

# ESTONIA

## The Aarhus Convention in operation: Quick Scan

### PART 1:

#### Aarhus 1st and 2d Pillar directives

#### Transposition, Implementation, Enforcement (TIE)

This Quick Scan is intended as a first assessment of how the Aarhus Convention is currently working at Member State level in the European Union. The questions are meant to serve as the basis for gathering information in a relatively short time. We recognize that in some cases and some countries the information is not readily available (for example, on the responses to access to information requests) or that more time might be needed to complete the picture. We hope however to collect a set of first impressions of how the Convention is working at this time.

Answers are given by Kärt Vaarmari (lawyer of Estonian Fund for Nature) on 16<sup>th</sup> April 2007.

#### Transposition

1. Have the first and second pillar directives been introduced into national law on time (Directive 2003/4 and 2003/35)?

Yes, the directives have been transposed in time:

- 1) the main legal act containing necessary requirements for transposition of Directive 2003/4/EC is Public Information Act (2002);
- 2) Directive 2003/35 has been mainly transposed by Environmental Impact Assessment and Environmental Management System Act (enforced on 3<sup>rd</sup> April 2005) (hereinafter referred to as EIA Act).
2. If not, what is the current status of transposition? (Is, for instance, a proposed law currently under consideration by the national parliament?)
3. Has the European Commission taken any action regarding late or incorrect transposition?
4. Have environmental organisations been involved in preparing for transposition?

Yes, in following ways:

- 1) a project for transposition of Directive 2003/4/EC of was carried out by Estonian Ministry of Environment on 2000-2002, involving also environmental NGOs (representatives of NGOs were members of the supervisory committee of the project);
- 2) regarding transposition of Directive 2003/35/EC, the environmental NGOs were involved in preparation of EIA Act, but not in the early stage; they had possibility to present written comments and many of the comments (but not all, especially regarding public participation issues) were taken into account.
5. Have other stakeholders been consulted? E.g. local governments, business interests, etc.

During the preparation of EIA Act, other ministries (Ministry of Social Affairs, Ministry of Economic Affairs and Communications, Ministry of Finances, Ministry of Justice) were consulted, as well as associations of local governments (Association of Estonian Cities, Association of Municipalities of Estonia). The business interests were represented in this process by Estonian Chamber of Commerce and Industry (representative organisation for enterprises).

### Implementation

#### 1. Have the directives been properly implemented?

In main parts, the directives have been properly implemented. There are, however some deficiencies regarding public participation issues. These deficiencies in implementation of Directive 2003/35/EC could be defined as following:

- 1) Informing public about proposals for plans and programmes is not sufficient (art 2(2)(a) (electronic means are mainly used for informing the public, but the methods of disseminating the information cannot be regarded as reasonable or efficient);
- 2) the public rarely gets a chance to express comments and opinions when all options are open before decisions on the plans and programmes are made (art 2(2)(b));
- 3) the results of the public participation are not always taken of due account (art 2(2)(c));
- 4) the time-frames are usually not reasonable, to ensure efficient public participation (art 2(3)) (the general rule for public display of proposals is timeframe of 2 weeks, which is not sufficient).

Furthermore, Estonian legislation does not contain specific provisions about access to justice of non-governmental organisations according to art 10a of Directive 85/337/EEC (art 3(7) in Directive 2003/35). In practice, however, Aarhus Convention has been directly applied and standing granted for environmental NGOs in this respect.

#### 2. Are there any studies analysing the implementation? (For instance, by the environment ministry itself or by someone working for an environmental group or at a university or research institute.)

We are not aware of any studies specifically on implementation of the directives. However, several studies have been made on implementation of the Aarhus Convention itself:

- 1) network Justice & Environment has produced a legal analysis about transposition and implementation of 3<sup>rd</sup> Pillar of the Convention on 2006<sup>1</sup>; this analysis includes national part about Estonian legislation and judicial practice, performed by Estonian Fund for Nature;
- 2) Estonian Ministry of Environment has presented a report about implementation of Aarhus Convention to the Secretariat of the Convention in 2004<sup>2</sup>;
- 3) Estonian environmental NGOs have presented a "shadow-report" about implementation of Aarhus Convention to the Secretariat of the Convention in 2004<sup>3</sup>.

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<sup>1</sup> <http://www.justiceandenvironment.org/je-international/aarhus/>

<sup>2</sup> <http://www.unece.org/env/pp/documents/mop2%20informal/Report%20Estonia%20long.version.pdf>

<sup>3</sup> <http://www.unece.org/env/pp/documents/mop2%20informal/NGO%20report%20Estonia.en.pdf>

3. What efforts have been/are being made to inform the public of the new directives?

Regarding Directive 2003/4/EC, Ministry of Environment has carried out a project for transposition of the Directive (2000-2002) and environmental NGOs were highly involved in the project; besides this, no remarkable efforts have been made by the authorities. This does not mean that authorities have done nothing on informing public about their right to access to information or public participation; the rights, arising from Aarhus Convention, rather than EU directives as such, have been the subject of informing efforts.

4. What use is being made of the opportunities the new directives provide?
  - a. Is there an increase of environmental information requests?
  - b. Does the public concerned participate in EIA and IPPC permitting proceedings?
  - c. Is there any system in place to register information requests, for instance by national or local authorities?
  - d. Is it possible to draw some preliminary conclusions about the use of the new directives?

Aarhus Convention was ratified by Estonia in June 2001 and stepped into force in October 2001. Since then, the new opportunities have been actively used by environmental NGOs and individuals, including increase of environmental information requests and participation in EIA proceedings (less in IPPC proceedings). By national and local authorities, the information requests have to be registered together with obligatory date for answer. The document registers of all authorities are publicly available (also via internet).

However, enforcement of the Directives has probably not caused big developments in this respect.

5. Is it possible to make an early assessment of the effect of the new provisions?

See the previous answer.

#### Enforcement

1. Have complaints been made to the European Commission about transposition?

As far as we know, no such complaints have been made (at least not by environmental NGOs).

2. Have complaints been made to the European Commission about application?

As far as we know, no such complaints have been made (at least not by environmental NGOs).

3. Have cases been brought before national administrative or judicial bodies concerning refusal of
  - a. access to information; or
  - b. problems with public participation?

Yes, such cases are an important part of our judicial practice in environmental law.

Concerning access to information, problems are mainly solved through administrative level. There is possibility to present complaint to Public Information Inspectorate (administrative body), which has been used by environmental NGOs (not often though). One example of such case was connected to information request of Estonian Fund for Nature (ELF) about declaration of intent of ministries of different EU countries about construction of Rail Baltica.

Problems with public participation have been more often matter of court disputes, especially in connection with environmental impact assessment procedure in proceedings of environmental permits.

4. What have been the results of any cases brought?

In most cases, the courts (in case of access to information, the administrative bodies) have been rather supportive towards the complainants.

5. Do Access to Justice provisions provide for
- a. adequate, fair, and effective remedies;
  - b. injunctive relief;
  - c. equitable, timely and not prohibitively expensive legal redress?

The Access to Justice provisions have not been transposed into Estonian legislation. In judicial practice, the Aarhus Convention has been applied directly in these matters.

6. Do you consider your country to be in compliance with the
- a. 1<sup>st</sup> pillar of the Aarhus Convention? If not, please state why not.

In general, Estonia is in compliance with 1<sup>st</sup> pillar of the Aarhus Convention. However, in practice there are deficiencies with answering the information requests timely and properly (in many cases the given answer is vague or incomprehensible).

- b. 2<sup>nd</sup> pillar of the Aarhus Convention? If not, please state why not.

In general, Estonia is in compliance with 2<sup>nd</sup> pillar of the Aarhus Convention (especially compared to other countries), but there are some deficiencies<sup>4</sup>:

- 1) the public is not informed about the activities in adequate, timely and effective manner (art 6(2) of the Convention)
  - a. the information about activities planned is published only electronically on specific website<sup>5</sup>, although several rural areas still have no proper access to internet; besides that, the mentioned website is not used by public in practice because it's difficult structure and mechanisms;
  - b. the contents of information, provided by public authorities about the planned activity and decision-making procedure, is insufficient (already on legislative level);
- 2) the timeframes for public participation are not reasonable
  - a. the basic time-frame for public participation in Estonian legislation originates from Administrative Procedure Act, which states (in § 48 and 49) that period for public to present comments and suggestions to the planned decision (in environmental matters it is usually environmental permit) cannot be shorter than 2 weeks. Unfortunately, the minimum 2 weeks period has been interpreted in practice as reasonable time-frame in any decision-making process and the 2 weeks period for public participation

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<sup>4</sup> The reasoning is presented in more depths in 2004's NGO report; the situation has changed somewhat, but not much since then

<sup>5</sup> [www.ametlikudteadaanded.ee](http://www.ametlikudteadaanded.ee)

(not as minimum, but as determined time-frame) has been transferred into environmental legislation and therefore into environmental decision-making proceedings. Hence, during the 2 weeks public has to manage to get information about the planned activity, elaborate the information, and make comments and suggestions. In case the planned activity/object is of significant impact and the information capacious and complicated, 2 weeks cannot be regarded as reasonable time-frame.

- 3) The public is not involved in early stage of decision-making
  - a. The provision of Convention about each Party providing for early participation, when all options are open and effective public participation can take place, has not been transferred into Estonian legislation; neither has it been properly implemented in practice. In case the planned activities have been connected to expensive and complicated objects, numerous preliminary studies have been made in practice. Such studies do not have to be (and in many cases have not been) subject of public participation, but nevertheless have significant impact to the final decision, substantially narrowing the possible alternatives – often only by economical reasoning – and often suggesting one “right” final decision.
- 4) The opinion of public is not taken into due account
  - a. As the Convention obligates the Parties to ensure that in the decision due account is taken of the outcome of the public participation, the public authorities often claim that they have taken the outcome due account, but there were other overriding interests, causing the decision to be opposite to the outcome of public participation. Hence, there is a problem of formal participation (in some cases we have called it Aarhus bluff).

## **PART 2:**

### **Aarhus proposed 3d Pillar directive**

1. Would the proposed directive, if adopted as proposed, improve access to justice?

Not in Estonia.

2. Or is there a risk the Directive could lead to a rollback of existing rights ?

Yes, there is such risk.

3. Would the proposed directive neither improve or worsen the existing situation?

The proposed directive would worsen the existing situation.

4. How, specifically, would the proposed directive improve or worsen the existing situation?

Although the 3<sup>rd</sup> pillar of Convention has not been transposed into Estonian law, the Convention has been directly applied by courts in this respect and in judicial practice the environmental NGOs have enjoyed wide access to justice in environmental cases. Because of the non-transposition, no criteria have been established for environmental NGOs to have standing in environmental matters – therefore, practically all environmental NGOs (in one case even NGO that was not legal person, but fellowship by it's legal status) have gained access to justice.

The proposed directive would put following restraints to A2J of NGOs:

- 1) the NGO should be legal entity (in Estonian practice it can also be a fellowship of physical persons);
- 2) it has to have organisational structure (that can cause major restraints, depending on how severely the provision would be followed);
- 3) it has to had been active for no more than 3 years (again – may cause problems, especially for the ad hoc fellowships, created in order to deal with specific problem);
- 4) it's annual report must be audited (that is the biggest problem – in Estonia, the associations have no auditing obligation, although the bigger associations use audits because of EU funding requirements – such regulation would grant standing for less than 10 NGOs in Estonia).

The restrictions would have most negative influence to little local (and maybe younger) environmental NGOs, who on the other hand are much more suitable to protect their interests in specific local issues. In case the restrictions should be enforced, the burden of protection of interests would lie on the biggest and most active NGOs who currently are already struggling in conditions of restricted capacity.

Although the Directive (proposal) allows the regime to be less strict (the Member States have discretion in some issues), it is expected that Estonian government will try to transpose the Directive as precisely as possible (this has been the practice by other Directives).

5. Are there specific changes that should be made to improve the existing access to justice situation that are not currently part of the Commission's proposed directive? Please specify.
6. Have studies been made of access to justice in environmental matters in your member state? Please list them.

Ministry of Environment has carried out a project on A2J conception in Estonia. In result of this project, in result of which following study has been made: "A Conception on the Implementation of 3<sup>rd</sup> pillar of Aarhus Convention in Estonia"<sup>6</sup>.

7. Do you consider your country to be in compliance with the 3<sup>rd</sup> pillar of the Aarhus Convention? If not, please state why not.

From transposition point of view, Estonia is definitely not in compliance with the 3<sup>rd</sup> pillar of the Aarhus Convention, because the Administrative Court Proceedings Act does not give environmental NGOs right to turn to court in environmental matters.

However, Estonian courts have been rather supportive towards environmental NGOs in judicial practice, applying the Convention directly.

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<sup>6</sup><http://www.envir.ee/orb.aw/class=file/action=preview/id=3601/Arhusi+konventsiooni+III+samba+l%F5ppkontseptsiooni+t%F5lge+inglise+keelde.pdf>