

Introduction to the Aarhus Convention

- ☒ Development, aim, main features
- ☒ The three-pillar structure
- ☒ The Aarhus Compliance mechanism

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NATIONAL JUDGES AND THE EU AARHUS ACQUIS
Focus on Access to Justice(online workshop, 1 March 2021)

Content

- What is the purpose and the ratio behind the Aarhus Convention?
- What is its scope?
- How can you use it in practice?



This presentation should work as a framework for the other parts of the workshop, which will follow.

Judges and other legal experts are often confused when they see an international treaty and then they realize how many aspects there are of public participation. There are several layers, for example, the principles behind it.

The Aarhus Convention

- *the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations* (Kofi Annan)
- *the world's foremost international instrument that links environmental and human rights*
- *a unique international treaty regime, combining notions from environmental as well as human rights law*

*A mature instrument, yet not always respected**

*** by Austria, Bulgaria, Czechia, Romania, Slovakia, Spain, United Kingdom, Croatia, Germany, Lithuania and the European Union**



The adoption of the Aarhus Convention was heralded as a major breakthrough in international law. The then UN Secretary General Kofi Annan described it as “the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations”.

It is a Human Right treaty, but a different Human Right treaty.

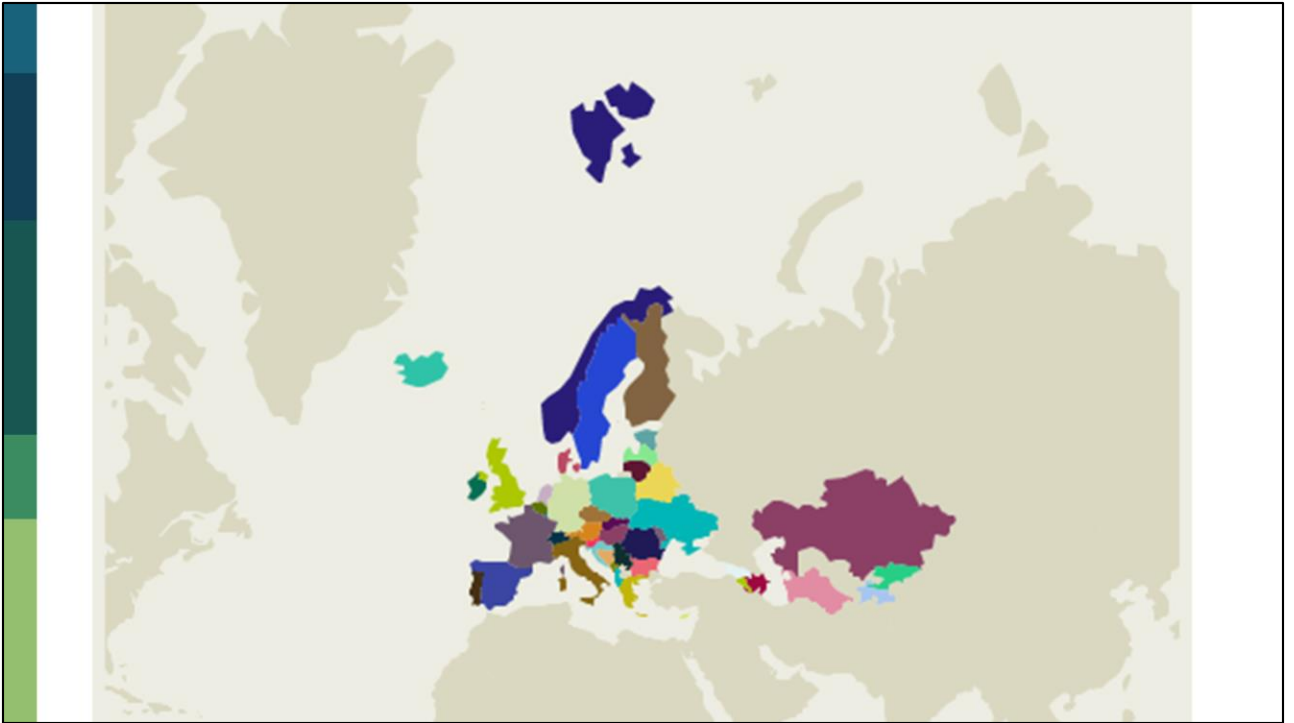
The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters



AARHUS CONVENTION
for our environment



The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention, was signed on 25 June 1998 in the Danish city of Aarhus. It entered into force on 30 October 2001. The Aarhus Convention is a multilateral environmental agreement through which the opportunities for citizens to access environmental information are increased and transparent and reliable regulation procedure is secured. It is a way of enhancing the environmental governance network, introducing a reactive and trustworthy relationship between civil society and governments and adding the novelty of a mechanism created to empower the value of public participation in the decision making process and guarantee access to justice: a "governance-by-disclosure" that leads a shift toward an environmentally responsible society.



Originally, it was meant as a global treaty, but if you see the map of the parties to the Convention, you realize that all the EU Member States as well as the EU itself are parties. Then there are some countries slightly beyond the borders.

All of the ratifying states are in Europe and Central Asia.

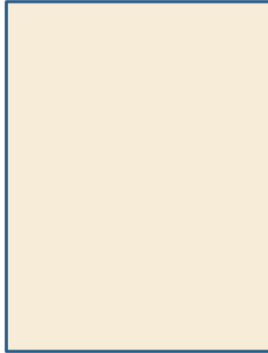
Still, it is possible for other countries to join the Convention, but, at the same time, I would say that the quantity of parties is established and it describes the system of environmental democracy.

The three-pillar structure

Access to information



Public participation in decision-making



Access to justice



As regards to the three-pillars structure, those are the three pillars. They interact with each other slightly and there is a reason why all those three pillars are included in the Aarhus Convention:

- Without information, you are not aware of what you are facing or what is happening, so you are not likely to participate effectively in decision-making
- If you are not satisfied with the outcome of the decision-making procedure, you should be allowed judicial procedure, which means access to justice

The Aarhus Convention: Aim

The rights we have already had... or not?

- One of the many objectives of the Aarhus Convention was to spread the notion of the rule of law to Eastern Europe, the Caucasus region and Central Asia.

Only procedural rights ... or is there a substantive right involved?

- Protection of the environment is generally supported... within the division of the powers between the Commission and the Member States
- High level of protection = from the Commissions (subjective) perspective
- Art. 37 of the EU Charter of Fundamental Rights:
A high level of environmental protection (...) must be integrated into the policies of the Union...
- Although the Convention is not written in the same “rights-language” as the European Convention on Human Rights, **it is apparent that it is intended to ensure rights for members of the public.**
- It is also apparent that compliance with the Convention requires **appropriate legislative and regulatory frameworks, which must be clear, transparent and consistent.**
- **Strengthening the role of the NGOs.**



From the EU perspective, one of the many objectives of the Aarhus Convention was to spread the notion of the rule of law to Eastern Europe, the Caucasus region and Central Asia.

From the perspective of these regions, civil society saw the Convention as a vehicle for democracy. Soon after the Convention had entered into force, in 2001, it would be shown that not only states in Eastern Europe, the Caucasus region and Central Asia, but also some EU Member States (old and new) as well as the EU itself had difficulties in complying with all parts of the Convention.

Although the Convention is not written in the same “rights-language” as the European Convention on Human Rights, it is apparent that it is intended to ensure rights for members of the public with respect to access to information, participation in decision-making and access to justice. It is also apparent that compliance with the Convention requires appropriate legislative and regulatory frameworks, which must be clear, transparent and consistent.

And the Convention itself is just a minimum, not a ceiling. (minimum standards)

Even though most of the parties to the convention already had legislation regarding public participation, it shows up very well that having such international instrument – having those minimum standards – brings benefits to many years to come. Even though the countries decide to lower the standard. Still, there is the minimum

standard of the Convention.

Aim – The Aarhus' cosmopolitanism

*"driving force for **environmental democracy**"*

(Wates, 2005)

*"at the forefront" of developing the **legal framework** in this respect worldwide*

(Ebbeson, 2007)

*"The significance of the Convention does not end with those provisions which are legally binding or the decisions of the Compliance Committee; as it becomes an increasingly **established part of the legal landscape**, it is also developing an indirect influence."*

(Lidbetter and Depani, 2014)

*"Aarhus' cosmopolitanism, yielding a moderating influence on sovereignty, **will not emerge without a stable framework** in which states institutionalise it."*

(Weaver, 2018)

*"assumption regarding **"vigorous enforcement"** of the Convention by the European Court of Justice (or now the Court of Justice of the European Union) has not yet proved to be the case."*

(Jendroška, 2011)

*"Community inaction in relation to the implementation of the "access to justice" pillar means that it will not be able to comply with its international obligations. It would prevent the Community from ratifying the Aarhus Convention, with a resulting lack of credibility at international level. In this way, **the credibility of the Community with respect to good governance** would also be at stake."*

[COM (2003) 624 final]



Development

Before the 1990's international law did not pay much attention to domestic procedures - domestic law- and policy-making only

- Principle I of the Stockholm Declaration on the Human Environment (1972) – *Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.*
- UN General Assembly resolutions (1982) on the World Charter for Nature and (1990) on the need to ensure a healthy environment for the well-being of individuals
- Customary international law?
- Human Right treaties – access to justice and effective remedies

The EU:

- **The EIA Directive (85/337/EEC), Directive on the freedom of access to information on the environment (90/313/EEC), The Habitats Directive (92/43/EEC),**
- **CJEU: elements of individual rights to rely on environmental laws before courts, e.g. with respect to environmental quality standards (C-59/89, Commission v Germany; C-361/88, Commission v Germany; and C-64/90, Commission v France).**



With the exception of international human rights law, before the 1990's international law did not pay much attention to domestic procedures for decisions-making, citizens' access to documents or citizens' access to court. Today, it may appear surprising that at that time only few multilateral environmental agreements addressed the engagement of members of the public in environmental matters at all; accordingly these matters remained essentially for domestic law- and policy-making only. The **EU** was a different case. Not only it adopted some pieces of legislation, in particular **Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, and Directive 90/313/EEC on the freedom of access to information on the environment**, which oblige the Member States to promote access to information and some degree of public participation in decision-making. The **European Court of Justice had also highlighted elements of individual rights to rely on environmental laws before courts**, e.g. with respect to environmental quality standards. (C-59/89, Commission v Germany; C-361/88, Commission v Germany; and C-64/90, Commission v France.)

United Nations Framework Convention on Climate Change (1992, 197 Parties):

- Art. 6 (a) *Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:*
- (ii) *public access to information on climate change and its effects;*
- (iii) *public participation in addressing climate change and its effects and developing adequate responses;*

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 1991, 45 Parties):

Art. 2(2): *Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including (...) the establishment of an environmental impact assessment procedure that permits public participation.*

Art. 2(6): *The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.*

Art. 3(8): *8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.*

Art. 4 (2): *... The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected...*

Declaration of France: *The Convention implies that it is the responsibility of each Party to ensure the public distribution within its territory of the environmental impact assessment documentation, inform the public and collect its comments, except where different bilateral arrangements apply*



If you focus on international instruments, you see that in the beginning of the 1990's, there was a movement towards public participation.

But before the Aarhus Convention (see highlighted text), there was not much about detailed requirements, about the standards, and those three pillars.

Also, as regards to impact assessment, I mentioned the EU Directive, and there is also the International Convention on Environmental Impact Assessment. Once again, it asks the parties to grant the opportunity to provide to public affected to participate in those procedures, but it did not describe that many details as regards to the effectiveness of participation.

The Aarhus Convention: Development

Principle 10 of the 1992 **Rio Declaration on Environment and Development** (UN Doc. A/Conf.151/26):

*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to **participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. Effective **access to judicial and administrative proceedings, including redress and remedy**, shall be provided."*

Agenda 21: "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making"

Political changes in Europe in the beginning of the 1990's influenced the perception of what are international and national legal issues. New matters, such as civic society, democratisation, environmental human rights and globalisation, transcended state borders, entered the international arena, and expanded into international discourse, law, and policy-making in a way that had previously not been possible.



So, in 1992, the propose come with a more stringent approach. You can already see that the construction of the three pillars was already quite visible.

While international human rights law and EU law was important for the Aarhus Convention, it would not have come into being were it not for two important circumstances.

The first is the outcome of the 1992 UN Conference on Environment and Development in Rio de Janeiro 1992. More specifically, through the Rio Declaration on Environment and Development, Principle 10 (United Nations Declaration on Environment and Development; UN Doc. A/Conf.151/26.), it was agreed at the conference that:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Principle 10 nicely frames what was to become the Aarhus Convention; it highlights access to information, public participation in decision-making, and effective access to judicial and administrative proceeding, including redress and remedy, ie access to justice.

The Aarhus Convention: Negotiations

1995: The Third “Environment for Europe” Ministerial Conference **endorsed the UNECE Guidelines** on Access to Environmental Information and Public Participation in Environmental Decision-making, which drew on and developed Principle 10. The Ministerial Conference also decided to consider the drafting of a convention.

1996: The UNECE Committee on Environmental Policy **established the** mandate for an *ad hoc* working group to conduct the negotiations for a new instrument.

June 1996 - March 1998: Over ten sessions of the working group. The NGOs engaged (*‘friends of the secretariat’*). **The EU** (EC) did not have a negotiating mandate, but increasing EU coordination and presentation of a single EU position. **The US and Canada** opted out of the negotiations at an early stage. **Russia and Turkey** played an active role, with many of their textual proposals being accommodated by the other negotiating parties, but did not sign or accede to the Convention.

25 June 1998 (Aarhus, Denmark): The Convention was adopted within the framework of the Fourth Ministerial ‘Environment for Europe’ conference.

30 October 2001: The Convention entered into force.

Since 2012, all EU Member States and the EU itself are parties to the Aarhus Convention.

4 March 2018: Escazú (Costa Rica) - Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters **in Latin America and the Caribbean**



Soon after the Rio Conference, in 1995, the Third “Environment for Europe” Ministerial Conference endorsed the UNECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, which drew on and developed Principle 10. The Ministerial Conference also decided to consider the drafting of a convention.

In January 1996, the UNECE Committee on Environmental Policy established the mandate for an *ad hoc* working group to conduct the negotiations for a new instrument, to be chaired by Willem Kakebeeke, a senior official from the Netherlands. The negotiations took place from June 1996 to March 1998 over ten sessions of the working group. For most of the negotiating period, the EU (then called the European Community) did not have a negotiating mandate and its Member States intervened directly in the negotiations, often with divergent positions. Towards the conclusion of the negotiations (and even more subsequently), there was increasing EU coordination and presentation of a single EU position. The US and Canada opted out of the negotiations at an early stage. Russia and Turkey played an active role, with many of their textual proposals being accommodated by the other negotiating parties, but did not sign or accede to the Convention.

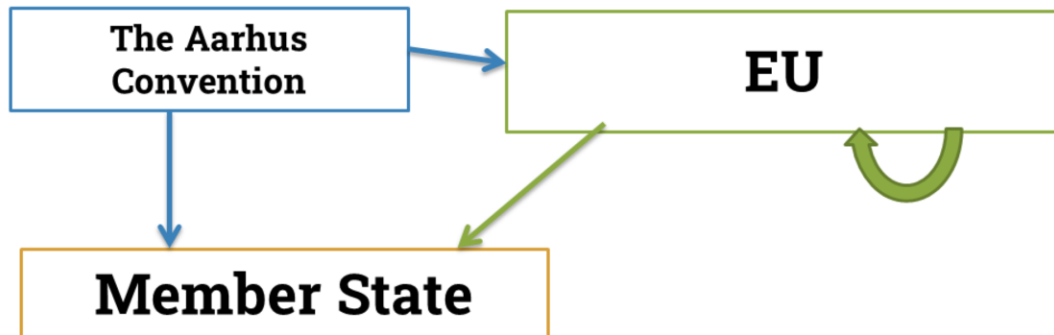
The level and depth of NGO engagement in the negotiations, while following a tradition established in the ‘Environment for Europe’ process, was unprecedented in the context of the formulation of an international environmental treaty and possibly any legally binding treaty. Even before the formal negotiations began, NGOs were

represented in a small 'friends of the secretariat' group that assisted the secretariat with preparing draft elements for the Convention text. Thereafter, environmental NGOs were able to be involved not just in the plenary but in every small drafting group. As the NGOs had the relevant experience and would end up being, on behalf of the public, the main 'clients' of the Convention, their active participation was not only justified from a principle standpoint but contributed materially to the relevance and robustness of the text.

The Convention was adopted on 25 June 1998 in Aarhus, Denmark, within the framework of the Fourth Ministerial 'Environment for Europe' conference. The same day, it was signed at the Conference by 35 States and the European Community, with four more States signing in December 1998 before the Convention was no longer open for signature.

The Escazu Convention is clearly based in the Aarhus Convention, and the initial idea was to join the Aarhus Convention, but due to specificities that apply to those countries, it was opted to go with a different convention.

The Aarhus Convention and the EU law



From the practical point of view, the most important point is that the EU is party to the Aarhus Convention.

So, as a national judge dealing with national law and its implementation, you are dealing with two out streams of law. First one, which is the Aarhus Convention itself, as part of international law. And then, since the EU joined the Aarhus Convention, it is enforcing it through the European legal system, which means that the Aarhus Convention is applied to the EU itself (you can see the arrow from the EU to itself), and, at the same time, the EU started amending its directives and proposing (and adopting) new ones to harmonize at least certain rules when it comes to EU Law towards the MS.

So, right now, you have the Aarhus Convention requirements coming from international law and, at the same time, some of them within the scope of the EU Law. Since you are already familiar with the differences between those two systems... The international law without its complex system of enforcement, the EU Law being rather strictly connected to the national systems. You already feel that you have to use both, in practice.

The Aarhus Convention implemented by EU law

[Directive 2003/4/EC](#) of the European Parliament and of the Council of 28 January 2003 on **public access to environmental information**

[Directive 2003/35/EC](#) of the European Parliament and of the Council of 26 May 2003 providing for **public participation** in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives [85/337/EEC](#) and [96/61/EC](#)
+ number of other environmental directives

Proposal for a Directive of the European Parliament and of the Council
on **access to justice**

[Regulation \(EC\) N° 1367/2006](#) of the European Parliament and of the Council on the **application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

(information - extends [Regulation \(EC\) No 1049/2001](#))

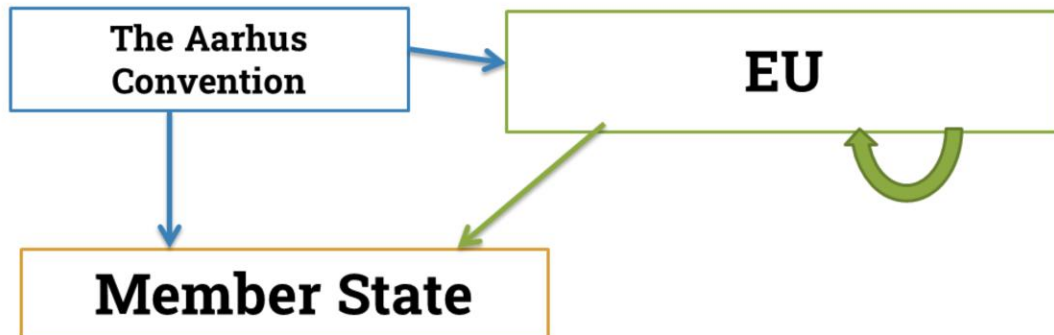


Just as illustration, here there are some directives that have been adopted since the EU joined the Aarhus Convention. And they changed or amended the most important environmental instruments towards more public participation. So, they introduced public participation into what was already existing at that time.

In particular, the two directives, one on impact assessment and one on industrial emissions directive. So, at least within the scope of the most important procedures, the EU amended its legislation to introduce the Aarhus Convention to its legal system.

And here you can see the so-called Aarhus Regulation, which applies the provisions of the Aarhus Convention to the institutions of the EU.

The Aarhus Convention and the EU law



AG Sharpston in C-664/15, para. 34:

*The Aarhus Convention is a mixed agreement, concluded by the EU on the basis of a competence it shares with the Member States. The provisions of that convention form an **integral part of the EU legal order**. The Court has already confirmed that **it had jurisdiction to interpret** different provisions of the Aarhus Convention and has given, in that regard, a significant number of judgments in the context of references for a preliminary ruling and infringement proceedings.*



As a consequence, the Aarhus Convention became a part of the EU Law, of the EU legal order, and, as AG Sharpston points out... (see quote)

All this can be initially confusing for you as national judges, but on the other hand it can be very helpful. Because all those basic definitions, all those instruments, and the minimum standard embodied in the Aarhus Convention are then to be interpreted with the help of the international law and its guidance, and also of the EU Law, which is binding for you as national judge.

The Aarhus Convention: Compliance mechanism

The Aarhus Convention Compliance Committee

- Established by the first Meeting of the Parties (MoP) to the Convention, through Decision I/7 "Review of Compliance", in 2002 as an arrangement *"of a non-confrontational, non-judicial and consultative nature for reviewing compliance"* (Art 15) in order to *"promote and improve compliance with the Convention"* (preamble of Decision I/7).
- fully independent vis-à-vis the Convention Parties
- nine members, serving in their personal capacity *"shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience"*.
- consultative nature, **not a court, no enforceable judgments**
- holds **hearings** with the parties, and it develops its **jurisprudence through "findings"** on compliance or non-compliance,
- provides assistance, makes recommendations on specific measures.

Requests:

- Submissions by Parties concerning compliance by other Parties or by themselves;
- Referrals by the secretariat,
- Communications by members of the public.



There is no International Court established for the Aarhus Convention. There is, however, the Aarhus Convention Compliance Committee, that was established by the first meeting of parties to the Aarhus Convention, in 2002.

The Aarhus Convention Compliance Committee was established by the first Meeting of the Parties (MoP) to the Convention, through Decision I/7 "Review of Compliance", in 2002 as an arrangement "of a **non-confrontational, non-judicial and consultative nature for reviewing compliance**" (Art 15 of the Convention) in order to **"promote and improve compliance with the Convention"** (preamble of Decision I/7).

The non-judicial and consultative nature of the Committee is fundamental for its work. The Committee is **fully independent** vis-à-vis the Convention Parties, and the nine members, serving in their personal capacity, "shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience". Based on Decision I/7 and in the spirit of the Convention, the Committee applies principles of transparency, fairness and due process in its reviews, it maintains strict rules on conflict of interest, it holds hearings with the parties, and it develops its **jurisprudence through "findings" on compliance or non-compliance**. Despite these quasi-judicial elements, the Committee is not a court and delivers no enforceable judgments. And it also has relevance to you as judges, because it indicates the directions in situations similar to what you may find in cases.

It also receives complaints by the public and so far it has received around 150 complaints.

Instead, the Committee's work is forward-looking and intended to promote compliance and get non-compliant Parties in compliance.

The Committee is mandated to **examine compliance by the Parties based on different requests:**

- *Submissions* by **Parties** concerning compliance by other Parties or by themselves (thus far, the Committee has received **two submissions**, one of which (S/2, submitted by Lithuania concerning compliance by Belarus) is pending;
- *Referrals* by the **secretariat** (so far the secretariat has brought **no referral** to the Committee); and
- Communications by **members of the public** (by 21 June, ie the first day of the Committee's 53rd meeting, and the day of the hearing before the EU Parliament, the Committee has received almost **140 communications**).

The Aarhus Convention: Compliance mechanism

- 1) When a communication is received and found preliminary admissible, the communication is forwarded to the Party concerned for reply with statements and comments regarding the alleged non-compliance.
- 2) The parties to the case are invited to a hearing, and the Committee starts drafting its **findings**.
- 3) Once the draft findings are adopted, they are sent to the parties for their comments. The Committee then takes these comments into account, before finalising its findings.

The Committee reports to the **Meeting of Parties (MoP)**, both on general compliance issues and specifically with respect to Parties found non-compliant. The decisions by the MoP are later followed up by the Committee.

Non-compliance by specific Parties usually falls within one or more of the following categories:

- **General failure** by a Party to take the necessary legislative, regulatory and other measures to implement the Convention;
- **Failure** of legislation, regulations, other measures or jurisprudence **to meet specific** Convention requirements; and
- **Specific events, acts, omissions or situations** demonstrating a failure by public authorities or courts to comply with or enforce the Convention



www.unece.org/env/pp/cc.html

In addition to examining compliance based on these requests, the Committee may in consultation or agreement with the Party concerned **advise and facilitate assistance, make recommendations** on specific measures and request strategies, including time schedules regarding the achievement of compliance.

When a communication is received and found *preliminary admissible*, the communication is forwarded to the Party concerned for reply with statements and comments regarding the alleged non-compliance. Thereafter, the parties to the case are invited to a hearing, and the Committee starts drafting its findings. Once the draft findings are adopted, they are sent to the parties for their comments. The Committee then takes these comments into account, before finalising its findings.

The Committee reports to the MoP, both on general compliance issues and specifically with respect to Parties found non-compliant. Non-compliance by specific Parties usually falls within one or more of the following categories:

General failure by a Party to take the necessary legislative, regulatory and other measures to implement the Convention;

Failure of legislation, regulations, other measures or jurisprudence to meet specific Convention requirements; and

Specific events, acts, omissions or situations demonstrating a failure by public authorities or courts to comply with or enforce the Convention

So far, the MoP has endorsed all Committee's findings on non-compliance. In so doing, the MoP also decides on recommendations on measures and requests addressed to the Parties concerned. These decisions by the MoP are later followed

up by the Committee when examining whether the Parties found non-compliant take the necessary measures to get in compliance with the Convention.

All documents in all cases before the Committee are posted on the Committee's website (www.unece.org/env/pp/cc.html).

The cases before the ACCC

*Although the Implementation Guide has **no binding force**, it may be taken into consideration for the purpose of interpreting the Convention (C-182/10, C-279/12, C-673/13 P)*

Guide is available in Chinese, English, French and Russian. If you would require a hard copy of the Guide please contact the secretariat at public.participation@un.org

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UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

The Aarhus Convention An Implementation Guide



What is important for you as practitioners, in my perspective, is that the Aarhus Convention Compliance Mechanism is trying to spread the word and it provides an implementation guide, which is based on that jurisprudence and nicely describes or provides guidance as regards to the main instruments and articles of the convention together with the history of the cases in which it was applied.

Important to note that the implementation guide is not binding, but may be taken into consideration. So, even the Court of Justice is using this guide. And, if it is good for the Court of Justice, probably it is also good for you.

You can find it in more languages than English in the official website of the UN.

Also, there is a common practice that the parties to the Convention translate the implementation guide to other languages. So, I am not sure if all the parties have done that, but I know that it was translated to at least 10 other languages.

The Aarhus Convention in practice: Principles

A floor, not a ceiling - the scope of the Convention is very wide but not all-embracing

- Sets **minimum standards** to be met by the Parties with respect to access to information, public participation in decision-making and access to justice in environmental matters.
- **Defines fundamental concepts and principles** to be applied and complied with by the Parties.



The Aarhus Convention in practice: Principles

A floor, not a ceiling.

- Sets **minimum** participation in
- Defines **fundamental**

3. A request for environmental information **may be refused if:**

- (a) The public authority to which the request is addressed does not hold the environmental information requested;
- (b) The request is manifestly unreasonable or formulated in too general a manner; or
- (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

- (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- (b) International relations, national defence or public security;
- (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
- (e) Intellectual property rights;
- (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
- (g) The interests of a third party which has supplied the information

ing
nation, public
by the Parties.



For instance, the Aarhus Convention establishes conditions to refuse requests for information. So, it can be refused, but it does not mean that the parties may use just some of those.

The Aarhus Convention in practice: Definitions

- Defines “public authority” broadly, so as to include not only governments at different levels, but also private actors performing public administrative functions under national law, or having public responsibilities or functions or providing public services in relation to the environment.
- Defines “environmental information” broadly so as to include not only information on the state of elements of the environment, but also on factors, activities, measures, international agreements, laws, policies etc. likely to affect elements of the environment and the state of the human health.

Art 4(4) d): *A request for environmental information may be refused if the disclosure would adversely affect: The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.*

- Is intended to provide for wide public participation and wide access to justice. For that reason, it defines “the public concerned” rather broadly

“The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

“The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest



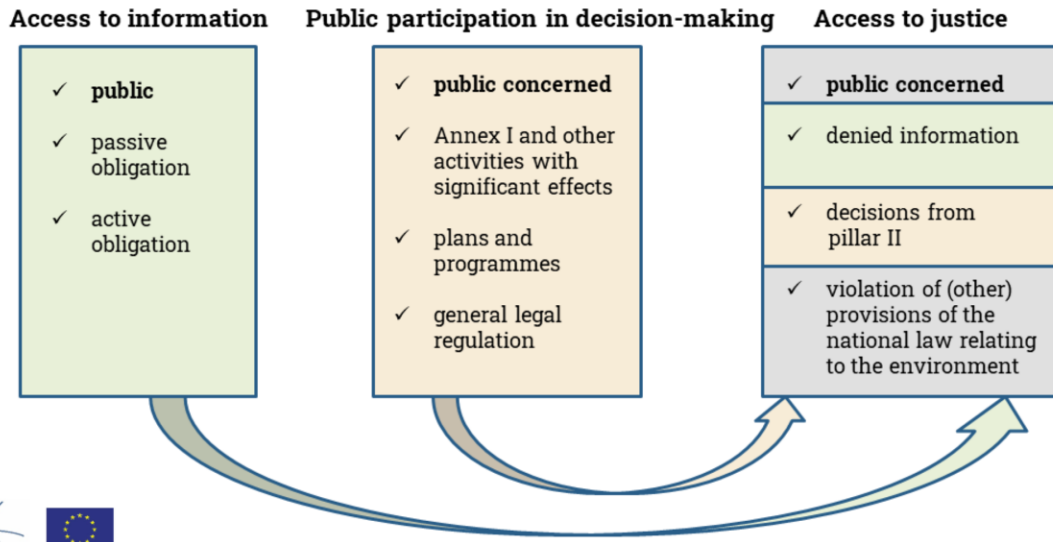
Even though it is a common practice of legislation, the definitions set by the Convention are an important part of it.

...

Please note the definition at the bottom of the slide. The public and the public concerned.

Basic, the public means **everyone**, and it is very important to the first pillar. So, it is not only about participation in your country. It is also transboundary.

The three-pillar structure



Take a closer look at the three pillars. I have already told you that there is connection between them, but you can see who benefits from those pillars and also how do they interact.

If you look at access to information, it is for the public.

Also, the Aarhus Convention requires the parties not only to grant information based on requirement, but also there is an active obligation to spread information regarding the environment.

Then, if you look at the second pillar, regarding participation in decision-making, it is very important, but it does not cover all the decision-making. It is rather narrow, I would say, because it only requires the parties to allow the public concerned to participate, and not in all the procedures, regarding all the activities. But only activities listed in annex I (list of significant activities and with significant effects).

In the third pillar, once again it is for the public concerned. And it should be allowed to challenge those decisions regarding information that was denied, and also decisions from pillar two. But also, beyond those three pillars, also violation regarding provisions of the national law relating to the environment.

So, the second pillar is rather narrow, only covering some activities, and then the third pillar is very wide, covering all possible violation, meaning all acts or omissions related to the environment. So, the parties are allowed, for example, to have a

restricted scope of participants to the proceedings, but then the public concerned should be at least allowed in all the environmental cases.

The three-pillar structure – PILLAR I

I. Access to information (Art. 4 – 5)

- a) a “passive” obligation - the environmental information possessed by **public authorities** should be provided to **members of the public** on request “as soon as possible” and at the **latest within a month**. Requests for information can only be refused if any of the listed grounds for refusal apply. Even when they do, **the grounds for refusal shall be interpreted in a restrictive way**, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. **Any refusal must be reasoned and in writing**.
- b) an “active” obligation - the Parties must **actively ensure** that public authorities possess and update relevant environmental information, and that **mandatory systems are established, providing for an adequate flow of information**. Electronic databases shall be publicly accessible and the Parties are to set up **nationwide systems of pollution inventories and registers**. This part has been further developed through the 2003 Kiev Protocol on Pollution Release and Transfer Registers.



Two obligations: a “passive” obligation, which means that the Parties must ensure that public authorities make available the environmental information they possess. The presumption is that the environmental information possessed by public authorities should be provided to members of the public on request “as soon as possible” and at the latest within a month. Requests for information can only be refused if any of the listed grounds for refusal apply. Even when they do, the grounds for refusal shall be interpreted “in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment” (Art 4(4)). Any refusal must be reasoned and in writing (Art 4(7)).

Second, the Parties must actively ensure that **public authorities possess and update relevant environmental information**, and that **mandatory systems are established**, providing for an adequate flow of information. Electronic databases shall be publicly accessible and the Parties are to set up nationwide systems of pollution inventories and registers. This part has been further developed through the 2003 Kiev Protocol on Pollution Release and Transfer Registers.

The three-pillar structure – PILAR II/A

II. Public participation - three categories of decision-making (Art. 6 – 8)

- a) **Decision-making concerning specific activities listed in Annex I and other activities which may have a significant effect on the environment.**

Annex I:

1. Energy sector
2. Production and processing of metals
3. Mineral industry
4. Chemical industry
5. Waste management:
6. Waste-water treatment plants
7. Industrial plants
8. Construction of railways, motorways, express roads, roads
9. Inland waterways, trading ports, piers
10. Groundwater abstraction or artificial groundwater recharge schemes

...

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.



The Convention provides for public participation with respect to three categories of decision-making.

First, most **detailed provisions apply to decision-making concerning specific, listed activities and to other activities which may have a significant effect on the environment**. For all these activities, the Parties must ensure:

Early information and notification about the decision-making procedure, in an effective, adequate and timely manner;

Reasonable time-frames to prepare and participate effectively;

Early and effective public participation when all options are open;

That *all relevant information* is made available at the time of the public participation procedure;

That the public is *allowed to submit comments, information, analyses or opinions* in writing or at public hearings;

That *due account* is taken of the *outcome* of public participation; and

Publicly accessible *decisions with reasons and considerations* (Art 6).

The three-pillar structure – PILAR II/A

II. Public participation - three categories of decision-making

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- The public is allowed to submit comments, information, analyses or opinions in writing or at public hearings;
- Due account is taken of the outcome of public participation;
- Publicly accessible decisions with reasons and consideration.



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That *due account* is taken of the *outcome* of public participation; and
Publicly accessible *decisions* with *reasons* and *considerations* (Art 6).

The three-pillar structure – PILAR II/B

II. Public participation - three categories of decision-making

b) Decision-making concerning plans and programmes.

- Practical or other provisions shall be made for public participation during preparations of **plans and programmes relating to the environment**;
- This should be provided in a **transparent and fair framework with necessary information**;
- **Reasonable time-frames** must be ensured to prepare and participate effectively;
- **Early and effective public participation must be provided when all options are open**; and
- Due account shall be taken of the outcome of public participation

The Parties must endeavour to provide for public participation when preparing policies relating to the environment (Art 7).



Second, rather similar, although to some extent less detailed, requirements for public participation apply to decision-making concerning **plans and programmes**. Thus: Practical or other provisions shall be made for public participation during *preparations* of plans and programmes relating to the environment; This should be provided in a *transparent* and *fair framework* with necessary *information*; *Reasonable time-frames* must be ensured to prepare and participate effectively; *Early and effective* public participation must be provided when all options are open; and *Due account* shall be taken of the *outcome* of public participation

The Parties must endeavour to provide for public participation when preparing *policies* relating to the environment (Art 7).

The three-pillar structure – PILAR II/C

II. Public participation - three categories of decision-making

c) Executive regulations and generally applicable legal instruments

- The Parties are obliged to strive to promote effective public participation, at an appropriate stage. To this end, certain requirements are set out (Art 8):
 - Time-frames sufficient for effective participation should be fixed;
 - Draft rules should be published or otherwise made publicly available; and
 - The public should be given the opportunity to comment, directly or through representative consultative bodies.The result of the public participation shall be taken into account as far as possible.
- In addition, the 2nd Meeting of Parties (MoP) decided to amend the Convention in order to provide for **public participation with respect to deliberate release into the environment and the placing on the market of genetically modified organisms**.



Third, still within the second pillar, as far as *executive regulations* and *generally applicable legal instruments* are concerned, the Parties are obliged to strive to promote effective public participation, at an appropriate stage. To this end, certain requirements are set out (Art 8).

In addition, the 2nd Meeting of Parties (MoP) decided to amend the Convention in order to provide for public participation with respect to deliberate release into the environment and the placing on the market of *genetically modified organisms*.

The three-pillar structure – PILAR III

III. Access to justice (Art. 9)

a) Denied information

- Anyone who is denied access to environmental information shall have access to a **review procedure before a court of law or another independent and impartial body** established by law.
- Standing should be granted to anyone whose request has been ignored, wrongfully refused or otherwise not dealt with in accordance with the Convention. In certain cases, the Parties should also provide for expeditious procedures for reconsideration by a public authority.

b) Decision-making concerning specific activities

- access to court or another independent and impartial body of law should also be granted with respect to decision-making concerning specific activities for members of the public concerned who either have a sufficient interest or, where so required in national law, maintain impairment of a right.
- These criteria should be determined in accordance with national law and consistently with the objective of giving the public concerned wide access to justice. To this effect, environmental NGOs are deemed to have a sufficient interest to be granted standing.
- This right to access to justice pertains to challenging the substantive as well as procedural legality of any decision, act or omission concerning specific activities



The last “pillar” of the Convention focuses on access to justice. Here too, the Convention distinguishes between three categories of decisions, acts and omissions.

First, **anyone who is *denied access to environmental information* shall have access to a review procedure before a court of law or another independent and impartial body** established by law. For these cases, standing should be granted to anyone whose request has been ignored, wrongfully refused or otherwise not dealt with in accordance with the Convention. In certain cases, the Parties should also provide for **expeditious procedures** for reconsideration by a public authority (Art 9(1)).

Second, **access to court or another independent and impartial body of law should also be granted with respect to *decision-making concerning specific activities* for members of the public concerned** who either have a sufficient interest or, where so required in national law, maintain impairment of a right. These criteria should be determined in accordance with national law and consistently with the objective of giving the public concerned wide access to justice. To this effect, **environmental NGOs** are deemed to have a sufficient interest to be granted standing. This right to access to justice pertains to challenging the substantive as well as procedural legality of any decision, act or omission concerning specific activities (Art 9(2)).

Finally, each Party shall ensure **access to administrative or judicial procedures to**

members of the public, meeting the criteria in national law, “if any”, **to challenge other acts and omissions by private persons and public authorities “which contravene provisions of its national law relating to the environment”** (Art 9(3)). In this regard, the Committee has concluded that for EU Member States applicable European Union law relating to the environment should also be considered to be part of the domestic, “national law”.

The three-pillar structure – PILAR III

III. Access to justice (Art. 9)

c) Violation of provisions of the national law relating to the environment

- Access to administrative or judicial procedures to members of the public, meeting the criteria in national law, “if any”, **to challenge other acts and omissions by private persons and public authorities “which contravene provisions of its national law relating to the environment”** (Art 9(3)).
- EU law relating to the environment should also be considered to be part of the domestic, “national law”.
- Contrary to the first and the second categories, **it may suffice to ensure access to administrative review procedures** to challenge acts and omissions in the third category.
- Access to justice must not be *pro forma* only. Therefore, all procedures referred to above under the three categories, including any administrative procedure, ***must provide “adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”***



Finally, each Party shall ensure **access to administrative or judicial procedures to members of the public**, meeting the criteria in national law, “if any”, **to challenge other acts and omissions by private persons and public authorities “which contravene provisions of its national law relating to the environment”** (Art 9(3)). In this regard, the Committee has concluded that for EU Member States applicable European Union law relating to the environment should also be considered to be part of the domestic, “national law”.

Why do you need to know (more) about the Aarhus Convention?

You are the EU judge!

The Court **is required to provide an answer** = you need to understand the law applicable.

Is it a public participation
matter?

Yes



If you look at the Convention as a judge, looking at the Convention should be the second or third step. Because you should, first, establish whether the Convention is applicable to the case you are dealing with, and it is up to you to establish that, because you are the EU judge, and you are required also to interpret the national law from the perspective of international requirements.

So, first you have to decide if the case you are dealing with has to do with public participation in environmental matters, which is easily established when it has to do with decision-making or access to information. I told you there is a definition of environmental information, which is also a part of applicable EU Law. So, you will have to take a look and see if the information is indeed environmental information and, therefore, subject to the Aarhus regime. If it was not, then the Aarhus Convention is, of course, not applicable, nor is the EU Law

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Is it a public participation
matter?

Yes

**Does it fall within the scope of the
Aarhus Convention?**

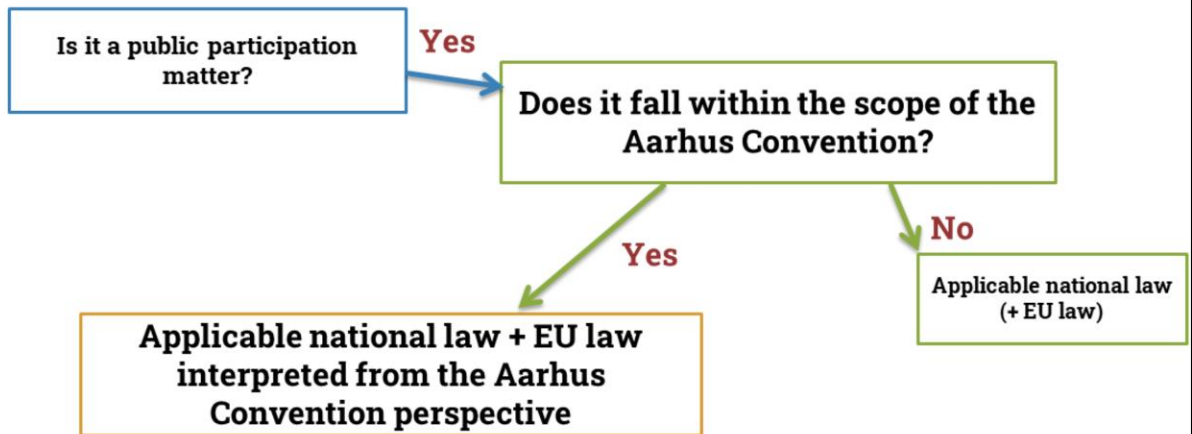


If it is a matter of public participation, you should ask the question if it falls within the scope of the Aarhus Convention. If it is about environmental information, then yes, it does fall.

Why do you need to know (more) about the Aarhus Convention?

You are the EU judge!

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Then, you should probably think about whether, if it falls under the Aarhus Convention, there is some EU Law.

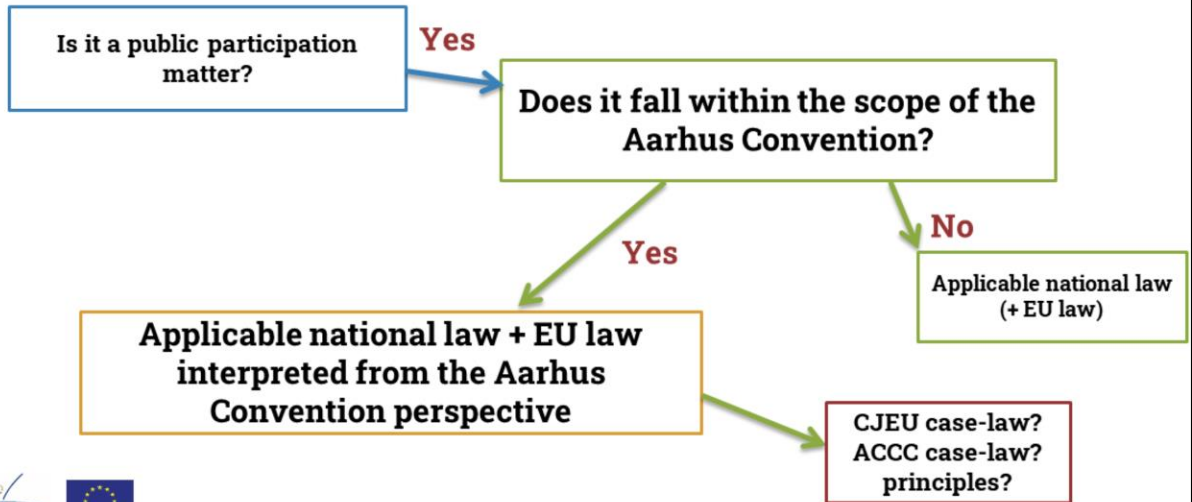
Even if it does not fall under the scope of the Aarhus Convention, there is probably still some applicable national and EU law.

If there are requirements coming from the Aarhus Convention, probably there is also some EU law applicable. Then, you basically apply both, because the EU law is usually in line with the Aarhus Convention, and tries to emphasize or harmonize the requirements more into the detail.

Why do you need to know (more) about the Aarhus Convention?

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So, that is the last step, in which you are probably going to try into some case law of the Court of Justice. Whether the Court of Justice has already interpreted the applicable EU law, and at the same time interpreted the Aarhus Convention, which is part of the EU law. And whether there is some Aarhus Convention Compliance Committee jurisprudence, which deals with a similar case. This is, as I told you, not binding to you, but, at the same time, may come as an argument in your decision. Also because a decision that goes against the Compliance Committee will probably ring a bell at the Committee.

Why do you need to know (more) about the Aarhus Convention?

Example: The Ministry of Economic Affairs **refused to provide information** to an NGO because the national law exempts public authorities from the requirement to provide environmental information where they are **engaged in the preparation of a regulatory instrument**.

1) Is the Aarhus Convention applicable? **PILLAR 1?**

2) Can you implement the national law in compliance with the Aarhus Convention?

(Is there a CJEU case law? ACCC case? Guidance? Principles?)

See C-515/11:

...it is clear that both the wording of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 and the aim pursued by the Aarhus Convention and by that directive (...) Indeed, it is the specific nature of the legislative process and its particular characteristics that justify the special rules relating to acts adopted by bodies acting in a legislative capacity in connection with the right to information, as provided for both by the Aarhus Convention and Directive 2003/4. It follows that the nature of the act in question, and in particular the fact that it concerns an act of general application, is not, in itself, capable of exempting a body which adopts that act from the obligations to provide information under that directive.



- 1) The Aarhus Convention is probably applicable, provided that it is environmental information. (within pillar 1)
- 2) ...

Why do you need to know (more) about the Aarhus Convention?

Example: In your country, an NGO did not obtain the status of a party to the **administrative procedure for the grant of a permit to cut a tree in a common residential area**. It contests the decision that it is not a party to the procedure.

- 1) Is the Aarhus Convention applicable? **PILLAR II?**
- 2) Can you implement the national law in compliance with the Aarhus Convention?

The NGO contests the **permit to cut the tree**.

- 1) Is the Aarhus Convention applicable? **PILLAR III?**
- 2) Can you implement the national law in compliance with the Aarhus Convention?
- 3) Can the NGO rely on the direct applicability of the EU law?



It would be pillar 2, then you would look the annex. So, probably doesn't fall. So, in principle, the NGO cannot participate based on the Aarhus Convention. But, on the other hand, the NGO contests the permit...

Then it would be pillar 3, because it is access to justice. And, as you already know, it is wider than the other two pillars. And it also allows the NGOs or other members of public, based on the criteria set by the national legislation, to challenge violation in environmental matters. There may be some criteria for some other members of the public, but, in principle, the NGO should be allowed to challenge the decision. And, also, if there is no further criteria, then you should interpret that the rule on access to justice from the perspective of the Aarhus Convention. In principle, this is quite important because, if you discover the correct regime, they probably your argument will come back in a different case. So, if you adopt a decision as judge that the Aarhus Convention is applicable, then probably the NGO will use your decision and return it back...

Why do you need to know (more) about the Aarhus Convention?

Example: An NGO challenges a spatial plan. As regards *locus standi*, the national law stipulates that the applicant must have sufficient interest. The NGO refers to the Aarhus Convention.

Is the Aarhus Convention applicable? PILLAR III?

See ACCC/C/2005/11 and ACCC/C/2011/58 – Art. 9(3)

Effectiveness?

Tips and Tricks?



The Aarhus Convention does not deal with urban plans, or at least with the definition. It just says violation of other rules on environmental protection. So, you don't know if it is applicable or not, and you cannot easily read it from the Convention itself. So, there is a difference when comparing with cutting the three. But, is the Aarhus Convention applicable? Well, it would once again pillar 3, because it is a challenge to the plan.

If you look into the jurisprudence of the Compliance Committee, you would find some cases concerning – I think – Ukraine and Belgium. And those say that even the spatial plans fall under article 9(3) and public should, therefore, be allowed to access to justice.

But very often it is not about the regime itself. It is about effectiveness. It is about the quality of the participation, and the remedy.

So, if there are any tips and tricks, you will find out during the workshop.

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Is the Aarhus Convention applicable? PILLAR III?

See ACCC/C/2005/11 and ACCC/C/2011/58 – Art. 9(3)

Effectiveness?

Tips and Tricks?

- Join the ERA workshop!
- Read the Aarhus Convention
- Use the Implementation Guide and EU guides
- Think about principles
- Use the preliminary reference procedure



THANK YOU FOR YOUR ATTENTION!

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