

Public participation and access to justice in the IED

Magdalena Bar

Jerzy Jendrośka

Trier, 23-25 September 2019

Jendrośka Jerzmański Bar &
Partners. Environmental Lawyers

1

Aarhus Convention

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998
- Aarhus Convention in EU
 - part of the acquis
 - EU shall adjust its law to the Convention
 - Including IED
 - Member States implement Aarhus via EU law

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

2

The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998 at Aarhus, Denmark. As of 5 February 2016, there were 47 Parties to the Convention.

Through decision II/1 adopted at its second session (Almaty, 25-27 May 2005), the Meeting of the Parties adopted an amendment to the Convention on genetically modified organisms

The Aarhus Convention represents the first binding international instrument attempting to comprehensively and exclusively address issues of citizens' environmental rights.

In 1998 European Commission signed the Aarhus Convention on behalf of the Community with a view to ratify it. The European Community concluded the Aarhus Convention by the Council Decision of 17 February 2005 and deposited its instrument of ratification on the same day. The Convention entered into force for the European Community on 18 May 2005. Thus, bearing in mind that under the Lisbon Treaty the European Union “shall replace and succeed the European Community”, the Convention is now part of the EU law and as such is subject to applicable rules concerning interpretation, implementation and enforcement of the acquis.

Upon approval the Community made a declaration, in which it stated *inter alia* that ‘it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention’ and that the ‘European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force’

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

The Aarhus Convention An Implementation Guide



UNITED NATIONS

3

Available at: <https://www.unece.org/index.php?id=35869>

UNECE

**Maastricht Recommendations on
Promoting Effective Public Participation in
Decision-making in Environmental Matters**
prepared under the Aarhus Convention



Available at: <https://www.unece.org/index.php?id=49142>

The Aarhus Convention Compliance Committee (ACCC)

- The Committee:
 - nine independent members having „recognised competence”
 - elected to serve in personal capacity
 - examines i.a. communications from the public

<https://www.unece.org/env/pp/cc.html>

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

5

Decision I/7 established a Compliance Committee consisting of eight members serving in a personal capacity. These individuals are to be nationals of Parties or Signatories to the Convention who are persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.

Through decision II/5, adopted at the second meeting of the Parties (Almaty, May 2005), the number of Committee members was increased to nine with effect from the third meeting of the Parties.

The hitherto practice shows that members of the Compliance Committee represent quite a diverse expertise: there are professors of law and practising lawyers as well as former governmental officers and former NGOs activists. Some of them have expertise related to general public international law or general environmental law while some others expertise related specifically to the issues of access to information, public participation and access to justice internationally or nationally. Bearing in mind the nature of the Convention and cases in front of the Committee, such a diversity of expertise is an asset and a proper balance in this respect is needed to be maintained in order to assure ability to comprehend legal and factual problems related to implementing the Convention in the context of national environmental law in various legal systems.

Geographical representation

According to para 3 of the Decision I/7 the Committee may not include more than one national of the same State while according to ts para 8 in the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience.

In real terms it means a commitment to provide a relative balance between representation of the 3 subregions: so called „Western” countries (mainly „old EU Members”), Central European countries (including „new” EU Member states and countries of South-East Europe) and EECCA countries (further divided into 3 clusters: Eastern Europe, Caucasus and Central Asia). This balance does not mean always equal division 3 x 3 but has usually been adjusted to the existing situation regarding nominations submitted.

Decision I/7 established a Compliance Committee consisting of eight members serving in a personal capacity. These individuals, according to the Decision, are to be nationals of Parties or Signatories to the Convention who are persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience. Through decision II/5, adopted at the second meeting of the Parties (Almaty, May 2005), the number of Committee members was increased to nine with effect from the third meeting of the Parties.

The hitherto practice shows that members of the Compliance Committee represent quite a diverse expertise: there are professors of law and practising lawyers as well as former governmental officers and former NGOs activists. Some of them have expertise related to general public international law or general environmental law while some others expertise related specifically to the issues of access to information, public participation and access to justice internationally or nationally. Bearing in mind the nature of the Convention and cases in front of the Committee, such a diversity of expertise is an asset and a proper balance in this respect is needed to be maintained in order to assure ability to comprehend legal and factual problems related to implementing the Convention in the context of national environmental law in various legal systems.

independency in this context is understood as “not being part of or representing an executive branch of a government of a Party or of an executive branch of a NGO

According to para 3 of the Decision I/7 the Committee may not include more than one national of the same State while according to ts para 8 in the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience.

In real terms it means a commitment to provide a relative balance between

representation of the 3 subregions: so called „Western” countries (mainly „old EU Members”), Central European countries (including „new” EU Member states and countries of South-East Europe) and EECCA countries (further divided into 3 clusters: Eastern Europe, Caucasus and Central Asia). This balance does not mean always equal division 3 x 3 but has usually been adjusted to the existing situation regarding nominations submitted.

A review of a specific Party’s compliance may be triggered in four ways:

- a) a Party may make a submission about compliance by another Party;
- b) a Party may make a submission concerning its own compliance;
- c) the secretariat may make a referral to the Committee;
- d) members of the public may make communications concerning a Party’s compliance with the Convention.

In addition, the Committee may examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the MoP; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention.

Results of the Committee's work

- Findings and recommendations of the ACCC
 - Findings
 - compliance or non-compliance
 - Recommendations
 - steps to be taken by Party concerned
 - steps to be taken by MOP
- Adoption by MOP
 - declaration of non-compliance
 - caution
 - suspension of rights and privileges

Jendrośka Jerzmański Bar &
Partners. Environmental Lawyers

6

The procedure under the Committee usually ends with adopting its findings, in which the Committee concludes as to the compliance or non-compliance of the Party concerned. The findings concluding non-compliance usually include also recommendations aiming to assist the Party concerned in achieving compliance.

The Committee is not a court and does not issue binding decisions, but rather may make recommendations either to the MoP, or, in certain circumstances, directly to individual Parties.

The Committee submits a report on its activities at each ordinary session of the MoP and makes such recommendations as it considers appropriate. The Committee finalizes the report at least twelve weeks before the session of the MoP at which it is to be considered. Every effort is made to adopt the report by consensus, and if this is not possible, the report reflects the views of all the Committee members. The reports of the Committee are available to the public.

Pending consideration by the MoP and with a view to addressing compliance issues without delay, the Compliance Committee may, in consultation with the Party concerned, provide advice and facilitate assistance regarding the implementation of the Convention. Also, the Committee may, with the agreement of the Party concerned, take other measures including issuing recommendations to the Party concerned.

Measures by the Meeting of the Parties

According to paragraph 37 of decision I/7 the Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance,

decide upon one or more of the following measures:

- (a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
- (b) Make recommendations to the Party concerned;
- (c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
- (d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;
- (e) Issue declarations of non-compliance;
- (f) Issue cautions;
- (g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;
- (h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

IED shall be compliant with the Aarhus Convention – Recital 27

- In accordance with the Århus Convention (...) effective public participation in decision-making is **necessary to enable the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions**, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken. Members of the public concerned **should have access to justice** in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

Access to information

- Main EU Act on access to environmental information – Directive 2003/4
- Specific requirements in the IED: Art. 24(2)-(4):
 - Obligation to „make available to **the public**”:
 - information regarding the permit issued, its conditions etc.
 - Information regarding:
 - post-closure measures
 - results of monitoring

- Obligation to make certain information available via Internet
- Subject to restrictions in Art. 4(1) and (2) of Directive 2003/4 on access to environmental information, including:
 - List of applicable grounds for refusal
 - Restrictive interpretation of grounds for refusal
 - Obligation of weighing interests for – and against - the disclosure
 - Exemption to exemptions – no refusal in case of information on emissions

Who is „the public”

- Basically: every person
- Definition in art. 3(16) of IED:
‘the public’ means one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups;
 - definition identical as in Aarhus

The concept of ‘the public’ is the broadest in designating the subject of rights under the Convention. It is constructed with a view to covering almost everyone and with a very limited room for discretion left for the Parties in designating the precise boundaries of its scope. Therefore, even if it allows for interpretations that would exclude from its scope, for example, groups or organizations having no legal personality in certain national jurisdictions, in many countries rights granted by the Convention to ‘the public’ and sometimes even to ‘the public concerned’ are being granted to ‘everyone’ which means the broadest possible scope of application.

‘The public’ is sometimes referred to as ‘general public’ in order to differentiate it from the ‘public concerned’ and other more specific terms which are meant to streamline this general concept, and in order to underline that this concept covers an unspecified and (almost) unlimited spectrum of subjects representing various interests including lay persons. Moreover, while part of the definition (‘one or more natural or legal persons’) is based on the definition from the Espoo Convention, it was supplemented with the clear recognition of associations, organizations and groups. In this respect, however, it is somehow limited by the phrase ‘in accordance with national legislation or practice,’ which may be interpreted as introducing some discretionary elements into this definition so that it is not automatically to be associated with the ‘every person’ principle.

Non-discrimination clause – Art. 3.9 of the Convention

- Within (...) this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters
- without discrimination as to citizenship, nationality or domicile and,
- in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Public participation

- Art. 6 of the Aarhus Convention
- Art. 24(1) + Annex IV of IED:
 - Public concerned are given
 - **early** and **effective** opportunities
 - to participate in certain procedures

The concept of ‘the public concerned’ is used only for the purpose of Article 6 and paragraph 2 in Article 9, which is related to Article 6. Its roots seem to have been stemming from the original version of the EIA Directive. It is envisaged in Article 6 that ‘the public’ should be informed about the request for development consent, though the right to submit comments is supposed to be granted only to the public concerned. The term ‘public concerned’ at that time was not defined in the Directive but it required that Member States should, ‘depending on the particular characteristics of the projects or sites concerned’, determine *inter alia* ‘the public concerned’. Many Member States did not bother to make such determination and granted the right to participate to everyone, but some Member States decided to determine the scope of ‘public concerned’ in a way that limited significantly the scope of participation, in particular in relation to associations, organizations and groups.

During the negotiation of the Convention it was necessary to define the term ‘the public concerned’, taking due account however of the experience gained.

The definition is based on the concept of ‘being affected’ which is well known in some jurisdictions and was already employed in 1991 by the Espoo Convention for the purpose of defining the public which should be allowed to participate in the transboundary EIA. This concept was supplemented with the concept of ‘interest’ which again is well known in many jurisdictions. By doing this the definition somehow combined two major approaches used in

various legal systems in the ECE region to define standing in administrative procedures.

Finally, the definition was supplemented with a phrase aiming to ensure proper recognition of environmental organizations, which – as already mentioned – in some countries traditionally had not always been considered as part of ‘the public concerned’. The end result of this is a concept which is a mixture of, partially at least, objective elements (being ‘affected’ or ‘likely to be affected’, or ‘having an interest’) in relation to ‘natural or legal persons’, with discretionary power to establish ‘any requirements under national law’ in relation to environmental organizations.

During the negotiations concerning Article 6 it was heavily debated, in relation to each paragraph, whether the respective rights corresponding to obligations contained therein should be granted to ‘the public’ or to ‘the public

concerned’. The final result is, as already mentioned, somewhat patchy and – interestingly enough – quite different from the approach employed by the EIA Directive, which provided a certain basis for the Convention in this respect.

The term ‘the public concerned’, as defined in the Convention,, has proved not to be suitable for purposes other than those of the provisions of Article 6. In fact, in other provisions of the Convention the term ‘public concerned’ does not appear at all except for Article 9(2) which is devoted to access to justice in relation to Article 6. For the specific purpose of Article 9(2) it was however modified to further streamline the scope of application of this provision.

Public participation – scope according to IED

- Public concerned participates in:
 - a) granting of a new integrated permit;
 - b) granting of a permit for any substantial change;
 - c) granting or updating of a permit where derogations (Art. 15(4)) are proposed
 - d) updating of a permit in accordance with Art. 21(5)(a) = reconsideration when the pollution caused by the installation is “too significant”

Who is „the public concerned” - art. 3(17) of IED

- the public affected or likely to be affected by, or having an interest in, granting or updating of a permit;
- for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest
 - while deciding who is “affected” (= is public concerned), one should take into account not only measurable factors, such as the property or health of the public concerned, but also less measurable aspects, like their quality of life (ACCC/C/2013/91 UK, para 73)
 - e.g. tenants may be affected too (ACCC/C/2010/50, Czechia, para 65-67)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

14

Public concerned – Case C-92/UK

73. With respect to decisions to permit specific activities within the scope of article 6 of the Convention, the public may be concerned either because of the possible effects of the normal or routine operation of the activity in question or because of the possible effects in the case of an accident or other exceptional incident, or both. In either case, the decision to permit a particular activity may not only impact measurable factors such as the property or health of the public concerned but also less measurable aspects, like their quality of life.

74. Moreover, whether the public is affected or likely to be affected by the environmental decision-making must not be determined only by considering the risk of adverse effects or accidents in statistical terms. In the same vein, the notion of having an interest in the environmental decision-making should include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity, but also those who have a mere factual interest (for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable). It may also include, as is the case in many jurisdictions, persons who have expressed an interest in a given case without having stated any specific reason for their interest

Foreign public concerned

- Non-discrimination clause applies
- The environmental impacts of activities may occur across national borders, so:
 - Neither legal framework nor the public participation procedure itself should contain anything that would discriminate de facto or de jure against the foreign public concerned (see para 23 Maastricht Recommendations)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

15

The Aarhus Convention stipulates in Article 3.9 that:

Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Identification and notification of the public concerned – ACC/71

In the case of decision-making on ultrahazardous activities like an NPP, being activities invariably of wide public concern, **particular attention must be taken at the stage of identifying the public concerned and selecting the means of notification in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activities and their possibilities to participate.** In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact not only on tangibles, such as property or health, but also on less

measurable areas, like quality of life. **For an ultrahazardous activity such as an NPP, members of the public may be affected or be likely to be affected by, or have an interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small.** In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident should indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and concerns of persons living within the possible range of the adverse effects. It is clear to the Committee that **with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond State borders and over vast areas and regions**

Public participation: general rules and steps according to Art. 6 Aarhus

- General rules:
 - Early public participation, when all options are open - art. 6(4)
 - Reasonable time-frames - art. 6(3)
- Steps in the procedure:
 - Notification – art. 6(2)
 - Access to relevant information – art. 6(6)
 - Possibility to submit comments – art. 6(7)
 - Due account taken of public comments – art. 6(8)
 - Decision taken notified and accessible - art. 6(9)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

16

Article 6(4) stipulates that ‘[e]ach Party shall provide for early public participation,
when all options are open and effective public participation can take place’

„The requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage.”

...each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programs) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details..”

„Within each and every such procedure where public participation is required it should be provided early in the procedure when all options are open and effective public participation can take place.”

Reasonable time-frames for

Notification

Inspection of relevant documents

Submission of comments

Consideration of comments (ACC/C/3
Ukraine)

Steps in public participation procedure

The public participation procedure include the following steps, within reasonable timeframes for participation, including provision for participation at an early stage:

timely and effective notification of the public concerned;

a right for the public concerned to inspect information which is relevant to the decision-making free of charge;

possibility to submit comments in writing or at a hearing,

an obligation on the decision-making body to take due account of the outcome of the public participation; and

prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible

Early and effective

- Is it enough to rectify certain flaws of public participation during the administrative procedure at second instance?
- IED does not preclude it, **provided that all options and solutions remain possible and that at that stage of the procedure the public may still effectively influence the outcome of the decision-making process**
 - Krizan case, C-416/10, para 87-91

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

17

In case ACCC/C/17 (*European Community*) the communicant alleged ‘that EIA Directive and IPPC Directive fail to comply with the Convention because they fail to provide for “early public participation, when all options are open and effective public participation can take place” on account of the fact that the participation may take place after the construction has commenced. It further maintained that ‘any public participation that is envisaged after the construction of an installation can by no means be considered as “early public participation, when all options are open and effective public participation can take place”’ (ACCC/C/17 (*European Community*), para. 29.

Furthermore it claimed that ‘after the construction is completed, most options are not open anymore and therefore there is no possibility for effective participation.

Thus the lack of provisions that clearly require public participation to be carried out before the commencement of construction in both the EIA and IPPC Directives is not in compliance with Article 6, paragraph 4, of the Convention.’

By way of answer to the above allegation the European Commission on behalf of the party concerned maintained that ‘the relevant procedures ensure early and effective participation when all options are open, although the range of

options differs according to the scope of both procedures which address slightly different aspects’.

The Committee, as a basis of its examination, decided that it ‘must consider the structural characteristics of the Party concerned, and the general division of powers between the European Community and its Member States in implementing Community directives’.

When examining the substantive issues the Committee noted that ‘it appears to the Committee that for all activities involving construction, the EIA Directive requires public participation to be carried out before the actual construction starts. This requirement can be interpreted from the definitions of “project” and “development consent” in Article 1, paragraph 2, of the EIA Directive taken in conjunction with the obligation set out in Article 2, paragraph 1, to require development consent.’

Following this, the Committee noted that: ‘the IPPC Directive obliges the Member States to ensure early and effective opportunities for public participation in procedures for issuing a permit for new installations covered by the IPPC Directive. A system whereby the IPPC permitting process starts after the construction is finalised need not of itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued

to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options. If a legal framework of a Party to the Convention is such that the only opportunity for the public to provide input to decision-making on technological choices which is subject to the public participation requirements of Article 6 of the Convention is at a stage when there is no realistic possibility for certain technological choices to be accepted, then such a legal framework would not be compatible with the Convention’.

The Committee concluded the above considerations with the opinion that ‘the provisions on public participation in both the EIA and the IPPC Directives, at least as far as decision-making for landfills is concerned, seem to be in line with the requirement of Article 6, paragraph 4, of the Convention to provide “early public participation, when all options are open and effective public participation can take place.”’

Reasonable time-frames

- Aarhus Convention (Art.6.3)
 - The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for **informing** the public in accordance with paragraph 2 above and **for the public to prepare** and **participate** effectively during the environmental decision-making
- IED (Annex IV.5)
 - Reasonable time-frames for the different phases shall be provided, allowing sufficient time to inform the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to this Annex.

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

18

Reasonable time-frames – change in the approach

Approach

(original EIA Directive) „appropriate time limits for the various stages of the procedure in order to ensure that **a decision is taken within a reasonable period**”

(EIA Directive after Aarhus) „Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

Non reasonable time-frames

- The time-frame of **only ten working days**, set out in the Lithuanian EIA Law, **for getting acquainted with the documentation**, including EIA report, and **for preparing to participate** in the decision-making process concerning a major landfill does not meet the requirement of reasonable time-frames (Case ACCC/C/16 Lithuania)

Reasonable time-frames

- 6 weeks for the public to inspect the documents and prepare itself for the public inquiry
- 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity,
- 6 weeks for the public concerned to exercise its rights under article 6(6),
- and approximately the same time relating to the requirements of article 6(7)

meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention (Case ACCC/C/22 France)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

20

„the announcement of the public inquiry...provided a period of approximately 6 weeks for the public to inspect the documents and prepare itself for the public inquiry ...the public inquiry ...provided 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity... The Committee is convinced that the provision of approximately 6 weeks for the public concerned to exercise its rights under article 6, paragraph 6, and approximately the same time relating to the requirements of article 6, paragraph 7.. meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention”(Case CCC/C/22 France)

Notification

- Aarhus (Art. 6(2))
 - Adequate, timely, effective
- IED
 - No clear indication that the public notice should be done in „adequate, timely and effective manner” as required in Art.6.2 Aarhus
 - Timely („sufficient time to inform the public and for the public (...) to prepare and participate effectively”)
 - Adequate („nature of possible decisions”)
 - Effective („bill posting or publication in local newspapers”)

Article 6.2 of the Aarhus Convention requires that this information shall be done in “an adequate, timely and effective manner”

And such clear obligations may be of utmost importance in practical implementation of the Convention.

To illustrate the possible problem one can have a look at a practical example in Poland. The law (Articles 3.19 and 31.3 of the Environmental Protection Law) require the public to be informed, inter alia by “provision of information in a customary manner at the seat of the authority which is competent in the matter” and by “bill-posting in the vicinity of the proposed project” and also by “placing of the information on the www homepage of the authority competent for making the decision”.

This will work perfectly in case of a project located in big cities or urban areas in well-off regions. In case however of a project located well outside human settlements, in a poor region where most people have no access to Internet, and with the seat of competent authority being in a town located 15 km from the respective area the situation may look differently. The key issue would be how to interpret the phrase “vicinity of the project”. If the “vicinity of the project” were interpreted literally - the legal obligation would be met by bill-posting in the middle of countryside. In such case, even if the information was put “timely” , in practice no one from the local public would have a chance to ever learn about the project and thus - to participate in decision-making. And this

will all be in line with the requirements of both the EIA Directive and Polish provisions transposing it, which both do not require clearly that the public is informed about the proposed activity in “adequate” and ‘effective” manner? But the Aarhus convention does - and this makes a difference. In order to meet such requirement the notice would have to be put in places where the public concerned would be able to see it. Such a clear legal requirement involve some degree of active consideration on the part of authorities which should carefully consider which means of notifying the public would be ‘adequate’ and “effective”. In different situation such means can be different but always subject to judicial control.

The notice should provide a clear explanation of how the public parties can find out more about the project, and how they can communicate their views to the competent authority.

The notice should identify the relevant documents and place where they will be open for public inspection and also should indicate where, when, and how the public may submit comments on the proposed project, and should list the names and addresses of the persons within the agency who are responsible for the project. Equipped with this information, members of the public will be able to submit their views to the appropriate individuals in the agency within the time period specified.

Examples

Public notice

- webpage - (in Public Information Bulletin)
- notice board in the seat of competent authority
- notice in the vicinity of project (bus stop, church, local shop etc)
- press (local or national)

Individual notification (letter) - to immediate neighbours

UK

On the webpage of competent authority

By individual notice to interested persons

By public notice

- for at least two successive weeks in one or more local newspapers circulating in the vicinity in which the proposed development would be situated;

- once in a national newspaper
- once in the London Gazette and, if land in Scotland is affected, the Edinburgh Gazette; and
- where the proposed application relates to offshore development
 - once in Lloyd's List; and
 - once in an appropriate fishing trade journal.

(In)adequate notice (1)

- Information about “development possibilities of waste management in the Vilnius region” rather than
- a process concerning a major landfill to be established in the neighbourhood.
- = inaccurate notification which cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention. (Case ACCC/C/16 Lithuania)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

22

„it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.” (Case CCC/C/16 Lithuania)

(In)adequate notice (2)

- „Application for the environmental authorization of the project involving the exercise of an activity of cement manufacture and rock extraction” instead of
- „substantial modification of the authorization to include the use of waste and dried sewage sludge as a fuel”
= inadequate

(Case ACCC/C/2014/99, Spain, para 90-94)

(In)effective notice

- The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned would have a reasonable chance to learn about proposed activities and their possibilities to participate
- Notice in a weekly official journal instead of a popular daily local newspaper = ineffective (Case CCC/C/16 Lithuania)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

24

The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned would have a reasonable chance to learn about proposed activities and their possibilities to participate.

Notice in a weekly official journal instead of a popular daily local newspaper = ineffective (Case ACCC/C/16 Lithuania)

If „most of the interested persons resided or owned a property on the island of Ios, the posting of a notice in the regional administrative headquarters, located on the island of Syros, even accompanied by publication in a local newspaper of the island of Syros, would not appear to have been liable to contribute sufficiently to informing the public concerned. (Case C-280/18)

Access to relevant information

- Aarhus Convention (Art. 6(6))
 - free of charge
 - all information relevant to decision-making
 - as soon as available
- IED – convoluted scheme in Annex IV
 - „information other than that referred to (...) (point 2 referring to point 1)

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

25

Article 6.6 of the Convention requires “the competent public authorities to give the public concerned access for examination (...) free of charge and as soon as it becomes available, to all information relevant to the decision-making (...) that is available at the time of the public participation procedure”.

This provision is meant to provide a certain exemption from general rules of access to information in Article 4 of the Convention. It requires that certain information useful for the public to participate effectively should be made available to it without applying certain limitations envisaged in Article 4: this includes in particular:

-time limits (Article 4.2) and

-possibility to charge for supplying information (Article 4.8).

It allows only to apply exemptions envisaged in Article 4.3 and 4.4 (“ without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4”).

Article 6.2 there is an obligation to actively inform the public about commencement of the procedure and details of envisaged procedure, in particular to inform the public where it can inspect the relevant information (Article 6.2.d) iv), while Article 6.6 supplements this provision with clear obligation to actually make available (upon request where so required) such

“relevant information” and provides a minimum list that such information should contain in Articles 6.6 letters a)-f).

The relevant information that should be made available is listed in article 6.6. The list in the Convention is not an exhaustive one.

The list in fact resembles closely contents of the EIA documentation. In addition to it the public should also have access to main advice and reports (including opinions of other authorities concerning the project) and obviously also to the application for a decision.

(Non)confidentiality of information

- Art. 24 IED on public participation shall apply subject to restrictions in Art. 4(1) and (2) of Directive 2003/4 on access to environmental information
 - Incl. restrictive interpretation of grounds for refusal and obligation of weighing interests for – and against - the disclosure
- urban planning decision for the installation cannot be excluded from disclosure because of confidentiality of commercial info (Krizan case, C-416/10)

Access to relevant documentation for foreign public

- No obligation to translate the notification and other documents into English – (ACCC/C/51/Romania)

In another case (ACCC/C/15, *Romania*, the so-called *Rosia Montana* case) the communicant claimed that in ‘the case of Rosia Montana, approximately 100 legal and natural persons sent specific requests to the local authority as to be notified and consulted for the Rosia Montana EIA. Many of these persons are foreign organizations or citizens with little or no understanding of the Romanian language or access to the Romanian press’.

The communicant further maintained that those who ‘do not speak Romanian and do not know the Ministry’s website are unable to understand the announcement’ and as a consequence alleged that ‘[i]n light of the Aarhus convention, this is a clear act of discrimination’.

The Committee did not address this allegation in this case but resolved the issue in case ACCC/C/51/Romania, in which communicant claimed that the authorities were under the obligation to provide the Energy Strategy in “the form requested”, i.e., in English, to a member of the public from abroad, i.e., Greenpeace CEE Austria. The Committee clarified that „article 4, paragraph 1, of the Convention relates to the material form of the requested information, such as such as paper, electronic media, videotape, recording, etc., and does not include an obligation to translate the document into another language. Thus, failing to provide the English translation of the requested document (the Energy Strategy), since such translation was not already available with the authorities, does not constitute non-compliance with article 4, paragraph 1 (b),

of the Convention” (para 107).

Possibility to submit comments

- Art. 6(7) Aarhus
 - Procedures for public participation shall allow the public to submit (...) any comments”
- Annex IV.3 IED
 - The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken
- In writing or in public inquiry (hearing)
- Comments don't need to be motivated (ACCC/C/16 Lithuania)

Due account

- Art. 6(8) Aarhus, Annex IV.4 IED
- Obligation to read and consider seriously - but not to accept all comments
- Sufficient time for authorities to consider comments (ACCC/C/3, Ukraine)

The obligation to take due account in the decision of the outcome of the public participation cannot be considered as a right to veto of a project nor as requirement to accept all the comments, reservations or opinions submitted.

According to Aarhus Convention *Implementation Guide*, the obligation to ‘take due account’ under Article 6(7) should be seen in the light of the obligation under Article 6(9) to ‘make accessible to the public the text of the decision along with the reasons and considerations on which [it] is based’. Therefore the Guide suggests that in the countries where general administrative law already requires decisions to be reasoned and given in writing

‘taking due account of the outcome of the public participation might be interpreted to require the written reasoned decision to include a discussion of how the public participation was taken into account’

Publication of the decision

- Art. 6(9) Aarhus, Art. 24(2) IED
- Obligation to notify the public promptly (ACCC/C/8, Armenia)
 - about the decision
 - where it can be made available
- Publication on the website only is insufficient (ACCC/C/2014/99, Spain, para 105)
- Together with a statement on:
 - reasons
 - considerations

Public participation in reconsideration of a permit

- Art. 6(10) of Aarhus: requirements for public participation apply to reconsideration or updating of a permit „mutatis mutandis, and where appropriate”
- Art. 24(1)(d) IED: public participation only in case of reconsideration referred to in Art. 21(5)(a)
= when the pollution caused by the installation is “too significant”

No public participation for certain types of reconsideration

- Reconsiderations referred to in Art. 21(5)(b)-(c):
 - when the operational safety requires other techniques;
 - new/ revised environmental quality standards
- Reconsideration when new BAT conclusions (art. 21(3)-(4))
- Update in case of a non-substantial change
- Other types of updates such as life-time extension
 - **excluded a priori from the public participation requirement**

Art. 24(1) IED vs Art. 6(10) Aarhus

- In line with Art. 6(10) Aarhus?
- Margin of discretion „mutatis mutandis, and where appropriate” vs. categorical exclusion
- Case ACCC/C/2014/99 (Spain), para 84-86:
 - „mutatis mutandis, and where appropriate” doesn’t mean complete discretion of the Party
- Case ACCC/C/2014/121 (EU) – pending

Access to justice

- Art. 9(2) Aarhus Convention, Art. 25 IED
- Members of the public concerned meeting certain requirements:
 - having a sufficient interest or, alternatively, maintaining impairment of a right,
- have access to a review procedure
- to challenge the substantive and procedural legality of the decision (permit), act or omission

Jendroška Jerzmański Bar &
Partners. Environmental Lawyers

34

Access to justice under Article 9(2) is granted not to all members of ‘the public concerned’ but only to those ‘having a sufficient interest’ or ‘maintaining impairment of a right’. Worth noting is that the Convention, while allowing Parties to determine what constitutes a sufficient interest and impairment of a right ‘in accordance with the requirements of national law’, nevertheless limits the scope of discretion of Parties in determining these two preconditions by requiring that the determination should be done ‘consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention’. Moreover, the Convention further limits this discretion by requiring Parties to properly accommodate within these two concepts also the possibility for environmental organizations to enjoy access to justice when performing their statutory functions, i.e. acting to protect the environment. The above formulation has been almost literally copied in IED.

How to determine who has standing

- Member States / Parties to determine „what constitutes a sufficient interest and impairment of a right” – but...
- ... with the objective of giving the public concerned **wide access to justice**
 - E.g. tenants - and only property owners - shall have standing (ACCC/C/2010/50, Czechia, para 73-76 and ACCC/C/2010/48, Austria, para 63)
- Environmental NGOs – meeting any requirements under national law - deemed to have sufficient interest or rights capable of being impaired
- Non-discrimination clause applies (Art. 3.9 of Aarhus)

Requirements of Art. 9(4) Aarhus

- The appeal procedure shall:
 - provide adequate and effective remedies, including injunctive relief as appropriate – this is not included into IED!
 - yet, the CJEU confirms that an injunctive relief is needed (Krizan case, C-416/10, para 109-110)
 - be fair, equitable, timely and not prohibitively expensive.