Free Access to Environmental Information: Meeting Summary

Avosetta Annual Meeting 29/30 May 2015

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This summary highlights some of the main elements of the discussion on the national reports prepared in response to the common questionnaire on Access to Environmental Information (AEI). The text of the questionnaire is available [here] and the national reports are [here].

Overarching Themes

One of the most striking aspects of the meeting's discussion was the contrast that emerged between the political mood of transparent government that AEI laws have provoked across EU Member States, and the challenging implementation of AEI laws in many Member States. This has been matched by difficulties at the EU level implementing AEI requirements. Thus, on the one hand, it can be said that Directive 2003/4, and the national measures designed to implement the directive, have transformed access to information requirements across the EU, particularly in those Member States that have historically had intensely secret public administrations. Similarly, in Member States where the move to open and transparent administration was already in progress, the EU AEI regime has provided a foundational framework for current access to information regimes. On the other hand, there are serious implementation problems in relation to AEI requirements. This is for at least four reasons.

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First, there are constitutional or procedural barriers to implementation in some Member States. In Member States such as Austria, Denmark and France, public authorities cannot be compelled to disclose any information, even if this is found by courts to be in breach of AEI laws. Second, there are weak review processes in some Member States. Whilst Article 6(1) of Directive 2003/4 requires an expeditious avenue of administrative review to be available to challenge any public authorities that do not comply with environmental information disclosure requests, this is not a review mechanism that dissatisfied applicants are required to use, and additional review by courts in some Member States is very slow and expensive. This results in limited case law and thus poor legal understanding of the EU AEI regime in certain jurisdictions.

Third, there are problems of norm conflict. Whilst there are limited permitted exceptions to disclosure of environmental information, these are subject to interpretation and can be influenced by legal cultures and norms within Member States. In Hungary for example, lots of information is protected for reasons of 'public security'. Furthermore, there are other legal regimes that undermine the broad disclosure requirements of the EU AEI regime. At the EU level, there are several other EU measures that serve to protect commercial information in a way that conflicts with the open disclosure requirements of Directive 2003/4. Fourth, active dissemination of environmental information is poorly carried out in some Member States (although States like Finland and Poland are exemplary with their registries of environmental information), and at the EU level as well. In the latter case, for

example, studies concerning the transposition of environmental directives in the Member States undertaken by consultants appointed by the Commission are not released. Note, however, that this general position is now set to change following the ruling of the Court of Justice of the European Union (CJEU) on 16 July 2015 in Case C-612/13 P *ClientEarth v Commission* EU:C:2015:486.

There was a range of detailed questions discussed at the meeting of Avosetta members on AEI. Below is a summary of the points that generated most discussion.

1. Constitutional Questions

Constitutional guarantees on access to (environmental) information differ considerably in the law of the European Union and in the individual European States. The Union as such "constitutionally" guarantees a general right of freedom of access to information in Art. 42 of the Charter of Fundamental Rights of the EU and in Art. 15 III of the Treaty on the Functioning of the EU (TFEU). The CJEU interprets these guarantees as creating a rule of free access to information. Any restrictions therefore have to be applied and interpreted in a restrictive manner. The European Convention on Human Rights (ECHR) contains no explicit guarantee of such a fundamental right. Nevertheless, the European Court of Human Rights has developed a line of jurisprudence grounded in particular on Article 10 ECHR which confirms that freedom to receive information embraces a right of access to information.

A majority of European States guarantees a right of free access to information in their domestic Constitutions. Sweden is the most prominent example with the longest tradition of constitutionally guaranteed free access to information. General constitutional guarantees are in place also in Belgium, Croatia, Greece, Hungary, Italy, Norway, Poland, Portugal, Slovenia, Spain, Switzerland and Turkey. Some of these States (Norway and Poland) additionally have specific constitutional guarantees of free access to environmental information. A smaller number of European States have no (Denmark, Ireland, UK) or only very limited (Germany at the level of some federal states) constitutional guarantees on access to information.

The Avosetta Group discussed and highlighted the importance of constitutional guarantees mainly for the application and interpretation of the law on access to information. Whilst many felt that access to information should be understood as a fundamental right, particularly where administrative and political cultures needed to adapt to norms of openness, the examples of the UK and Denmark show that AEI laws can be very strong without a constitutional guarantee.

2. The Impact of Directive 2003/4 on Member State law

In Member States without an access to public information tradition, Directive 2003/4 (and its predecessor) on free access to environmental information had a huge impact in the development of a more general concept of free access to information held by public authorities. In Germany and in former middle and east European countries, this effect was enhanced by the general revolutionary developments of the time. In general, Directive 2003/4 'adds value' beyond general freedom of information legislation, in that it adopts a broader

definition of ‘public authorities’, contains a presumption in favour of disclosure, constrains exceptions when there are ‘emissions’ into the environment involved, and requires a right of review that is timely and not expensive.

3. Empirical Data

Empirical data concerning the use of the right of access to environmental information is rather limited. However, two general observations can be made. In general, the new right seems not to have created an excessive burden for public authorities. With the notable exception of Spain, most Member States reported a rather modest and manageable number of **environmental** information requests. However, in some cases (such as the UK), there has

been ‘a large number of requests, but these have been met with a strong administrative response. In other cases, it might be that there is simply a lack of awareness of the AEI regimes amongst the public, or a lack of data recorded by authorities about requests. Second, the applicants seeking environmental information are often not only environmental NGOs or interested citizens. A large number of applications are filed by private firms, journalists and politicians.

4. Concept of “Public Authority”

Directive 2003/4 includes a broad definition of “public authority”. This is because it includes natural or legal persons performing public administrative functions under national law and also includes natural or legal persons having public responsibilities or functions, or providing public services, relating to the environment under the control of a public authority. These aspects of the definition of “public authority” were clarified by the CJEU in Case C-279/12 *Fish Legal* EU:C:2013:853. The national reports indicated that private persons who come within the scope of the definition of “public authority” are often still insufficiently aware of their obligations under Directive 2003/4 and unwilling to grant access to environmental information.

Member States may opt to exclude from the scope of the definition of “public authority” bodies or institutions when acting in a legislative or judicial capacity. The CJEU has also clarified the scope of these exceptions.

5. Practical Arrangements and Charges

Sweden and Norway provide good practice examples for the creation of public information databases that are easily and effectively searchable via the internet. Member State authorities should make greater efforts in the area of active dissemination of environmental information.

The Avosetta Group noted with regret that deadlines established by Directive 2003/4 for disclosure of information are often not met by public authorities. The EU Commission itself is a rather poor example in this respect as it often does not meet the deadlines for answering information requests under Regulation 1049/2001.

Directive 2003/4/ permits Member States to levy a reasonable charge for the supply of information. Charges can undermine the effectiveness of the right of access to information. The national reports demonstrate mixed approaches to charging across the European States. At a more general level, there is a lack of clarity as to what constitutes a "reasonable" charge and the circumstances in which a charge may be levied. Is a public authority entitled to charge search and retrieval fees? This issue is currently pending before the CJEU in Case C-71/14 *East Sussex County Council*.

6. Exceptions

Directive 2003/4 is grounded on a presumption in favour of disclosure. National authorities find it difficult to apply the public interest balancing test in practice. It is interesting to see from the national reports that certain exceptions are used more frequently in particular Member States (e.g. the exception for unfinished documents in Spain). The national reports also demonstrate a variety of approaches to the exceptions, with some jurisdictions (e.g. Belgium) construing exceptions narrowly, which others interpret them broadly (e.g. Turkey).

The Avosetta Group noted and discussed the important Glyphosate case on business secret concerning emissions (T-545/11, C-673/13 P) currently pending at the CJEU.

7. Third Party Protection

Information requests may affect 3rd party-rights such as trade secrets. The national reports indicated a mixed picture across the Member States as regards third party rights, with some Member States (such as Austria, Denmark, Germany, Italy, Norway, Portugal, Slovenia, Sweden, Switzerland, Turkey, and the UK) providing for notification of, and consultation with, third parties, while other States do not recognise third party interests (including Belgium, Croatia, Greece, Ireland, Poland, and Spain).

8. Judicial Control

The effective judicial control of rejections of information requests often requires an "in-camera" control by the courts, so that courts can examine the validity of decisions not to grant access in a comprehensive way without disclosing information in public proceedings that might have been justifiably withheld. There was much discussion about whether courts should be able to order a public authority to grant access to certain documents and not only to nullify a public authority's unlawful decision. Avosetta members suggested that courts should have this power in order to improve the effectiveness of AEI laws, and that this power might even be a requirement of the Directive. This remedy would meet constitutional hurdles in some Member States.

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