

## AARHUS CONVENTION

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### 1. Background

The Aarhus Convention, formally known as the UNECE (United Nations Economic Commission for Europe) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, came into force on 30 October 2001. As of 23 November 2011, there were 45 Parties to the Convention.

The Convention is based upon three main pillars:

- (i) Wide and easy access to environmental information for all citizens, disseminated by public authorities in a timely and transparent manner (except in particular situations where they may refuse, e.g. national defence).
- (ii) Public participation in decision making, whereby the public are informed of relevant projects and have the chance to participate during the decision-making and legislative process. The Convention emphasises that public participation should be possible at an early stage ‘when all options are open and effective public participation can take place’.
- (iii) Access to justice for the public through judicial or administrative recourse procedures in case a Party violates or fails to adhere to environmental law and the Convention’s principles. There are three contexts in which this may occur: (i) review procedures with respect to information requests; (ii) review procedures with respect to specific decisions that are subject to public participation; (iii) challenges to breaches of environmental law in general.

A distinction is made between “the public”, all the civil society's actors, and the “public concerned”, precisely, those person or organisations affected or interested in environmental decision-making (e.g. environmental NGOs). “Public authorities” are the addressees of the convention, namely, governments, international institutions, and privatized bodies that have public responsibilities or act under the control of public bodies. Private sector, for which information disclosure depends on voluntary, non- mandatory practices, and bodies acting in a judicial or legislative capacity, are excluded.

Other significant aspects are the “non-discrimination” principle (all the information has to be provided without taking account of the nationality or citizenship of the applicant), the international nature of the Convention, and the importance attributed to the promotion of environmental education of the public.

The Aarhus provisions regarding access to justice have been specifically incorporated into EU law as a result of amendments to both the Environmental Impact Assessment (EIA) Directive and the Integrated Pollution Prevention and Control (IPPC) Directive. Directive 2003/35/EC of 26 May 2003 (“the PP Directive”) provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment, amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, and inserting inserting into Directive 85/337/EEC (“the EIA Directive”) and Directive 96/61/EC (“the IPPC Directive”) Articles 10a and 15a respectively which mirror Article 9 of the Aarhus Convention. The recitals say that the PP Directive aims to align EU law in certain regards with the Aarhus Convention.

On 8 March 2011, the Court of Justice of the European Union (CJEU) considered the case of C-240/09 *Lesoochranárske Zoskupenie VLK*, which concerned a Slovakian association applying to the Slovakian Ministry of the Environment to be a party to administrative proceedings relating to various environmental protection measures. This was rejected and then challenged in the Courts, who referred the case to CJEU as to the effect of Art.9(3) of the Aarhus Convention. The CJEU held that it had

jurisdiction and stated that: *“in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention”* (para 50, judgment).

## 2. Text

### **Article 1**

#### “OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

### **Article 3**

#### “GENERAL PROVISIONS

Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings”.

### **Article 4**

#### “ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.”

## **Article 5**

### **“COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION**

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.”

“4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.”

“9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and offsite treatment and disposal sites.”

## **Article 6**

### **“PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES**

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.”

“6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non-technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and
- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.”

## **Article 9**

### “ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

- (a) Having a sufficient interest

or, alternatively,

- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any

decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention...”

“3... each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

“4... the procedures referred to...shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive...”

## **Article 10**

### “MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties.”

### 3. Compliance

The Convention has a unique Compliance Review Mechanism, which can be triggered in four ways:

- (i) a Party makes a submission concerning its own compliance,
- (ii) a Party makes a submission concerning another Party's compliance,
- (iii) the Convention Secretariat makes a referral to the Committee, or
- (iv) a member of the public makes a communication concerning the compliance of a party.

The Compliance mechanism is unique in international environmental law, as it allows members of the public to communicate concerns about a Party's compliance directly to a committee of international legal experts empowered to examine the merits of the case (the Aarhus Convention Compliance Committee). Nonetheless, the Compliance Committee cannot issue binding decisions, but rather makes recommendations to the full Meeting of the Parties (MoP). However, in practice, as MoPs occur infrequently, Parties attempt to comply with the recommendations of the Compliance Committee. As of August 2009, 41 communication from the public - many originating with non-governmental organizations - and 1 submission from a Party had been lodged with the Convention's Compliance Committee.

The Committee hearing complaints has given rulings which interpret and clarify provisions of the Convention and a body of “case law” is emerging. There have been findings of non-compliance against several parties resulting in recommendations that the Respondent states should change their law, develop better implementation, or engage in capacity-building and training. However, not all respondent governments have cooperated with the Compliance Committee or implemented its recommendations. In theory it is then open to the Meeting of the Parties to suspend a non-complying party's treaty rights and privileges or take other appropriate measures to secure compliance.

#### 4. UK implications

*The application of the Convention in the context of public law (judicial review) and private law (private and public nuisance) proceedings*

- The status and effect of the Aarhus Convention were considered by the Court of Appeal in *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107. Carnwath LJ, giving judgment held that because it has the status of an unincorporated treaty, the Aarhus Convention was in itself not binding in domestic law, even though the Convention had been ratified by the EU. Ratification by the EU does, however, mean that the European Commission has the right to ensure that Member States comply with the Convention in areas within Community competence. But from the point of view of a domestic judge, the provisions of the Convention can only be taken into account in resolving ambiguities in legislation intended to give effect to the Convention or in exercising judicial discretion. Even then, it 'is at most a matter potentially relevant to the exercise of a judge's discretion', along with other discretionary factors, including fairness to the defendant.
- The Aarhus Convention Compliance Committee in a communication relating to *Morgan v. Hinton Organics (Wessex) Ltd* not only found that Art.9(3) of the Convention was applicable to private nuisance proceedings (which was not disputed by the UK government) but so too that the obligations under Art.9(4) do require procedures in such proceedings to provide "adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".
- The Compliance Committee's approach to the issue of costs is one which "considers the cost system as a whole and in a systemic manner" (*Client Earth* case, UK ACCC/C/2008/33, December 2010). In this case the Committee did find that the cost rules of the English and Welsh courts place the UK in a systemic breach of the Art.9(4).
- As a result of the *Client Earth* proceedings, the Compliance Committee acknowledged two overriding issues:
  - (i) The uncertainty faced by claimants at the commencement of proceedings when they consider that litigation in respect of the environment is required. (In Case C-427/07 *Commission v Ireland* [2009] E.C.R. I- 6277, the CJEU had considered the costs of proceedings and held that: "Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts. That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35" (paras 93-94, judgment).
  - (ii) The sheer amount of defendant's costs faced by claimants who wish to raise environmental issues in court proceedings and the UK's failure to take effective measures to control this impact. For instance, in *Barr v. Biffa Waste* [2011] EWHC 1107 (TCC), a trial lasting some three weeks about odours from a landfill site, the Defendant's full costs were £3.236 million.

- The Committee’s recommendations in the Client Earth proceedings were that the UK:
  - “(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified...to ensure that such procedures:
    - (i) Are fair and equitable and not prohibitively expensive; and
    - (ii) Provide a clear and transparent framework”.

#### *Costs reviews and current proposals*

- The *Review of Civil Litigation Costs* headed by Lord Justice Jackson – Having given careful consideration to the consequences of the Aarhus Convention and the developing law on PCOs Lord Justice Jackson recommended the implementation of a system of Qualified One Way Costs Shifting (QuOCS) in all judicial review claims (environmental and non-environmental).
- As to private nuisance cases Lord Justice Jackson was not convinced at the time of the final report that these cases give rise to a widespread breach of the Aarhus Convention. He contemplates that claimants should be able to rely either on statutory nuisance proceedings or on BTE insurance. However he proposed a “fallback” position whereby QuOCS could be introduced for private nuisance claims if a “strong view emerges that the abolition of recoverable ATE insurance premiums gives rise to a breach of the Aarhus Convention or an obstacle to access to justice for claimants in private nuisance.”
- Introduction of an effective QuOCS system means the UK is more likely to have a costs system which is compliant with the provisions of the Convention. This is primarily because it ameliorates problems caused by the “costs follow the event” rule criticised by the Compliance Committee and especially the uncertainty as to the liability for costs which a claimant might end up bearing.
- However, the government has chosen to propose the repeal of the legislation permitting the recovery of CFA uplifts and of after-the-event (“ATE”) insurance premiums without doing what the judiciary has recommended as a means of ensuring compliant access to environmental justice, namely enacting Lord Justice Jackson’s reforms in full. In particular, the Government has decided to restrict QuOCS to personal injury cases. There are proposals in public law cases to standardise the existing regime for protective costs orders, which some of those commenting upon the proposals suggest may fail to achieve Aarhus compliance.

#### 5. Conclusion

The Aarhus Convention:

- acknowledges that we owe an obligation to future generations;
- establishes that sustainable development can be achieved only through the involvement of all stakeholders;
- links government accountability and environmental protection.