sup>.

Its purpose was twofold:

- to compare the experiences of the Association's 27 supreme administrative jurisdictions in applying Community environmental law alongside Community legislators (primarily the European Commission, the Council and the European Parliament);
- to highlight the role of national administrative courts in applying Community environmental law.

Some 100 participants attended this working seminar held in the Robert Schuman Room of the Berlaymont building, a fitting venue for such a meeting given that the latter is also home to the various Commissioners and their staff.

All the Association's member Councils of State and supreme administrative jurisdictions sent one judge to represent them (in most cases the same judge who had previously completed the questionnaire on the two topics selected for discussion at the seminar).

This seminar was the first in which stakeholders outside of the Association were invited to become involved in the latter's work. The following were invited to attend:

- European institutions (in particular the European Commission's Legal Service), the Environment DG, the Council and the European Parliament – all made valuable contributions on the various panels;
- stakeholders from the worlds of academia and business and, specifically, lawyers specialising in environmental law.

I was honoured to be able to open the seminar. There followed two introductory presentations by Ms. **Eva Kruzikova**, Director and Principal Legal Advisor to the MIME Team (Internal Market for Goods, Energy (including Euratom), Enterprise, Customs Union and Environment), and Mr **David Grant Lawrence**, Director of Directorate D: Water Chemicals and Cohesion, both from the European Commission.

The seminar then addressed the two main topics on its agenda:

- Topic One: Public information on and participation in environmental issues

Community law makes provision for public access to information on environmental issues and for giving citizens the opportunity to be involved in drawing up projects likely to have an effect on the environment. The seminar therefore focussed on the scope of Community directives on environmental

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<sup>1</sup> All presentations and documentation cited in this introduction along with a list of participants is available on the Association's website: [www.juradmin.eu](http://www.juradmin.eu)

issues and the powers of the national administrative courts in monitoring Community legislation in force.

➤ Topic Two: Regulations governing waste and polluting facilities

Community legislation on waste and polluting facilities is designed to reconcile the dual requirements for both economic growth and protection of the environment. In comparing the situations in the various Member States, the seminar sought to gain an overview of case law concerning restoration of damage caused by registered centres and the national courts' definition of "hazardous waste".

General reports were compiled respectively by Messrs. **Yann Aguila**, Member of the Council of State of France and **Mattias Guyomar**, *Maître des requêtes* (Counsel) of the Council of State of France, based on the answers submitted by the Association's members to the questionnaire sent out to them. *These reports are reproduced in parts one and two of this newsletter.*

The reports were presented by their respective authors and members of each of the two panels were then given a chance to discuss the issues raised.

Topic One panel:

**Jean-Paul JACQUE**, Director, Legal Service of the Council of the European Union

**Benoît JADOT**, First Auditor, Head of Division, Council of State of Belgium

**Michel PAQUES**, Lecturer at the University of Liège

**Charles PIROTTE**, Administrator – Communication and Governance Unit of the Environment DG (European Commission).

Topic Two panel:

**Johannes BLOKLAND**, Vice-Chairman of the European Parliament's Committee on the Environment, Public Health and Food Safety

**Marc CLEMENT**, Administrator – Infringements Unit of the Environment DG (European Commission)

**Isabelle LARMUSEAU**, Lawyer and member of the team at the University of Ghent's Centre for Environmental Law

**H.G. SEVENSTER**, Member of the Council of State of the Netherlands

The feedback sessions following the two panels gave all participants the opportunity to express their opinions and suggestions and ask any questions on the topics discussed.

The seminar concluded with a presentation by Mr **Jean-Marc SAUVÉ**, Vice-President of the Council of State of France. *The full text of his conclusions is reproduced in part three of this newsletter.*

This extremely successful seminar marked the first of what both the Mr Sauvé and the Association hoped would be the first of many. The process reflects the Association's desire to initiate dialogue between its member jurisdictions and their respective judges and Community legislators. It is hoped that the exercise will be repeated later this year since the Association has been asked to take part in a cooperation programme to be launched by the European Commission under the French Presidency of the European Union at a colloquium to be held on 9-10 October 2008 in Paris.

Yves Kreins  
Secretary-General

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

*By Mr Y. AGUILA, Member of the Council of State of France.*

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<sup>2</sup>. 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 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

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<sup>2</sup> 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).

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 **Århus 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 1 November 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 combined-cycle gas turbine to the company Arcelor.

## **2) The concept of public authority**

**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) Persons entitled to access**

**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) Forms of reporting information**

**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) Grounds for refusing to make information available: Form**

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) The effectiveness of legal recourse in this area**

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.

\*

**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 **Århus 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 nucléaire*, 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) Concept of “public concerned”**

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) Forms of consultation**

**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) Stage of consultation**

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 Århus 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) Legal recourse

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 **Århus 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 Århus Convention was raised as follows in the Belgian report:

*“There are differences between the Århus 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 Århus 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 21<sup>st</sup> 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.

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## 2. Regulations governing waste and polluting facilities

*By M. GUYOMAR, Maîtres des requêtes (Counsel) at the Council of State of France.*

I shall introduce this afternoon's discussions by presenting my report compiled on the basis of the wide-ranging and comprehensive contributions received from the Association's various member courts<sup>3</sup>.

As the President has just outlined, **issues surrounding pollution and waste-management are, by their very nature, problems which need to be tackled at European level** since water, air and soil know no boundaries – and neither, therefore, is contamination of them restricted to any one area alone.

It is therefore extremely important to approach the environmental problems associated with pollution and waste-management from a transnational angle and a response at European level would seem to be the most appropriate course of action.

There is also a myriad of **Community legislation** on pollution and waste-management, a selection of which is detailed below.

*The main piece of legislation in this area is Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, better known as the IPPC Directive.*

Also of significance are:

- *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage (I shall return to this particular directive in due course);*
- *Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community;*
- *Framework Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (replacing Directive 75/442/EEC);*
- *Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste;*
- *the draft Framework Directive on soil protection (as mentioned this morning).*

It seems to me that today's framework is, to some extent, saturated by Community legislation, the objectives of such legislation both intersecting with and complementing each other at various points.

In relation to types of pollution, reference should be made to the Framework Directive 2006/12/EC of 5 April 2006 (waste) and Directive 2006/11/EC of 15 February 2006 (pollution in aquatic environments). In turn, Directive 2004/35/EC of 21 April 2004 (environmental liability) outlines the duty placed on the party responsible for complying with environmental obligations to remedy any damage, while the draft Framework Directive on soil protection will no doubt form the future benchmark as regards the location of pollution.

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<sup>3</sup> These contributions are available in full on the Association's website : [www.juradmin.be](http://www.juradmin.be).

It is clear, then, that by drafting this plethora of legislative texts – some pertaining to types of pollutant, some to polluters themselves and others to polluted locations – we face a mesh of interweaving rules and standards which we must ensure form a cohesive overall framework.

**In addition to this internal ‘mesh’ of Community rules and standards, there is also combined a network of both Community and national legislation.** To my mind, then, while there may be some *certainties* there are, unfortunately, also a great many *uncertainties* with which to contend.

In short, the **first certainty** from my point of view is that environmental issues *are best dealt with at European level* since they affect all Member States as well as economic players – such as companies and their respective boards – which themselves operate at European level.

The **second certainty** is that *consideration of the polluter-pays principle* enshrined in Article 174 of the EC Treaty is becoming increasingly important in the context of Community environmental law. It also forms the core framework of Directive 2004/35/EC of 21 April 2004 mentioned above and is also anchored in countless pieces of current national legislation.

The **third certainty** is that of the *principle of subsidiarity*. Community law forms the underlying foundation setting out minimum requirements while national standards may be much more stringent.

The **fourth certainty** is rooted in *the binding nature of Community law*. Accordingly, the Member States are duty bound to transpose Community legislation; if they fail to do so, they are penalised and this system ensures broad application of the concepts observed and, indeed, established by the Community court itself.

Let me give you an example. In the aforementioned Directive 2006/11/EC of 15 February 2006, the Community legislator opted to introduce a system of prior authorisation. In so doing, its terms were more stringent than some national rules, which simply required prior notification. However, this broad approach was adopted and enforced by the Community court.

The VAN DE WALLE ruling handed down by the European Court of Justice on 7 September 2004 is based on a broad definition of the concept of waste – one which continues to pose problems for Member States whose legal systems do not recognise such a wide-reaching concept.

These are just a few of what I consider to be the certainties in relation to Community environmental law.

However, it is important to highlight a number of uncertainties in this regard too. There are certainly grey areas in terms of environmental rules and standards and difficulties which we can overcome together since we, as judges representing our respective national courts, face the same difficulties as those arising within the framework of Community law.

The **first uncertainty** is clearly that associated with the *precise concept of waste*, which raises the question of whether the broad approach established by the *Van De Walle* judgement is likely to be enshrined in the draft framework directive or whether, by contrast, the Member States can somehow “secure” a more limited scope for the concept since, as you will recall, the *Van De Walle* judgement classed soil contaminated by hydrocarbons as waste.

A **second uncertainty** is the concept of *restoration*. What does restoration of a site entail? Restoring it to its condition prior to becoming polluted? Or rather ‘restoring’ it to a state compatible with future use?

Community law provides no degree of certainty on this issue either.

A **third uncertainty** is the *concept of “competent authorities”*. Does this refer to the State? Or perhaps local authorities? By definition, from the point view of Community law the issue of what constitutes a “competent authority” within individual national legal systems is irrelevant and this gives Member States some room for manoeuvre, which can result in complex – and often inconsistent – frameworks.

This list of uncertainties is by no means an exhaustive one and I shall conclude by highlighting the limitations of Directive 2004/35/EC of 21 April 2004 and, specifically, the ambiguity associated with the concept of “operator” contained therein (see Article 2(12), which states: “*operator*” means any natural or legal, private or public person who operates or controls the occupational activity”).

Article 2(12) therefore defines “operator” as the person who operates or owns an occupational activity – two concepts which, under national law, are generally quite different. It is up to first the national court and subsequently the Community court to clarify this crucial concept of “operator” and this is one of the difficulties facing us in our profession.

However, there are other ‘grey areas’ too. Great importance is attached to *subsidiarity* – and rightly so – but, paradoxically, *the room for manoeuvre this affords Member States can be a source of potential legal uncertainty*.

Of course, legal uncertainty in this field is linked to poor harmonisation of national systems and the role of Community law is not to impose a benchmark that is incompatible with the practical realities of each individual Member State but rather to map out a legal framework common to all.

I should like to highlight a further limitation of Directive 2004/35/EC of 21 April 2004 as regards the *underlying failure to introduce a system of subsidiary responsibility on the part of the State*. Naturally, the directive stipulates this subsidiary responsibility but it is optional and is therefore left to the discretion of each individual Member State. In this context too, therefore, the principle of subsidiarity is – paradoxically – a source of uncertainty.

This brief overview of rules and standards reveals, therefore, that the Member States are involved in generating Community and national legislation while at the same time being players within the latter since they themselves are responsible for complying with it.

I will now move on to present a **comparative view** of my findings – indeed the purpose of our discussions today – to highlight what we, as judges representing our respective national courts, can learn from courts in other Member States based on the national feedback received from the Association’s members in response to common questions. This presentation will focus on three main areas:

- legal systems and the combined ‘mesh’ they form;
- environmental players: in this context, it will be important to underscore the role of the State in safeguarding compliance with rules and standards as well as the role of economic players, namely companies and their respective boards. In each case, I shall endeavour to outline the response of each Member State to the questions submitted by the President and designed to establish who is the responsible party in the event of pollution;
- the Community and national courts responsible for enforcing these legal systems vis-à-vis environmental players: we will observe together how conflicts between rules and standards are resolved and disputes between players settled, while all the time keeping sight of what, to my mind, is the shared challenge facing all of us, namely protecting the environment on the one hand and remaining sympathetic to economic interests on the other.

**The interwoven ‘mesh’ of legal systems** is a problem which has been largely resolved by Community law and the primacy afforded the latter insofar as the various individual national systems have gradually come to converge. Indeed convergence is becoming a greater priority given the mechanism for transposing and defining Community standards.

Nevertheless, when comparing the different legal systems in the various Member States, one key criterion for comparison is *chronology*, i.e. whether the Member States established a legal framework on management of waste and polluted sites before or after Community rules and standards were defined. Viewed from this angle, the paradox lies in the fact that where a Member State established the relevant legal framework of its own accord before the obligations inherent in Community law required it to do so it is more difficult to reconcile already established national rules and standards with Community legislation since the latter outline only minimum standards. This is certainly true in France in relation to Law No. 75-633 of 15 July 1975 on waste disposal and the recovery of material (*Loi du 15 juillet 1975 relative à l'élimination des déchets et à la récupération des matériaux*) and Law No. 92-646 of 13 July 1992 on waste disposal and registered environmental protection centres (*Loi du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement*).

By contrast, where Member States established the relevant frameworks at the time Community legislation itself was drafted or reworked said frameworks to reflect the new system of legislation in force at European level, there are fewer difficulties since full transposition simply entails either a sort of ‘copying-and-pasting’ exercise, as it were, or replacing national rules with Community legislation.

However, all legal systems whether established before, during or after the advent of Community rules and standards must all comply with the relevant requirements in full. Accordingly, in the national reports, I was struck by the fact that some Member States such as the Netherlands, Italy, Portugal, Finland and Estonia are making every effort to transpose Community rules and standards in full.

In some countries, though, two types of legislation have been introduced, i.e. legislation on environmental damage and separate legislation on waste. This is the case in France, Finland and Germany. By contrast, some Member States have taken as their basis Directive 2004/35/EC of 21 April 2004 and have put in place legislation combining environmental damage as a whole and making no distinction between contamination of sites as a result of operations and purely waste-related issues.

Some systems are often extremely complex. In Poland, for example (where the system is similar to the French model), there are three complementary sets of legislation governing respectively civil liability, criminal liability and administrative matters. This system is a complex one since it risks one set of legislation overlapping with another. France has a similar system based on a framework of administrative provisions (applicable to waste and registered protection centres) combined with a system of administrative penalties if the aforementioned administrative provisions are not observed. There is also a concurrent – and, potentially, simultaneous – system of criminal penalties.

*These examples demonstrate that even within the same general trend towards full transposition of Community law, responses from individual Member States may vary widely; this disparity is, to a certain extent, the result of the room for manoeuvre afforded the Member States – according to the principle of subsidiarity – in tackling environmental issues in their own way.*

It is also important to remember that these legal systems can result in **the overall legal framework becoming extremely complex for all players involved**. Said systems cannot be neatly summarised, i.e. there is not simply a public authority guaranteeing respect for the environment on the one hand and the private and economic players causing pollution on the other. Economic growth is also a matter for the State. So in my view it is impossible to compare one system against another.

The *definition of what constitutes a player* also varies widely. Firstly, in terms of the public authority, in some Member States the local authority is classed as a “state authority” depending on the field in

question. This is true in France, for example, where the mayor is in charge of waste management while the *préfet* is in charge of registered centres. In the mayor's absence, the *préfet* may take his/her place. In addition, where waste has been produced by a registered centre, the mayor may act under waste legislation and the *préfet* under legislation governing registered centres. This is reflected in a recent ruling by the Council of State of France.

This kind of system is far too complicated – too complicated for the economic players themselves who are required to comply with two separate legal systems and are monitored by two separate authorities (the monitoring process itself also being subject to two sets of separate obligations), and too complex for mayors and *préfets* who sometimes become involved to little effect in respect of environmental legislation before the court has clarified the situation.

In Ireland, too, the local authorities oversee waste issues while there is a national agency for environmental protection. Such a system featuring an agency is echoed in other Member States, too, for example in Great Britain where both local authorities and a national environment agency are responsible for environmental issues.

In some Member States, whether authority is held by the State or the region is not determined by the purpose of the relevant legislation but by the size of the site in question and/or the scale of the operation (this is the case in Italy).

*Although definitions vary, they also sometimes overlap.* However, in all cases the various powers all enable the administrative authorities to enforce legislation. Said powers generally include the authority to require action to be taken, which may extend not only to automatic performance of the work in question as in France, the Netherlands and Estonia but also to the required posting of a bond or guarantee as in Germany. They may also result in the State being held liable in the event that it fails to fulfil its obligations. At this juncture I should like to return to a point already mentioned concerning the option granted to Member States under Directive 2004/35/EC of 21 April 2004 to claim subsidiary liability on the part of the State. As a judge, I find it a shame that this option is not available at European level – and for one simple reason: where the party responsible for complying with environmental obligations – and I will come back to this in a moment – is found to have failed to fulfil its obligations either because it cannot be identified or because it has become insolvent, some Member States have made provision for legal action to be taken against the State which, ultimately, ensures that environmental obligations are fulfilled. By contrast, in other Member States where no such provision has been made, there is the risk that some restoration measures will not be taken and/or that some of the costs associated with sorting out the damage will not be covered. So in this regard – even if only at the level of unfair competition – there is no common benchmark and I find this regrettable.

Some States, such as France, have agreed that the State should be held liable where a party responsible for complying with environmental obligations fails to fulfil those obligations. The ALU SUISSE judgement (dating from mid-July 2005) demonstrates that if, due to certain constraints, the State can no longer hold the operator liable for restoration, then the State itself must take responsibility for such. In the national reports, I came across case law from Austria (4 June 1996) ordering a province to remedy damage caused, and from Finland stating that the municipality may, in the final instance, be required to take responsibility for making good any damage where all other responsible parties have failed to fulfil their obligations.

So it is clear, then, that different approaches are taken to this issue in different Member States. And, with the exception of cases where there is no *subsidiary liability* on the part of the State, this variety of approaches is *in no way detrimental to the system operating satisfactorily* since the solution required is ultimately provided for within the general administrative framework even if the latter is sometimes rather complex.

Much *more detrimental*, by contrast, is the *wide variety of responses to the question of the responsible party*, i.e. the issue of whose responsibility it is to comply with environmental obligations. Community

law is not sufficiently binding and the definition of “operator” contained in Directive 2004/35/EC of 21 April 2004 is clear evidence of this. However, most national legal systems specifically stipulate that the operator is the party responsible for fulfilling restoration and clean-up obligations. In some cases, too, the party holding the operating permit bears said responsibility – I am thinking in this connection of examples from Luxembourg and Greek law – where there is a series of operators, a chain of responsibility. In such cases, the responses generally follow the same pattern, i.e. that the primary responsible party must be identified.

That said, I should point out that most national legal systems in the various Member States formally recognise the principle of subsidiary liability. So where it is not possible to identify the operator, the holder may be held liable – this is the case in Spain and Finland, for example. If neither the holder nor the operator can be identified, it is the owner who is considered liable; indeed in Hungary owners are the primary responsible party but in Ireland, Austria and the Netherlands they are subject only to subsidiary liability.

Finally, it is interesting to look also at systems in which neither the operator, the holder nor the owner are considered liable and where the polluter-pays principle is applied – quite rightly in my view – directly. There is therefore no presumed automatic liability on the part of any operator, holder or owner since the party which caused any damage is required to rectify it. This system is applied in Great Britain, Portugal and Italy. In these countries, it is often the court that is best placed to ascertain who is liable and to me, this solution would seem to fit more comfortably with the practical economic and environmental reality.

This brings me to the final aspect I wish to address, namely that of **courts** (both **Community and national**). To me this is a particularly interesting area since it is ultimately the courts’ responsibility to ensure that the legal system in place remains coherent and balanced, i.e. to **rule on conflicting regulations and standards and to keep disputes between the various players involved to a minimum**. Courts perform this task on the basis of both Community law and national law; the latter is becoming increasingly ‘common’ in its scope and if one delves a little deeper and moves beyond the initial varying responses received, there are clear areas in which the various national systems converge. Hence the following question: Would it be possible to establish shared rules and standards on environmental issues which would take a different form to Community environmental law? And it is here that our comparative law approach comes into its own since this exercise demonstrates clearly that Community law is the driving force behind Member States and encourages them to establish this common framework of legislation – a common framework which is vital if we are to protect our environment and balance the economic interests of competing companies.

Let’s now take a closer look at how courts operate.

It should be noted, firstly, that *the Association has helped to establish real dialogue between national judges and the Community court.*

*In legal terms, this dialogue takes the form of a ‘reference for a preliminary ruling’.* Under this procedure, references are submitted for a preliminary ruling on the definition of a concept within the meaning of Community law. It is also an opportunity for the Community court to rule on the validity of a directive – I am thinking here of the ARCELOR ruling of 8 February 2007 in which the Council of State of France submitted a reference to the ECJ for a preliminary ruling concerning the validity of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC in view of the principle of equality throughout the Community. This reference raised the question of competition between the chemicals and plastics industries outside the territory of a Member State. In a case such as this it is the role of the Community court to issue a ruling – not least because a greenhouse-gas emissions-quota system can only function effectively at European level.

I should like to outline one further example of this process, namely that of a reference for a preliminary ruling again submitted by the Council of State of France in a bid to harmonise a number of systems which often do not operate smoothly together. I mentioned earlier on that the longer a national system has been established prior to Community legislation concerning it being introduced, the more introspective that system is and the more difficult it is, potentially, for it to be adapted to meet Community requirements. I was thinking there of the French system which I myself am required to implement on a daily basis. In a judgement handed down on 27 June 2007 (*Association nationale pour la protection des Eaux et Rivières* ruling), a reference for a preliminary ruling was submitted to the European Court of Justice in respect of the interpretation of Directive 2006/11/EC of 15 February 2006 (pollution in aquatic environments). This preliminary reference centred on the concept of prior authorisation governing the disposal of discharges of pollutants cited in the Annex to the aforementioned directive. Under the French legal system, ordinances have been passed simplifying legislation pursuant to which in respect of small companies – in this case fish-farming companies – the decision was taken to replace prior authorisation (considered a heavy-handed formality) by a system of prior notification. And this is where difficulties arise sine we have two opposing systems which cannot be combined, i.e. one, which I shall refer to as the ‘material’ system, focussing on the issue to which the system applies, namely pollution, and which is based on the directive (essentially, the discharge in question is a pollutant and therefore, if a company is likely to produce such discharge, it must be authorised to do so), and an ‘organic’ system (such as that of France) which views the size of a company and the scale of its operations as a criterion in respect of application of the legal system and which allows small companies to operate on the say-so of notification alone. Can the system of prior authorisation within the meaning of the directive also be a system of notification incorporating (as in France), the right of the *préfet* to decline it? The Council of State of France is awaiting a response to this reference and will, of course, adopt the ECJ’s solution.

I should now like to address the *powers of administrative courts*. The administrative court system in France differs from ordinary law since national administrative courts enjoy substantive prerogatives which authorise them not only to quash but also to reverse rulings. This system dates back to the 19<sup>th</sup> century when the *préfet* (who is nowadays in charge of registered centres), used to sit in the Prefect’s Court or *Conseil de préfecture* to hear administrative disputes. On that basis, then, it has been quite natural for the *préfet* ruling as the sole administrative authority to have the same powers as when he ruled as part of a panel of magistrates via the *Conseil de préfecture*. So in France, we have a court which has the same powers as the authorities, i.e. powers to reverse authorisations, make them contingent on fresh requirements, amend their duration or to issue formal notices.

Based on the national reports, it would seem that these exorbitant powers under ordinary law exist in other Member States too.

Of course, most national legal systems do not confer any special powers on the national administrative courts in terms of environmental law, other than granting them the power to quash rulings. Is this sufficient? This is another issue we shall need to address in our discussions. However, in some Member States the national administrative courts have the power to issue summary orders but such Member States are in the minority. One example is the Netherlands.

Another issue is that of *who may request a ruling from the court*. It is interesting in this context to note that ordinary citizens enjoy certain powers in this regard in Spain and Portugal. In Portugal, on behalf of the collective interest, any individual as well as associations and the public prosecutor’s office may take action against the authorities where the latter have failed to fulfil their obligations and may ask the court to rule in a case where no restorative action has been taken. A judgement by the Porto Court of Appeal in 2001 mentioned in the report submitted by Portugal is testament to the sway of this popular right of action – a right of action which is also seen in Spain where associations can hold government authorities accountable for failure to act. I should point out that although I spoke earlier of the State, the administrative authorities and economic players, other stakeholders such as those campaigning for environmental protection (often associations) should also be included nowadays.

From this standpoint, we should also address the concept of suitable persons authorised to address the courts (as exists in the United Kingdom).

One final point I should like to raise is that of the *complex technical nature of environmental legislation* since we judges sitting in national courts are called upon to hear cases in which there is a large volume of scientific and technical information. Of course, in most Member States the courts may commission expert reports; I see that the responses received from Germany and Latvia describe the use of such expert reports as “commonplace”.

There are two examples I should like to cite here and which to my mind are of particular interest. In the Netherlands, the Ministry of the Environment makes arrangements for an impartial report to be made available to national courts to assist judges. In Finland, too, the supreme administrative court comprises two expert judges sitting part-time in disputes concerning environmental issues and requiring specialist technical expertise or knowledge of natural sciences. In my view, such a system which combines technical and legal experts could be a very productive one and is worth exploring.

I should now like to **set the ball rolling for discussions on the following aspects:** a) To what extent does the drafting of Community rules and standards – as applicable to the European Commission and the European Parliament alike – take account of national traditions and any pre-existing national laws? b) To what extent do courts and/or lawyers exploit differences and indeed divergences between the Community legal system and the legal systems of the individual Member States? c) How do the Community court or national courts in the individual Member States rule in cases where Community and national rules and standards conflict?

It would also be interesting to hear the views of the panel participants on the question of complex technical issues. Standards do exist – I am thinking here of the so-called ‘best available techniques’ or BAT. It would be worth examining how defining such standards at Community level would be received in the individual Member States and by the national courts.

**In conclusion,** I should like to underline that harmonising legal systems is a challenge in both environmental and economic terms and I think my presentation has demonstrated this quite clearly. Such a harmonisation is borne out of the requirements imposed under Community law and is a task for the Community legislator and national governments alike. Ultimately, however, I believe it is upon the courts that the onus for such efforts to achieve harmonisation rests and as such it is vital to establish the necessary dialogue between the Community court and the national courts in the individual Member States. And indeed the dialogue under way at present is proving fruitful: I believe that the common challenges facing us are unfolding within a shared legal framework and that we must therefore make every effort to provide common answers in terms both of the complex technical considerations within disputes and in the legal aspects contained therein. The principle of legal certainty requires this and legal certainty itself is thus a precondition for securing economic security for all stakeholders. Viewed from this angle, I believe that creating a level playing field for competition and ensuring environmental security are vital. Legal certainty is therefore a fundamental precondition for ensuring both environmental and economic security.

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### 3. Conclusions

*By J.-M. SAUVÉ, Vice-President of the Council of State of France.*

At the close of this successful seminar, I should like to extend my warm thanks to the General Secretariat of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, represented by the Association's President, Yves Kreins, and to the Secretary-General for organising the event to perfection since I fully appreciate what a mammoth task staging such a seminar is.

I would also like to thank the chairmen, the general rapporteurs and the members of the two panels who provided an excellent springboard for our discussions through their summaries, presentations and questions. They devoted a substantial amount of their personal time to outlining their views on and approach to the issues of access to information and public participation and on the concept of waste. They drew our attention to a number of extremely thought-provoking considerations and helped to expand and refresh our existing ideas.

The various topics addressed during the seminar clearly underscore the fundamental principles of environmental law, namely the principle of access to information and public participation and the polluter-pays principle.

I – The need for participatory democracy dovetails with the first signs of increased international awareness of the threats facing the environment.

The 1972 Stockholm Declaration called upon States to facilitate “*public participation in managing and monitoring the environment.*”

The World Charter for Nature adopted by the United Nations General Assembly on 28 October 1982 and cited specifically in the Århus Convention outlined the principle of public access to planning elements and the opportunity for all members of the public to participate in environmental decision-making.

The principles set out in the 1992 Rio Declaration also follow this line.

But it was the Aarhus Convention of 25 June 1998, drawn up under the aegis of the United Nations Economic Commission for Europe (UNECE) and signed, notably, by the European Union which set out in the most detail the conditions governing access to information, public participation in decision-making and access to justice in environmental matters.

The convention outlines the arguments in favour of these two primary rights: on the one hand public access to information serves an educational purpose while participation promotes social acceptance of the decisions ultimately taken, while on the other, the public can provide information thereby helping to identify the most efficient and most viable solution.

Although public access to information and participation are not among the principles of Community environmental policy cited in the EC Treaty, Community legislation has always remained mindful of the need for environmental democracy. This concern is evidenced not only by sectoral legislation but also in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and in Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. In order to comply with the requirements set out in the Århus Convention, the first of these directives was supplemented 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,

and the second was repealed and replaced by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003.

Rules governing access to information have been drafted in the broadest possible sense in terms both of defining the concept of environmental information (which includes topics indirectly related to environmental matters such as contamination of the food chain and cultural sites) and of the source of said information, the latter not being confined to documents produced by the public authorities or private parties fulfilling public-service tasks but extending to evidence held by such authorities and parties and, indeed, to documentation held by other parties on their behalf. Ultimately, access is available to all natural and legal persons without any need for said persons to give reasons for requiring such access.

The general nature of these terms has already led to disputes concerning recognition of the right of public authorities to request documentation from each other, an issue also raised by the Committee of the Regions during preparatory work on Directive 2003/4/EC.

However, it is derogations from the principle of unfettered communication which will no doubt raise the most controversial questions, specifically questions concerning “documents in the course of completion” and those produced on the basis of confidential information protected by law, primarily to ensure protection of intellectual property rights and to safeguard public security. Naturally, these exceptions must be interpreted stringently but ongoing terrorist threats and the increasingly radical approach being adopted by some environmental protest movements may make arbitration difficult. The confidential nature of criminal investigations also raises certain issues: an administrative report citing the failure on the part of a company to comply with discharge standards imposed upon it is one of several documents cited in the directive but this in itself may be the underlying basis for criminal proceedings.

The issues raised by Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment and Directive 2003/35/EC of the European Parliament and of the Council supplementing it and concerning the drawing up of certain plans and programmes relating to the environment are a different kettle of fish entirely. They pertain primarily to the scope of the provisions in question (for example, the decommissioning of a nuclear power station featuring in French case law), determining what parties constitute the ‘public concerned’, ascertaining the ways in which to provide access to information and facilitate consultation (which must ensure that the relevant parties can make a useful contribution at the appropriate stage of the decision-making process) and considering the consequences of failure to facilitate such consultation mechanisms.

Community rules calling for mandatory public consultation on environmental matters are certainly vague in countries which traditionally promote participatory democracy and reaching a consensus. In countries where the general trend is towards confidentiality and details of the government’s decision-making process are not freely available, Community law creates a special framework as pertaining to environmental matters – a framework which, in turn, throws into question the relevance of rules applied in other fields.

Take, for example, the precautionary principle which transcends environmental law and extends equally to consumer protection and health; transparency and participation, in all their various forms, are extremely dynamic and can be extended and applied in a variety of fields.

On all issues, national case law is formulated either upstream or in counterpoint to the case law of the European Court of Justice. It is up to us to ensure that such national case law is circulated adequately and that all supreme administrative jurisdictions are aware of it and can, where appropriate, draw inspiration from it. In light of the written and oral exchanges on these issues, it is my feeling that the major points on which the systems of the various Member States diverge are rooted less in differences as regards the content of the right to information and participation and the manner in which said rights can be exercised, and more in the ways in which justice can be accessed: it would seem that the means

of accessing justice vary considerably from one Member State to the next – a situation which explains the lack or abundance (as the case may be) of case law.

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II – While the first half of this seminar focussed on largely consensual issues (even though it may have emerged that such issues are applied in very different ways in the various Member States), the second essentially highlighted the limitations of what is perhaps the most emblematic principle of Community environmental law and expressly cited in Article 174 of the EC Treaty, namely the polluter-pays principle.

The issue of polluted sites, which concerns us both as legal experts and as citizens, centres around two aspects: What does restoration entail and whose responsibility is it?

A – What does restoring an industrial site entail?

Should consideration be given to the initial state of the site (i.e. prior to its expropriation or at the time industrial operations commenced)? While this solution complies most fully with the polluter-pays principle, it is highly unrealistic in terms of former activities. Or should only future use of the site be taken into account and the clean-up requirements adapted accordingly? Should such an approach be imposed by the government or should it be negotiated with the operator? Ultimately, should we be content with minimum conditions ensuring that neighbouring waters and land remain uncontaminated?

Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive) provides no answer to these questions.

The Commission has tried on several occasions to close this loophole.

One proposal for reforming the IPPC Directive would entail operators drafting thorough reports on the state and level of contamination of soils and groundwater to ascertain the restoration requirements when the activity ceases. However, such provisions would only be of use for future application and would not address the problem of historic pollution.

The same can be said of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage, which pertains specifically to soil contamination posing a serious risk to human health. It seeks to ensure restoration of natural resources to their original state “based on the most accurate information available” and makes provision for additional compensation in the form of establishing comparable natural resources on another site if such restoration cannot be achieved.

However, the scope of Directive 2004/35/EC does not include damage caused by an activity completed prior to 30 April 2007 and as such is also only relevant to future contamination.

Only the draft Framework Directive on soil protection tackles the problem of historic contamination and endeavours to define remediation of soil as actions “[...] to remove control, contain or reduce pollutants so that the contaminated site no longer poses any significant risk to human health or the environment, taking account of its current use and approved future use.”

Of course, as clearly stated in the presentation of the grounds for this draft directive, soil – unlike air and flowing water – may be appropriated by private individuals but there is no question that civil law mechanisms – be they rules governing action in respect of a warranty against hidden defects in the case of a property sale or liability on the part of the landowner for pollution emanating from his site – are woefully inadequate on account of the sometimes longstanding nature of the pollution in question and the unpredictable restoration costs as well as the degree of the threat to human health and the environment. Since the public authorities are responsible for monitoring polluting activities and for

planning and authorising land use, they must exercise these powers or be held accountable. This will certainly give rise to disputes before the administrative courts and such disputes will be an opportunity to define the precise scope of the powers of and obligations incumbent upon the public authorities and, in turn, of operators within the pollution chain.

B – Ascertaining what restoration of contaminated sites entails is one thing, but identifying who is responsible for the clean-up operation is just as tricky.

Like the Environmental Liability Directive, the IPPC Directive only recognises the operator, i.e. the party authorised to perform the regulated activity and acting under the supervision of the authorities, which have broad powers to issue approvals, injunctions and alternative orders.

When the activity is completed, the polluter-pays principle requires that the most recent operator take full and sole responsibility for restoration of the site. Even if it is taking over the activity from another party either through the purchase of equipment, via a merger or by any other means, the mechanisms of private law have, in theory, given it knowledge of the assets and liabilities – including in an environmental context – of the operation it has taken over and he must therefore take responsibility for such.

However, this model is often difficult to apply in practice either because the most recent operator has long since disappeared or because it has become insolvent. Permanent decommissioning of an industrial facility also often comes as a result of financial difficulties.

Where the most recent operator is part of a flourishing group, to what extent is it acceptable – from both a legal and a social standpoint – to hold a parent or holding company responsible for the environmental liabilities of its subsidiaries? Should not the principle of corporate bodies remaining autonomous only be bypassed in the case of established fraud? Or should more flexible solutions be sought allowing a broader third-party claim against parent companies at the very least in cases where the latter are involved in managing the subsidiary or where an unconventional system of financial links is in place?

Such solutions, if adopted at national level, are likely to result in unfair competition and should therefore be tackled through transversal solutions.

Another avenue explored in both Community and national case law is that of appeals under waste legislation and, specifically, Framework Directive 2006/12/EC of 5 April 2006.

Waste legislation and the aforementioned Framework Directive do not recognise ‘operators’ but rather ‘producers’ and ‘holders’ of waste. Producers are those whose activities give rise to waste or who process waste in such a way that its composition alters. Holders of waste are simply those parties who have possession of the waste – they need neither be the source of the waste nor the owners of it.

Like the concept of waste itself, such a category is very broad. Indeed anything which can be polluted by waste itself becomes waste, even in the case of immovable property such as contaminated and non-excavated soil (as per the European Court of Justice’s ruling in the well-known VAN DE WALLE case of 7 September 2004).

Consequently, a holder of waste who is neither the producer of it nor the former operator is likely to have to cover the financial costs not only of removing movable waste abandoned on its site but also of measures to decontaminate the soil. The facts of the VAN DE WALLE case entailed a scenario in which the service-station operator prosecuted for hydrocarbon leaks from its storage tanks had been both the holder and the producer of the waste in question insofar as it owned the contents of said tanks and had ‘disposed’ of the hydrocarbons by allowing them to leak into the subsoil. The Court also invited the national court to identify from within the chain of successive producers and holders the most appropriate responsible party. Equally, the definition of ‘waste’ and ‘holder of waste’ takes the

form of a broadening and extension of the polluter-pays principle. The concept of 'holding' waste also makes it difficult to apply another general principle (that enforced by the Environmental Liability Directive), namely limitation of civil obligations.

The durability of the VAN DE WALLE case law is by no means assured. Indeed, the fourth recital of Framework Directive 2006/12/EC suggests applying the concept of waste solely to movable property while the proposed reform by the Commission seems to go even further down this path.

However, that should not preclude us from reflecting in more detail on an issue not satisfactorily resolved by any legislation currently in force.

Here too, certainly, the scope of the responsibilities incumbent upon the public authorities do not compel national courts to take a position on these issues – issues which will ultimately be clarified by the case law of the European Court of Justice however Community legislation evolves.

Legislation on registered centres and waste should also be articulated more clearly since such legislation, given its distinct purpose, results in concurrent systems of liability overlapping on the same or similar issues.

In terms both of waste and access to information and participation, the role of national courts should be to promote the following under the supervision of the European Court of Justice:

- effective and standardised (as standardised as possible) application of Community law;
- economic neutrality of rules and regulations via such effective and standardised application;
- enhanced legal certainty via clarification of applicable legislation and the raising of its profile;
- the highest possible level of environmental safety.

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In conclusion, I should like to outline some of the results achieved by the seminar.

#### I – Results in terms of exchanges on and training in Community environmental law

Through its Environment DG, the Commission is looking to implement a cooperation programme with courts in the Member States on environmental law. This programme would be an opportunity both to run training exercises and to share details of good practices and as the discussions at today's seminar have shown, this would certainly be a worthwhile initiative. The Member States of the European Union share the same principles, are party to the same conventions and apply the same rules and standards; this means that they need to work more closely together and that there needs to be more dialogue between their various national courts. Since environmental law increasingly has its origins at Community level, the programme devised by the Commission is vital. It should enable the courts in the individual Member States to supplement and enrich their training and to exchange information on their experiences, difficulties and respective case law not only with each other but also with the institutions and courts within the European Union system.

During its presidency of the European Union during the second half of 2008, France is to host the launch conference for this programme (date and venue to be confirmed) and the event will be included on the official list of engagements for the French Presidency.

#### II – Results in terms of environmental courts in particular and administrative courts in general

Like all public law in the Member States, environmental public law is undergoing radical change. In the past, such legislation was the sole and sovereign preserve of individual Member States and remained extremely resilient to outside influences. As evidenced by current environmental law, public

law is now heavily influenced by Community law in the way in which it is conceived, amended and updated. The experience of the court over which I preside is, I believe, one which is widespread: between 32% and 45% of the major rulings passed by the Council of State of France have, over the years, been in application of either European Union law or the terms of the European Convention on Human Rights.

And this trend is set to continue. There are three resources to which we all have access:

1) Common rules governing trials and, in particular, governing fair trials along with, specifically, access to justice and effective judicial proceedings;

2) shared monitoring mechanisms and techniques<sup>(4)</sup> under Community law, which shore up the procedural guarantees for individuals and companies alike: these include, for example, the principles of proportionality, legal certainty and legitimate expectations, liability, good governance and reasoning, transparency and access to administrative documentation;

3) shared substantive law, the scope of which is increasing since it is linked to achieving the European Union's goals in various fields (single market, environmental protection, asylum and immigration and so forth), achieving said goals being the responsibility in whole or in part of the authorities within the individual Member States. This substantive law influences and directly inspires the actions taken by said public authorities and the national courts are increasingly applying it.

The trend towards convergence between the various bodies of administrative law is become even more marked since these procedural and substantive rules and regulations we now share are being combined with the principles of the primacy and ability to plead Community law and Member States are duty bound to comply with the latter when implementing it or indeed derogating from it. Failure to comply with these shared rules and regulations means that Member States can be held liable before national courts where their failure to fulfil their obligations – even where the legislator is at fault – has resulted in serious damage and where there is a direct causal link between the breach committed and the damage caused. The impact of Community legislation on administrative law and liability is particularly striking. For confirmation of this, see the *Francovich* (ECJ, 19 November 1991) and *Factortame and Brasserie du Pêcheur* (ECJ, 5 March 1996) judgements.

It is therefore clear that while national courts have become ordinary-law courts as regards application of Community legislation, the individual Member States' bodies of administrative law have become instruments borne out of implementing said legislation. In assuming this role, they are ensuring their own continued transformation within the European melting pot and are contributing to developing a truly European system of administrative justice.

To my mind, then, it is our responsibility as administrative courts to play an active role in applying Community legislation as comprehensively and effectively as possible and, in so doing, to encourage convergence between the systems of administrative law in the individual Member States and to promote the emergence of a European system of public law shared by all Member States. In this way, we will be helping to minimise legal uncertainty and to avoid the scourge of unfair competition.

In assuming this role, there are two paths open to us – paths which may be followed either alternately or concurrently:

1) Institutional cooperation – or 'vertical' dialogue – based on the system of preliminary references submitted by national courts to the European Court of Justice to ensure uniform interpretation and application of legislation as well as monitor the legality of Community law: this vital form of cooperation functions effectively and could be expanded in some cases but in isolation is not sufficient.

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<sup>(4)</sup> judicial and non-judicial.

2) Informal collaboration – or ‘horizontal’ dialogue – between courts to share experiences, working methods and case law, and to compare issues raised in the light of applying Community law and the responses provided. It is vital for national courts to be able to operate in full knowledge of responses given and issues raised by other courts. Given the challenges we face in applying Community law comprehensively and coherently, engaging in dialogue on experiences, methods and bodies of case law and even organising a court exchange programme within either a bilateral framework or a network of European associations and supreme courts are crucial and efforts must be made to promote more such action.

This collaboration and enhanced dialogue between European courts should not result in any particular feature of the national law of an individual Member State being discounted or, on the contrary, to any particular national model being exported. The principle of subsidiarity remains valid. It is more a question of providing a complementary mechanism to the key role of the European Court of Justice as a regulator and of holding ourselves accountable to our counterparts in other Member States and discussing together the conditions governing the implementation of Community law and the consequences this may and should entail for our respective national practices and bodies of case law.

Against the backdrop of this informal consultation, the seminar model – along the lines of that held today – bringing together both national courts and the institutions of the European Union (the European Commission, the European Parliament and the European Court of Justice) and academics and lawyers should certainly be pursued, as should all the future planned exchange mechanisms (exchanges between courts and concerning bodies of case law as well as rapid consultation via resources administered by the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union such as the Forum and the Jurifast database).

There are many topics worthy of discussion, for example sectoral issues such as:

- State aid;
- public-sector contracts and public concessions;
- certain issues pertaining to asylum and immigration (e.g. family reunification, expulsion measures for Schengen countries);
- tax-related issues such as abuse of right.

Cross-sectoral issues such as the following could also be addressed:

- implementation by national administrative courts of the primacy of Community law;
- the system of administrative liability under Community law;
- the system of administrative rulings;
- implementation of a proportionality review.

Indeed we are spoilt for choice! At a time when legislation is undergoing such far-reaching changes and public action is increasingly being pursued at European level, I am certain that with 27 Member States we can, between us, identify an appropriate and balanced route via which to investigate these and other issues.

I am preaching to the converted, I know. I hope that this initial meeting – which is an extension of the work done by the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union – is just the first of many and that today’s success will spur us on and help keep the momentum going.

To quote Yves Kreins at the start of the seminar, this is the start of a process which I hope will go from strength to strength.

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