Right of access to environmental information at national level

A complement to access to justice

EU law established a basic individual right to access to environmental information in the early 1990s in the form of former Directive 90/313 on the freedom of access to information on the environment, which member states had to implement by the end of 1992. The EU therefore already had adopted a body of rules on access to information by the time the Århus Convention was signed in June 1998. Århus, however, represented an advance for the EU in this particular area of environmental policy, setting down a number of general and specific requirements for its contracting parties going substantially beyond those stipulated in the 1990 Directive. An overview of the Convention’s provisions has already been provided in the previous chapter (see section 8.1 of Chapter 8). The Convention’s provisions have been implemented at EU level principally through Directive 2003/4, which will be considered for the remainder of this chapter.

8A.1 Directive 2003/4 on public access to environmental information (AEI Directive)

As a means of structuring the implementation the Århus Convention’s access to information provisions into national law of the EU member states, on 28 January 2003
the EU promulgated Directive 2003/41 on public access to environmental information and repealing Council Directive 90/313 (AEI Directive). Under the AEI Directive, member states are obliged to ensure that they have transposed its requirements into national law by 14 February 2005, the point in time when its predecessor, Directive 90/313, was repealed. In several respects, the AEI Directive builds upon the foundations created by Directive 90/313, which laid down important and novel rights of access to information on the environment held by member state public authorities. However, the AEI Directive also introduced a new dimension to the area of access to information with a raft of requirements relating to the collection and public dissemination of environmental information by member states and their competent authorities; Directive 90/313 only laid down a rather general and vague commitment in this respect.

In alignment with the Århus Convention, the objectives of the AEI Directive are to introduce two main sets of obligations for member states: the establishment of a right of access to environmental information as well as the setting up of systems to ensure an efficient collection and dissemination of information to the public. In accordance with Århus, the AEI Directive specifies that member states retain the right to maintain or introduce measures that provide for broader access to information than that required by its provisions. The AEI Directive is designed to serve as a general instrument (lex generalis) on access to environmental information at EU level, applicable generally in the absence of any legislative provisions on AEI contained within EU legislation specific to a particular environmental sector or issue (lex specialis). Accordingly, as confirmed by the Court of Justice of the European Union (CJEU), the AEI provisions contained in a
legislative instrument which specifically regulates a particular field will normally apply instead of the AEI Directive, such as the Genetically Modified Organisms (GMO) Directive, unless the specialist Union legislative instrument stipulates otherwise. The CJEU has also confirmed that the AEI Directive is to be interpreted in light of the wording and scheme of the Århus Convention.

8A.1.1 Right of access to environmental information under the AEI Directive

Article 3 of the AEI Directive establishes the ground rules pertaining to a Community law right of access to environmental information. Specifically, Article 3(1) lays down a general and fundamental obligation on Union member states to ensure that public authorities are to make available ‘environmental information’ held either by or for them to any applicant, without the latter being required to state any particular interest in order to justify a request for information.

This right is far-reaching, given the broad definitions of key terms referred to in the AEI Directive. Specifically, ‘applicant’ is defined to include ‘any natural or legal person’ requesting environmental information. ‘Environmental information’ is defined very broadly indeed to cover a wide range of information on: the state of the elements of the environment and their mutual interaction, such elements including air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components such as GMOs; factors affecting or likely to affect environmental elements; measures and
activities affecting or likely to affect or intended to protect the above-mentioned factors and/or elements; reports on implementing EU environmental legislation; cost–benefit and other economic analyses and assumptions used within the framework of above-mentioned measures or activities; and the state of human health and safety, and conditions of human life, cultural sites and built structures inasmuch as they are affected by environmental elements. The definition also makes it clear that information may come from a wide variety of sources, namely ‘written, visual, aural, electronic or in any other material form’. Accordingly, it is important to note that the AEI Directive does not simply cover written information in hard-copy format but also information communicated in other ways, such via telephone conversations, electronic media or meetings. This broad definition of information sourcing ensures that informal as well as formal communications relating to environmental decision-making fall under the ambit of AEI controls, including informal but often very influential correspondence between lobby groups and national public authorities (except where bodies act in a ‘legislative capacity’ as discussed below). The CJEU has also underlined that the definition of ‘environmental information’ in the directive is to be interpreted in a broad manner, in keeping with the aims of the EU legislation and Convention, and with any derogations construed narrowly.

In alignment with the Århus Convention, ‘public authority’ is defined broadly in the AEI Directive as a range of persons and entities directly associated with the performance of public services. Article 2(2) of the AEI Directive defines the term as covering the following:
(a) government or other public administration, including public advisory bodies, at national, regional or local level;
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any other natural or legal persons having public responsibilities or functions, or providing public services, relating to the environment, under the control of a body or person falling with subparagraphs (a) or (b) above.

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

The AEI definition of ‘public authority’ accordingly includes not only government and public administrative entities but also natural and legal persons performing public administrative functions or otherwise having public responsibilities or functions in relation to the environment. Accordingly, the right of access to information is secured even if EU member states seek to delegate, transfer or contract out information and information services to private entities. The breadth of the definition also constitutes a particular application of the integration principle set out in the EU treaty framework,
which provides that environmental protection requirements are to be integrated into the
definition and implementation of Union policies and activities.20 At the same time the
‘public authority’ definition enables member states, in alignment with Århus, to exempt
bodies engaged in judicial or legislative capacity.21 The exemption regarding judicial
bodies was introduced in order to ensure that the integrity of legal proceedings would not
be undermined, including the principle of independence of the judiciary. The exemption
relating to bodies acting in a legislative capacity was established on the basis that it was
assumed that the existing national procedures and practice concerning public access to
the national parliamentary process would already provide sufficient transparency in
relation to the enactment of statutes concerning the environment. This may well be an
optimistic and unrealistic assumption to have been made, given that access to information
in relation to lobbying of national legislative processes varies considerably across
Europe.

The CJEU has already had occasion to provide further clarification on the scope of the
‘public authority’ definition in Article 2(2) of the AEI Directive. In particular the
exemption relating to bodies acting in a ‘legislative capacity’ has arisen. In Flachglas
Torgau22 the CJEU confirmed that national ministries participating in a legislative
process involving the enactment of public legislation taken through the national
parliamentary process may be exempt for the duration of the process. However, in a more
recent case the CJEU has indicated that the ‘legislative capacity’ exemption should be
construed narrowly, in keeping with the aims of the EU legislation to ensure wide public
access to environmental information. In Deutsche Umwelthilfe eV23 a German non-
governmental environmental organisation (NGEO) wished to access correspondence between the German Federal Ministry of Economic Affairs and Technology and the automotive industry during the consultation phase prior to the adoption of German legislation on energy consumption labelling. German law excluded the possibility of the public accessing information concerning the promulgation of all national legislation relating to the environment.

In a preliminary ruling, the CJEU confirmed that, in line with Articles 2(2) and 8 of the Århus Convention, EU member states may not use the ‘legislative capacity’ exemption to cover ministries when adopting regulations of a lower rank than a legislative statute or law. Accordingly, executive regulatory acts enacted on the basis of enabling legislation are subject to the AEI Directive’s obligations. This judgment is potentially very significant in terms of rendering more transparent the lobbying process exerted in relation to the enactment of environmental regulation, the most crucial elements of which, containing substantive protection obligations, are executive in nature and are not necessarily subject to (detailed) national parliamentary scrutiny.

In Fish Legal an angler’s association and a member of the public sought information from two privatised water companies concerning aspects of water quality and management within their respective geographical areas of jurisdiction, including in relation to discharges, clean-up operations, emergency overflow and sewerage capacity. The water companies, Information Commissioner and first-tier administrative review tribunal considered that the water companies did not fall within the scope of UK access to
environmental information regulations\textsuperscript{25} intended to implement the AEI Directive. In a
detailed preliminary ruling requested by the UK Upper Tribunal (Administrative Appeals Chamber), the CJEU clarified that privatised utilities may be caught under the ‘public authority’ definition contained in Article 2(2). Specifically, they may fall under Article 2(2)(b) as legal persons performing public administrative functions under national law in relation to the environment if they are vested under national law with special powers beyond those resulting from the normal rules applicable between persons governed by private law.\textsuperscript{26} Alternatively, they may be caught under Article 2(2)(c) as legal persons having public responsibilities, functions or providing public services relating to the environment under the control of a body or person falling within the scope of Article 2(2)(a) or (b). In particular, where a legal person is subject to a precise legal framework setting out the rules stipulating the ways in which it must perform public functions relating to environmental management with which they are entrusted, and where this entails administrative supervision intended to ensure compliance with those statutory rules (such as via administrative orders or imposition of financial penalties), it may be concluded that the person is subject to ‘control’ for the purposes of Article 2(2)(c) of the AEI Directive.\textsuperscript{27} The fact that the state (in the form of a public authority covered by either Article 2(2)(a) or (b)) may not control day-to-day managerial functions is accordingly irrelevant; the key is whether the state is able to exercise decisive influence on the legal person’s activities in the environmental field.\textsuperscript{28} The CJEU made it clear from this judgment that that the definition of ‘public authority’ is to be broadly interpreted, and on no account may be said to exclude entities from its ambit on account of their commercial status. Once classified as a ‘public authority’, a body or person is obligated
to disclose environmental information they hold in the context of the supply of public 
services in the environmental field. It should also be pointed out in this context that the 
public and NGEOs are entitled (under general principles of EU law as discussed in 
Chapter 6) to be able to rely upon the provisions of the AEI Directive that meet the 
criteria of direct effect directly against a privatised utility in light of the latter’s status as 
an ‘emanation of the state’, in accordance with CJEU case law such as Foster.

Article 3(2)–(4) of the AEI Directive specifies the procedural rules incumbent on member 
states’ public authorities to be observed in relation to responding to requests for 
information. Subject to a list of exceptions provided in Article 4 of the directive, member 
states are required to ensure that as soon as possible and at the latest within a month after 
receipt of a request for environmental information, such information is to be made 
available to the applicant. However, this deadline may be extended where volume and 
complexity of the information so require. In such cases, applicants are to be notified as 
soon as possible and, in any event, before the end of the initial one-month period. If a 
request is formulated in too general a manner, public authorities must notify the applicant 
within a month of receipt of the initial information application to specify the request as 
well as assist the applicant in so doing. Refusals of requests for information, either in 
full or in part, must be furnished to applicants together with reasons for a rejection within 
one month of receipt of a request. Refusals must be notified in writing or electronically 
if the request is in writing or the applicant so requests and must contain reference to the 
applicant’s rights to have the decision reviewed. Tacit refusals are accordingly 
outlawed. Member states are under a general duty to make reasonable efforts to ensure
that environmental information at their disposal is held in forms or formats readily accessible and reproducible electronically,\textsuperscript{37} and to ensure that information is to be made available where possible in a form or format requested by the applicant.\textsuperscript{38} These procedural requirements correspond largely with those stipulated in the Århus Convention.\textsuperscript{39}

Under Article 3 and other provisions of the AEI Directive, member states are also required to take certain steps to ensure that the mode and manner of reacting to requests for information are both user-friendly and constructive. Specifically, Article 3(5) requires member states to ensure that their public administration takes steps to assist applicants for information by requiring officials to be supportive, that it provides publicly accessible lists of relevant public authorities and that practical arrangements are put in place to ensure access rights may be effectively exercised.\textsuperscript{40} In addition, member states are obliged to ensure that their competent authorities disseminate adequate information and advice to the public about their access-to-information rights.\textsuperscript{41} Access to public registers or lists established for this purpose must be free of charge.\textsuperscript{42} Any charges member states levy for the supply of requested information must ‘not exceed a reasonable amount’ and make publicly available a schedule of such administrative fees and information as to the circumstances in which they may be imposed.\textsuperscript{43} Recital 18 of the preamble to the AEI Directive indicates that this implies as a general rule that charges may not exceed actual costs of reproducing material and that requirements for advance payment should be limited. However, the recital also concedes that a commercial rate and advance payment may be charged where necessary in order to guarantee the continuation of collection and
publication of such information. If information may be able to be separated from parts exempted from disclosure, then the member state must ensure that its public administration discloses the non-exempted parts.\textsuperscript{44} In the event of receiving a request for information that it does not hold, a public authority is obliged as soon as possible thereafter either to inform the applicant as soon as possible of the relevant authority which it believes holds the information concerned or transfer the request to the authority concerned itself.\textsuperscript{45}

Article 4(1)–(2) of the AEI Directive provides a definitive list of exceptions to the duties to disclose environmental information enshrined in Article 3, which corresponds with the Århus Convention’s set of derogations.\textsuperscript{46} Member states are entitled but not required to refuse access to information on the basis of such exceptions. Article 4(1) specifies a number of general grounds justifying rejection of a request for information, namely that the information requested: is not held by or for the public authority receiving the request;\textsuperscript{47} is ‘manifestly unreasonable’;\textsuperscript{48} is formulated in too general a manner;\textsuperscript{49} concerns material, documents or data not yet completed or finalised;\textsuperscript{50} or relates to internal communications, bearing in mind the public interest served by disclosure.\textsuperscript{51} Article 4(2) provides a list of grounds for refusing information requests where certain specific public interests would be adversely affected. Specifically, the interests protected are: confidentiality of public authority proceedings, insofar as confidentiality is protected by law;\textsuperscript{52} international relations, public security or national defence;\textsuperscript{53} the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to carry out a criminal or disciplinary enquiry;\textsuperscript{54} confidentiality of commercial or industrial
information where protected by national or EU law to protect a legitimate economic interest (such as statistical confidentiality or tax secrecy);\textsuperscript{55} intellectual property rights;\textsuperscript{56} confidentiality of personal data or files of a natural person where the person has not consented to public disclosure and where such confidentiality is protected by national or EU law;\textsuperscript{57} interests or protection of a person volunteering information without being under legal duty to do so, where they have not consented to public disclosure;\textsuperscript{58} and the protection of the environment (such as location of rare species).\textsuperscript{59}

Some of the exceptions listed in Article 4(2) are subject to an important caveat. Specifically the exceptions relating to confidentiality as well as the protection of the environment\textsuperscript{60} are not applicable where a request concerns information on emissions into the environment.\textsuperscript{61} This particular qualification is partially reflected in the Århus Convention,\textsuperscript{62} and serves to boost the rights of access to information particularly pertinent to issues connected with environmental law enforcement. Whether or not this qualification is compatible with privacy rights recognised under the EU Charter of Fundamental Rights (Articles 7–8 EUCFR) and the European Convention of Human Rights (Article 8 ECHR) is potentially debatable, insofar as disclosures contain information about particular persons. However, it is submitted that it is questionable, to say the least, how disclosure of information pertinent to the state of the environment may be held to be undermining fundamental human rights, and in any event the EU institutions as well as the member states have a considerable margin of discretion within the legal framework of privacy protection to carry out their responsibilities of protecting the environment as a matter of general interest.\textsuperscript{63}
The CJEU has confirmed that protection of commercial or industrial information is limited if it relates to information on emissions into the environment. In *Stichting Natuur* an NGO had sought to gain information from a public authority concerning the fixing of a maximum permitted residue level in relation to a plant protection product, including certain studies and reports on field trials concerning residues and effectiveness of the biocide. Access was denied on grounds of commercial confidentiality. The CJEU confirmed, however, that such a ground of refusal must be interpreted restrictively and that public authorities are obligated to disclose information if it relates to emissions into the environment or where the public interest of disclosure outweighs interests served by a refusal to disclose. A similar outcome was arrived at in *Križan*, which involved a dispute regarding access to information in connection with the exercise of rights under the second pillar of Århus to participate in environmental decision-making. In that case members of the public wished to challenge a decision authorising the operation of a landfill site in Slovakia, but were unable to obtain information regarding the location of the site on grounds of commercial confidentiality. Under the EU implementing legislative rules implementing the second pillar relating to the granting of permits, now enshrined in Article 24 of the Industrial Emissions Directive 2010/75, the right to gain access to information concerning the permit is made subject to the restrictions set out in Article 4(1) and (2) of the AEI Directive, which includes restrictions justified on grounds of commercial confidentiality. The CJEU held first that access to information under the EU directive covered information relating to the location of the site of the landfill, seen in light of Article 6 of the Århus Convention. In particular, Article 6(6) stipulates that the
public must be able to access all information relevant to the decision-making relating to
the authorisation of activities covered by Annex I (which includes landfill sites receiving
more than 10 tonnes of waste per day or with a total capacity exceeding 25,000 tonnes).
Secondly, the CJEU rejected that denying access to such information could be justified
on grounds of commercial confidentiality to protect a legitimate economic interest, given
the importance of the criterion of location to the final urban planning decision on whether
to authorise the installation concerned.68 The Court held also that in any event non-
disclosure based on confidentiality was used in breach of Article 4(4) of the AEI
Directive, in that it led to public being denied proper access to the urban planning
decision. Article 4(4) requires public authorities to separate out any information falling
with certain exceptions justifying non-disclosure including protection of commercially
confidential information.

Whilst Article 4 of the AEI Directive provides several grounds enabling a member state
public authority to refuse a request, it is also important to note in this context the clear,
general legal limits relating to their scope. Specifically, the AEI Directive requires that all
the grounds for refusal cited in Article 4(1) and (2) be interpreted restrictively. In each
individual case, the public authority in receipt of a request for information must engage in
weighing the public interest of disclosure as against the interest served by a refusal of a
request.69 The CJEU has confirmed that the interests should be balanced on a case-by-
case basis.70 The Court has also held that when weighing the public interest served by
disclosure against interests promoted by a refusal to disclose, the separate interests
protected under Article 4(2) should be considered cumulatively against the general public
interest in favour of disclosure. This particular issue arose in the Office of Communications\textsuperscript{71} in which a UK public authority responsible for telecommunications refused to disclose to researchers commissioned by the UK Department of Health the grid references of mobile-phone base stations on grounds of public security as well as the need to protect IP rights of mobile-phone operators (i.e. grounds based on Article 4(2)(b) and (e) of the AEI Directive). In addition, the list of exceptions contained in Article 4 constitutes an exhaustive list; accordingly, member states are not entitled to rely on grounds other than the ones expressly stated in the AEI Directive. Disclosure of information should be the general rule, subject only to the specific derogations set out in the AEI Directive.\textsuperscript{72} This accords with the general approach of the CJEU when interpreting derogations from fundamental rights in EU law, namely to apply a strict and narrow interpretation to any derogations provided.\textsuperscript{73}

Finally, where a member state does decide to provide for exceptions to the access-to-information rights, the AEI Directive entitles it to draw up a publicly accessible list of criteria for the purpose of steering public authorities on how to determine individual requests for information.\textsuperscript{74} The CJEU has confirmed, as a qualification, that criteria set down at national level to facilitate a comparative assessment of interests involved (namely those in Article 4 of the AEI Directive) must not dispense with the need for competent authorities to actually carry out a specific examination of individual cases.\textsuperscript{75} Notwithstanding this proviso, such a list of criteria would be of value to all parties involved, enabling them to clearly ascertain the more general and undefined exceptions listed in Article 4 of the AEI Directive (e.g. clarification of requests deemed to be
‘manifestly unreasonable’). Self-evidently, though, such criteria laid down at national level must not serve to undermine the integrity of the parameters set down in Article 4 in relation to the exceptions. In order to minimise dangers of this sort, the Commission would be well advised to be involved in drawing up recommendations and guidance on the setting of criteria, a strategy that would be in accordance with its focus on stimulating good practice in terms of implementing EU environmental legislation under the auspices of the EU’s Seventh Environment Action Programme (2013–20).

8A.1.2 Public dissemination of environmental information under the AEI Directive

Articles 7–8 of the AEI Directive serve to implement the requirements flowing from the Århus Convention on the collection and dissemination of environmental information to the public at large, as far as EU member states and their public authorities are concerned. Article 7 contains various obligations concerned with the organisational aspects of member state collation of information with a view to rendering it transparent and in a suitable format for public dissemination. Article 8 focuses on qualitative aspects of the information garnered.

As far as the collection of environmental information is concerned, Article 7 of the AEI Directive requires member states to ensure that they make available a number of sources of environmental information to the public, subject to the former being able, at their option, to utilise the exceptions specified in Article 4. In alignment with the Århus
Convention, three types of information are addressed in this regard: legal and policy-related texts; information on the state of the member state’s environment; and information to be disseminated in the event of threats to human health or the environment. Article 7(2) specifies that the following legal and policy documentation should be made available as a minimum: texts of international agreements, EU law as well as national law on the environment; policies, plans and programmes relating to the environment; progress reports on implementation of environmental law when prepared in electronic form by public authorities; reports on the state of the environment; data or data summaries derived from the monitoring of activities affecting or likely to affect the environment; authorisations with a significant environmental impact and environmental agreements or a reference to a place where such information may be requested or found; and environmental impact studies and risk assessments concerning environmental elements or a reference to a place where such information may be requested or found. Article 7(3) requires member states to publish at regular intervals, not exceeding four years, ‘national and, where appropriate, regional or local reports on the state of the environment’. Such reports must include information concerning the quality of as well as pressures on the environment. Although it is evident from this provision that member states are provided with discretion to compile reports at regional and local levels on the state of the environment in accordance with their particular constitutional requirements, it is also clear from its wording and aims that, collectively, the reports published must at least offer nationwide coverage in terms of information on environmental quality and pressures. By virtue of Article 7(4) of the AEI Directive, member states are obliged to take necessary measures to ensure that, in the event of an
imminent threat to human health or the environment caused either naturally or from human activity, all information held by public authorities is disseminated immediately that could assist in the prevention or mitigation of harm arising from the threat concerned. Self-evidently, this provision requires member states to take active precautionary steps to ensure that their authorities are in a suitable position to be able to provide this information in a timely fashion if such a situation arises. This implies that that relevant information is to be organised and stored on the basis that its dissemination may be readily be accessed when required.

Article 7 of the AEI Directive also seeks to ensure that EU member states organise the collation of environmental information held by public authorities in a way that readily lends itself to being disseminated to the general public. The first paragraph of Article 7(1) lays down a general obligation in this regard, stipulating that public authorities are to organise their environmental information with a view to its ‘active and systematic’ public dissemination, in particular by means of computer telecommunication and/or electronic technology (e.g. via the internet) where this is available. Member states are under a parallel general duty to ensure that environmental information ‘progressively’ becomes available in electronic databases readily accessible to the public via public telecommunications networks, although this obligation does not apply to information collected before the entry into force of the AEI Directive (14 February 2003). Further encouragement for member states to promote the use of electronic systems as a means of storing as well as communicating environmental information is provided in Article 7(6) of the AEI Directive, which stipulates that member states may fulfil the collection and
organisational requirements of Article 7 as a whole by creating relevant webpage links to internet sites hosting required information.

In terms of other organisational aspects, the AEI Directive does not include any provisions to follow up those contained in the Århus Convention on establishing a system of publicly accessible computerised pollution inventories. This is because, by the time of the directive’s adoption, the EU had already proceeded to begin to develop a central, standardised European database system providing information on certain pollution emissions. Under the Århus Convention, contracting parties are obliged to take steps to provide over time a ‘coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting’. This latter provision has enormous potential in facilitating enforcement of agreed environmental emission standards, given that such databases could provide a detailed account of emissions generated by particular countries, regions, conurbations and even individual plants, depending upon the range and depth of information made available on such a database system. On 21 May 2003, a United Nations Economic Commission for Europe (UNECE) Protocol on Pollutant Release and Transfer Registers was adopted in Kiev as a supplementary instrument to the Århus Convention (known as the Kiev/Pollution Release Protocol) and entered into force on 8 October 2009, after the requisite number of ratifications (16) had been obtained. At the time of writing, the Pollution Release Protocol has 33 contracting parties. The EU and its member states (excepting Greece, Italy and Malta) have become contracting parties.
In line with these developments under the aegis of Århus, the EU has taken steps since
the early 2000s to establish and develop Union-wide pollution database systems. In
February 2004, the EU commenced work in this area in earnest with the formal launch of
the so-called ‘EPER’ database (European Pollutant Emission Register),\textsuperscript{93} a free online
database system available to the public via the European Environment Agency’s website
which contained information on pollution emissions dating back to 2001.\textsuperscript{94} Formally
speaking, the EPER database was required to be set up by virtue of the former Integrated
Pollution Prevention and Control (IPPC) Directive 96/61, but the idea of setting up
emissions inventories dates back at least to the 1992 UN Conference on Environment and
Development in Rio. EPER provided information supplied by participating states
(initially EU member states and Norway) on pollution emanating from some 10,000
industrial installations. The database was intended to create an extensive publicly
accessible internet portal to free information about regional and localised environmental
pollution covering the complete area of the European Economic Area by 2008.\textsuperscript{95} Under
the EPER system, the following data was to be made accessible on a triennial basis from
the EU member states and other participating countries relating to the emission into air
and water of 50 industrial pollutants from 56 types of industrial activity: emissions from a
specific industrial site by name/postal code/address/location; industries in specific
countries or by a specific activity; and emissions by name of pollutants. It also provides
general information on reported pollutants including its impacts on environment and
health.\textsuperscript{96}
Within a relatively short space of time after the EU decided to upgrade the EPER system and transform it into a more comprehensive public register. The successor system, known as the European Pollutant Release and Transfer Register (E-PRTR), became fully operational in 2009 and covers a wider range of pollution sources and industrial activities than EPER. The E-PRTR is intended to serve to implement the 2003 Pollution Release Protocol. As a publicly accessible online database system, the E-PRTR focuses on 91 pollutants from 65 different industrial activities emitted into air, water and onto land, covering some 30,000 installations across the Union as well as other participating countries (currently Iceland, Liechtenstein, Norway, Serbia and Switzerland). It also provides information on the management operations by such installations concerning solid waste and waste water as well as information about pollution from diffuse sources (e.g. traffic, aviation, shipping, agriculture). Reporting is conducted on an annual basis instead of the previous triennial reporting framework under EPER. In 2013, the Commission published its first review of the state of implementation of the database system covering the initial three years of reporting (2007–9). Like its predecessor, the E-PRTR database does not contain real-time information, but a collation of relatively recent data reported by participating countries. Accordingly, there will be a time lag of a couple of years relating to the currency of the information made available on the online system. Nevertheless, the E-PRTR database provides a fairly accurate overview of the trends and overall state of key pollution emissions across Europe and is a highly valuable information tool for both the public and policy-makers alike.
One of the most crucial components of the AEI Directive relates to obligations in Article 8 concerning the quality of environmental information collated and disseminated to the public. Directive 90/313 did not include any specific provisions regarding the qualitative state of environmental information. Specifically, Article 8(1) sets out the following key requirement:

1. Member States shall, so far as is within their power, ensure that any information that is compiled by them or on their behalf is up to date, accurate and comparable.

This general obligation applies to the contents of the three types of information sources to be disseminated under Article 7 of the AEI Directive. In addition, it is submitted that it is of legal relevance in connection with the disclosure of environmental information by public authorities to the public upon request under Article 3 of the AEI Directive. Article 8(1) inherently requires member states to ensure that adequate financial, technical and human resources are made available to their competent authorities so as to ensure fulfilment of the critically important criteria of temporal currency as well as factual accuracy of environmental information disseminated or disclosed. However, the provision is subject to the qualification that member states are to carry out their obligations ‘so far as is within their power’. This indicates that member states retain a considerable margin of discretion in terms of fulfilling the criteria, in particular determining the level of resources to be allocated from the public purse into improving existing environmental information-collection and analysis systems. It would, though, be
inaccurate to suggest that this caveat renders the obligations in Article 8(1) of the AEI Directive devoid of any essential legal force. In particular, the provisions require, at the very least, Union member states to take active steps to consider in a serious and meaningful way possibilities (administrative as well as technical) of improving environmental data collection, and provide a reasoned justification for conclusions that they make in relation to these considerations. A failure to undertake these minimum steps would constitute a violation of Article 8(1), and would be in all probability justiciable before the national courts of the member states under the terms of the *Kraaijeveld* judgment (Case C-72/95) and allied jurisprudence, as discussed in Chapter 6.

Article 8(2) of the AEI Directive includes the second of the legislative instrument’s provisions on qualitative aspects of environmental information. The provision requires public authorities, in the context of a request for information on the environmental impact of particular factors specified in Article 2(1)(b) of the directive, to supply upon request details regarding the authority’s methods of analysis of the impacts. Specifically, they are to report to the applicant on the place where the following may be found that have been used to compile environmental information: measurement procedures, including methods of analysis; sampling; and pre-treatment of samples. Alternatively, applicants may be referred to a standardised procedure where this is used. This particular provision is designed to ensure that scientific analysis conducted by public authorities of human activities affecting the environment is rendered as transparent as possible, for instance in relation to analysis of exposure to particular emissions into air, water and/or soil from industrial installations. Disclosure of such information opens up the possibility for
individuals to subject public authority monitoring of environmental quality and safety to rigorous scrutiny, and as such constitutes an important right for individuals to ensure that the legal commitments on quality entered into under Article 8(1) are adhered to.\textsuperscript{104}

8A.1.3 Impact of the AEI Directive on EU environmental law enforcement

Initially, the implementation of the legislative instrument got off to a slow start with several member states failing to honour the transposition deadline set by the directive.\textsuperscript{105} Two member states, Ireland and Austria, were condemned by the CJEU in infringement proceedings for failing to adopt within the deadline prescribed the necessary measures to transpose the AEI Directive.\textsuperscript{106} Subsequently, in 2012 the Commission confirmed that member states (EU-27) have now transposed the EU legislation into national law.\textsuperscript{107}

There is little doubt that the AEI Directive constitutes a vital legal tool in terms of assisting the opportunities of enforcement of EU environmental legislation by private persons. It provides individuals and NGEOs with a range of rights that may be used to assist them in establishing the extent to which the private as well as the public actors within member states are acting in compliance with minimum binding EU environmental legislative standards. In particular, the right of access to environmental information held by public authorities enables private individuals to determine to what extent national authorities are seeking to act upon information they receive in monitoring the state of the environment, in particular in assessing the types and quantities of emissions and
discharges from industrial entities. If a public authority responsible for enforcing adherence to an EU environmental norm within the territory of a member state is found wanting in this respect, private individuals then have the opportunity to take the matter further, such as by way of complaint to the European Commission with a view to promoting the use of Article 258 TFEU infringement proceedings against the member state involved, and/or by way of review before the relevant national authorities and courts.108 Accordingly, the AEI Directive provides an incentive here for member states to make sure that appropriate action is taken by public authorities to ensure that instances of activities found not to be in compliance with EU environmental norms are addressed satisfactorily. Even where member states may fail to transpose the AEI Directive into national law correctly, it is clear that this will not be a bar to the legal operation of many of its provisions within their territories. Specifically, it is evident that a number of the directive’s provisions satisfy the criteria for direct effect, so that in particular private persons are entitled to rely upon the rights of access to information guaranteed under Article 3 and 7(2) of the AEI Directive directly within the national legal order and enforce them against member state public authorities holding environmental information.

On the other hand, much of the success of the AEI Directive will depend upon the relative efficiency as well as effectiveness of public authorities in fulfilling the requirement underpinning the legislative instrument to ensure that the quality of environmental information that they collect is up to date and accurate (as required under Article 8(1) of the directive). It is important not to lose sight of the fact that it is public authorities entrusted with environmental protection duties, as opposed to private
individuals and associations, which are vested with legal powers to inspect sites as well the technical and financial resources to make effective use of them. The role of private persons in enforcing EU environmental law is never going to be as significant as public authorities, given these factors. Nevertheless, the AEI Directive endows the public with certain rights which may be used potentially to good effect in inducing public authorities involved in environmental law enforcement to carry out their work effectively where evidence of a violation of an EU environmental standard is publicly accessible. In addition, the access-to-information rights provided in the AEI Directive offer the chance for private individuals to place pressure on public authorities to carry out up-to-date assessments of the state of the environment, where individuals consider that there are environmental protection concerns raised by the absence of information concerning a particular area or activity. One clear example of a deficit of information in the UK would be the long-standing paucity of information available on the handling and management of fly ash from municipal waste incinerators, a residue containing extremely high levels of toxic elements such as dioxins, which have potentially very serious adverse health effects when coming into contact with humans or animals. In addition, uncontrolled management of this fraction of waste may have serious long-term detrimental consequences for the environment, for instance if disposed of in an uncontrolled fashion so as to be liable over time to seep through soil and contaminate groundwater. Concerns have abounded as to where such fly ash is actually deposited in the UK and whether its waste management is compatible with EU waste legislation, notably the health and safety requirements of the Waste Framework Directive (WFD) 2008/98.109
The AEI Directive does not address two aspects of the Århus Convention which are targeted at environmental information provided by the private commercial as opposed to public sector. Specifically, under Article 5(6) of the Convention contracting parties are required to ‘encourage’ operators whose activities have a significant impact on the environment to inform the public ‘regularly’ of the environmental impact of their activities, ‘where appropriate’ by way of voluntary eco-labelling or eco-auditing schemes or by other means. The EU has already adopted voluntary measures in this regard, so the AEI Directive did not, strictly speaking, need to take specific action here. This rather soft clause in Århus therefore offers nothing new in terms of substance for the Union, and contains a fundamental flaw in failing to introduce either any element of compulsion or clear incentive (such as through fiscal credits) as a means of ensuring that in practice such persons are likely provide consumers with full and fair disclosure of the environmental impact of their activities. Article 5(8) of the Convention requires contracting parties to develop mechanisms with a view to ensuring that sufficient product information is made available to the public so that the latter is in a suitable position to make informed environmental choices. The EU has adopted a number of measures requiring environmental information to be incorporated in labels of certain products, such as warnings in relation to dangerous chemicals, batteries, GMOs as well as quality-related information in relation to organic agricultural produce and energy consumption. However, this particular provision in Århus is an important requirement for the EU, given that the latter has a long way to go to ensure that relevant environmental information is provided to consumers in relation to all products containing
substances which constitute a threat to the environment and in relation to the production processes of products which may have significant adverse impacts on the environment.

In 2012 the European Commission compiled an EU-wide report on the experience gained in the application of the AEI Directive,\textsuperscript{117} in light of national reports issued by the member states.\textsuperscript{118} The Commission’s overall assessment of the application and impact of the directive has been broadly positive, in terms of effecting substantial improvements in the field of access to environmental information. Recognising that member states still have some way to travel in order to fully implement all the AEI provisions,\textsuperscript{119} the Commission’s report indicates that in essence most of the key obligations of the AEI Directive have been implemented more or less adequately. It has not considered it necessary to propose any specific legislative amendments at this relatively early stage in the legislative instrument’s history. Whilst the Commission acknowledges the wide discretion generally accorded to member states on the mode of disseminating information about the environment under the AEI Directive, it is keen to emphasise in the report its view of the need for states to shift further from an ‘information-on-request’ approach towards one based far more upon active and broad dissemination of information using the latest information technologies, such as online maps depicting environmental information as applicable to distinct geographical areas within individual member states. This reflects a broader ongoing agenda on the part of the Commission to broaden as well as deepen the range of electronic environmental information available to the public.\textsuperscript{120}
The EU’s Seventh Environment Action Programme (2013–20)\textsuperscript{121} (EAP7) foresees a deepening of the Union’s commitment towards enhancing the current state of national implementation of the EU access to environmental information legislative framework. As a general goal, it has set itself the task, as part of one of its priority objectives,\textsuperscript{122} to ensure that by 2020 ‘the public has access to clear information showing how Union environmental law is being implemented consistent with the Århus Convention’.\textsuperscript{123} To achieve this, the EAP7 envisages the need to focus on improving the way that knowledge about implementation of EU environmental law is collected, structured and disseminated at national level, such as through the appropriate use of online tools and other targeted assistance measures.\textsuperscript{124}

\begin{itemize}
\item[3] Art. 10 AEI Directive. Bulgaria and Romania had until 1 January 2007 and Croatia until 1 July 2013 to adhere to the terms of the AEI Directive.
\item[6] See Art. 7 of former Directive 90/313, which required member states to provide only general information to the public on the state of the environment.
\item[7] See Art. 1(a)–(b) AEI Directive.
\item[8] See recital 24 of the preamble to the AEI Directive, which corresponds to Art. 3(5) of the Århus Convention. Given that the AEI Directive is an environmental measure based on Art. 192 TFEU, member states are, in any event, vested with the competence under the EU treaty framework to pass or maintain measures that afford stricter environmental protection in the policy sector concerned, so long as they are compatible with the TFEU and TEU. They must notify the European Commission of such measures (see Art. 193 TFEU).
\end{itemize}


11 See e.g. Case C-115/09 Bund für Umwelt und Naturschutz Deutschland (para. 41 of judgment) and Case C-515/11 Deutsche Umwelthilfe eV v Germany (para. 32 of judgment). This judicial finding is wholly consistent with the terms of the AEI Directive, which in the second sentence of recital 5 states that ‘provisions of [Union] law must be consistent with that of the Convention with a view to its conclusion by the European [Union]’.

12 Art. 2(5) and recital 8 of the preamble to the AEI Directive.

13 The EU definition is more extensive than that provided in Art. 1(3) of the Århus Convention.

14 Art. 2(1) and recital 10 of the preamble to the AEI Directive.

15 See first sentence of final subpara. of Art. 2(2) AEI Directive.

16 See Case C-266/09 Stichting Natuur en Milieu and others (para. 52 of judgment).

17 Art. 2(2) of the Convention defines ‘public authority’ to mean:

(a) government at national, regional and other level;
(b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) any other natural or legal persons having specific public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling with subparagraphs (a) or (b) above;
(d) the institutions of any regional economic integration organisation referred to in Article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity.

18 See also recital 11 of the preamble to the AEI Directive.

19 See ibid., recital 12.

20 Art. 11 TFEU. See also recital 11 of the preamble to the AEI Directive.
See Case C-204/09 Flachglas Torgau GmbH v Germany in which the CJEU confirmed that national ministries participating in a legislative process may be exempt for the duration of the process. See also, though, Case C-515/11 Deutsche Umwelthilfe eV v Germany in which the CJEU confirmed that, in line with Arts. 2(2) and 8 of the Convention, EU member states may not use the ‘legislative capacity’ exemption to cover ministries when adopting regulations of a lower rank than a legislative statute or law (i.e. regulatory acts). In the latter case, the NGEO wished to access correspondence between the German Federal Ministry of Economic Affairs and Technology and the automotive industry during the consultation phase prior to the adoption of German legislation on energy consumption labelling.

Case C-204/09 Flachglas Torgau GmbH v Germany.

Case C-515/11 Deutsche Umwelthilfe eV v Germany, decided on 18 July 2013 (not yet reported).

Case C-279/12 Fish Legal and E. Shirley v Information Commissioner and others, decided on 19 December 2013 (not yet reported).


Case C-279/12 Fish Legal (para. 56 of judgment).

Ibid. (para. 71 of judgment).

Ibid. (para. 73 of judgment).

Ibid. (paras. 81 and 83 of judgment).

Case C-188/89 Foster and others v British Gas.

Art. 3(2)(a) AEI Directive. See also recital 13 of the preamble to the directive.

Art., Art. 3(2)(b). Compare with Art. 3(4) of former Directive 90/313 (OJ 1990 L156/58), which simply set a two-month deadline for public authorities to reply to information requests.

Art. 3(3) AEI Directive.

Art. 3(4) third para.

Art. 4(5).

See Case C-186/04 Housieux in which the CJEU confirmed that tacit refusals were prohibited under similar provisions of the former EU environmental information directive (Directive 90/313).

Art. 3(4) second para. AEI Directive.

Art., Art. 3(4) first para. (a)–(b).

See notably Art. 4(1), (2) and (7) of the Convention.

Art. 3(5)(a)–(c) AEI Directive, which is the counterpart to Art. 5(2) of the Århus Convention.
Art. 3(5) final para., AEI Directive. See Art. 3(2) of the Århus Convention.

Art. 5(1) AEI Directive, corresponding with Art. 5(2)(c) of the Århus Convention. This constitutes an advance on Directive 90/313, which only addressed the issue of fees from the perspective of the supply of information (Art. 5).

Art. 5(2)–(3) AEI Directive, corresponding with Art. 4(8) of the Århus Convention.

Art. 4(4) and recital 17 of the preamble to the AEI Directive, corresponding with Art. 4(6) of the Århus Convention.

Art. 4(1)(a), second sentence AEI Directive, corresponding with Art. 4(5) of the Århus Convention.

Specifically, Art. 4(3)–(4) of the Convention.

Art. 4(1)(a) AEI Directive. However, as noted earlier the authority is required in this event to assist the applicant in tracing the information source.

Ibid., Art. 4(1)(b).

Ibid., Art. 4(1)(c). However, as noted earlier above, the authority is under a duty to assist the applicant to specify their request under Art. 3(3).

Ibid., Art. 4(1)(d). In such an event, the recipient of the request is required to identify the authority preparing the material and the estimated time required for completion by virtue of Art. 4(1) final para..

Ibid., Art. 4(1)(e).

Ibid., Art. 4(2)(a). See also Case C-204/09 Flachglas Torgau GmbH v Germany.

Art. 4(2)(b) AEI Directive.

Ibid., Art. 4(2)(c).

Ibid., Art. 4(2)(d).

Ibid., Art. 4(2)(e).

Ibid., Art. 4(2)(f). By virtue of Art. 4(2) third para., member states are also specifically required in this context to respect Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281/31).

Art. 4(2)(g) AEI Directive.

Ibid., Art. 4(2)(h).

Namely the exceptions cited ibid., Art. 4(2)(a), (d) and (f)–(h).

Ibid., Art. 4(2) second para., third sentence.

In the context of protecting confidentiality of commercial and industrial information under Art. 4(3)(d) of the Århus Convention.
See Art. 52 of the EU Charter and Art. 8(2) ECHR. The margin is subject, in particular, to the principle of proportionality recognised in the human rights jurisprudence of the CJEU as well as the ECHR.

Case C-266/09 *Stichting Natuur en Milieu and others*.

See ibid. (paras. 52–53 of the judgment).

Case C-416/10 *Križan and others*.

OJ 2010 L3314/17.

See Case C-416/10 (paras. 79–82 of judgment).

Art. 4(2) second para., first and second sentences of the AEI Directive, corresponding with Art. 4(4) second para. of the Århus Convention.

See Case C-266/09 *Stichting Natuur en Milieu and others* (para. 59 of judgment).

Case C-71/10 *Office of Communications v Information Commissioner*.

See recital 16 of the preamble to the AEI Directive.

See e.g. Case C-321/96 *Mecklenburg*, where the CJEU applies this approach in relation to the AEI Directive’s predecessor, namely Directive 90/313.

Art. 4(3) AEI Directive.

Case C-266/09 *Stichting Natuur en Milieu and others* (para. 58 of judgment).

Art. 5 of the Århus Convention.

Art. 7(5) AEI Directive, corresponding with Art. 5(10) of the Århus Convention.

Art. 7(2)(a) AEI Directive, corresponding with Art. 5(5)(a)–(c) of the Århus Convention.

Art. 7(2)(b) AEI Directive, corresponding with Art. 5(5)(a) of the Århus Convention.

Art. 7(2)(c) AEI Directive, corresponding with Art. 5(5)(a) of the Århus Convention.

Art. 7(2)(d) in conjunction with Art. 7(3) AEI Directive. See counterpart provision Art. 5(3)(a) and 5(4) of the Århus Convention.

Art. 7(2)(e) AEI Directive. See counterpart provision Art. 5(7)(a) of the Århus Convention.

Art. 7(2)(f) AEI Directive, corresponding in part with Art. 5(7)(a)–(b) of the Århus Convention.

Art. 7(2)(g) AEI Directive, corresponding in effect with Art. 5(7)(a)–(b) of the Århus Convention.

The corresponding stipulation of the Århus Convention (Art. 5(4)) provides contracting parties with the option of producing such reports on a three- or four-year basis.

This corresponds with the duties under Art. 5(1)(c) of the Århus Convention.
87 Art. 7(1) second para. of the AEI Directive, corresponding with Art. 5(3) of the Århus Convention.
88 Art. 7(1) third para. of the AEI Directive.
89 Art. 5(9) Århus Convention.
91 The status of ratification of the Protocol may be inspected at the following UNECE website: www.unece.org/env/pp/ratification.html.
93 Decision 2000/479 on the implementation of a European pollutant emission register (EPER) according to Article 15 of Directive 96/61 concerning integrated pollution prevention and control (IPPC) (OJ 2000 L192/36).
94 EPER’s website address is: http://www.eper.cec.eu.int.
98 Information about the E-PRTR system may be found at the following European Commission DG ENV website: http://ec.europa.eu/environment/air/pollutants/stationary/eper/legislation.htm
99 The E-PRTR website is located at: http://prtr.ec.europa.eu/.
101 This requirement corresponds with the more general and limited requirement set out in Art. 5(1)(a) of the Århus Convention that ‘public authorities possess and update environmental information which is relevant to their functions’.
102 In response to information requests, public authorities are obliged by virtue of Art. 8(1) (in the author’s opinion) to disclose at least the most recent information they have at their disposal. In addition, such authorities should in principle ensure that any information disclosed is of current
value so that it is of meaningful assistance in terms of enabling them to fulfil their particular functions assigned under national law. This latter obligation is, however, subject to the caveat ‘so far as is within their power’ contained in Art. 8(1), which is discussed below.

103 Art. 2(1)(b) AEI Directive. A component of the definition of ‘environmental information’ refers to: ‘factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)’.

104 See recital 20 of the preamble to the AEI Directive, which notes that disclosure of methodology of information compilation is important in assessing the relative quality of the information.


106 Cases C-340/06 Commission v Austria and C-391/06 Commission v Denmark.


108 The latter route to seeking review of a national authority’s conduct remains, however, often difficult and costly in several member states in the absence of uniform, progressive standards on access to environmental justice set at EU level (on account of the failure by the Union to adopt the Draft Access to Justice in Environmental Matters (AJEM) Directive).


110 See Regulation 1980/2000 on a revised Community eco-label award scheme (OJ 2000 L237/1) and Regulation 1221/09 on the voluntary participation by organisations in a Community eco-management and audit system (EMAS) (OJ 2009 L342/1). See European Commission DG ENV website pages for further information on the EU eco-label and EMAS schemes:

http://ec.europa.eu/environment/ecolabel/index_en.htm;


112 Regulation 1272/08 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548 and 1999/45 and amending Regulation 1907/06 (OJ 2008 L353/1).

113 Directive 2006/66 (OJ 2006 L266/1) as amended.

114 Regulation 258/97(OJ 1997 L43/1) as amended.

115 Regulation 834/07 (OJ 2007 L189/1).
118 Art. 9 AEI Directive required member states issuing national reports on their experience with the directive by 14 February 2009, for the purposes of this to be then used as source material for a subsequent EU-wide report compiled by the Commission. The Commission only received all of the national reports belatedly in April 2010, and then after having launched 11 infringement actions. The review process lends itself to feeding into the amendment and review of compliance procedures provided in Arts. 14–15 of the Århus Convention.
119 E.g. the Commission notes that some member states apply derogations to access-to-information requests that are not covered by Art. 4 of the AEI Directive or are not properly weighing up interests when assessing the need to disclose information: p. 8 of COM(2012)774.
120 See notably Directive 2007/2 establishing an Infrastructure for Spatial Information in the EC (INSPIRE) (OJ 2007 L108/1); Directive 2003/98 on the re-use of public sector information (OJ 2003 L345); and COM(2008)46, Commission Communication, Towards a Shared Environmental System (SEIS), 1 February 2008. See the following EU websites for further information on INSPIRE and SEIS:
http://inspire.jrc.ec.europa.eu/;
http://ec.europa.eu/environment/seis/.
121 Decision 1386/13 (OJ 2013 L354/171).
122 Priority Objective 4: To maximise the benefits of Union environment legislation by improving implementation.
123 Para. 65(a) of Annex to Decision 1386/13 (OJ 2013 L354/171) (EAP7).
124 See ibid., paras. 59 and 65(i).