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**Public participation and access to justice
in the findings of the Aarhus Convention
Compliance Committee**

**The environmental protection in the town and
country planning or in land use in the EU law**

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Introduction – issues addressed

- Aarhus Convention and its compliance mechanism
- Public participation
 - Scope of application
 - General rules
 - Procedural steps
- Access to justice
 - Art. 9 of Aarhus
 - Standing at EU level
 - Scope of review
 - Costs

UNECE Aarhus Convention

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
 - 1998 - adopted and signed in Aarhus (Denmark)
 - 2001 - entry into force
 - 2003 - PRTR Protocol adopted and signed in Kiev
 - 2005 - GMO Amendment adopted and signed in Almaty (Kazakhstan)

3 pillars

- **Access to information**
 - passive disclosure – Art. 4
 - active disclosure – Art. 5
- **Public participation**
 - decisions whether to permit specific activities „which may have a significant effect on the environment” - art 6
 - GMO decisions – Art. 6 bis
 - plans/programs „relating to environment” – Art. 7
 - policies „relating to environment” – Art. 7
 - normative acts/legally binding rules „that may have a significant effect on the environment” – Art. 8
- **Access to justice**
 - redress in case of abusing right to information - art.9.1
 - redress in case of abusing right to participate - art.9.2
 - separate right to file a public interest law suit - art.9.3

Aarhus Convention – status and role in Europe

- Aarhus Convention as a benchmark
- Aarhus Convention in EU
 - part of the acquis
 - Member States implement Aarhus via EU law
 - European Commission and ECJ as enforcers

Direct effect of Aarhus Convention

- Direct effect at EU level
 - Case C-240/09 Lesochranarske: art.9.3 has no direct effect but standard test of direct effect applicable
- Direct effect in Member States
 - no direct effect because of article 3.1 („Each Party shall take the necessary legislative, regulatory and other measures..”) – verdicts in Czech Republic and Poland
 - each provision separately judged (ie. paragraphs 1,2,3 and 7 of Art.6 produce direct effect according to Conseil d’Etat in France)

Aarhus Compliance mechanism

- Compliance Committee
 - nine independent members
 - elected to serve in personal capacity
 - regional balance
- Compliance procedure - triggers
 - Submission by Party about another Party
 - Submission by Party about itself
 - Referrals by secretariat
 - Communications by the public (60 hitherto)

Legal effect

- Findings and recommendations of CC
 - Findings
 - compliance or non-compliance
 - Recommendations
 - steps to be taken Party concerned
 - steps to be taken by MOP
- Adoption by MOP
 - conditional caution imposed on Ukraine

Public participation - legal nature of obligations

- Individual decisions
 - Art.6 permits – „shall”
 - Art.6 bis GMO decisions – „shall”
- Strategic decisions
 - Art 7 - Plans and programs - „shall”
 - Art.7 – Policies - „shall endeavor”
 - Art. 8 - Executive regulations and other legally binding rules - „shall strive to promote” and „should”

Specific decisions – activities covered

- Art.6.1 a) - list of activities in Annex I
 - based on EIA Directive Annex I and IPPC Directive
 - any other activity subject to domestic EIA (point 20)
- Art. 6.1 b) - other activities „which may have a significant effect on environment”
 - language to cover EIA Directive Annex II projects
 - „Parties shall determine...” = screening
- Changes and extensions

Art. 6.1 (b)

- „Each Part [s]hall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions”
- Objective criteria or discretionary power of Parties?
- In EU:
 - mandatory screening only for Annex II of EIA Directive projects
 - or
 - for any other proposed activities „which may have significant effect on the environment”)?

Decisions covered

- Multiple decisionmaking
 - Public participation only once?
 - Public participation with each decision?
- Criteria
 - Regulatory vs financing
 - Regulatory vs agreements (ACC/C/22 France)
 - „Whether to permit”
 - Significance test (ACC/C/17 –EU)
- EU requirements
 - PP required for development consent with EIA and IPPC permit
 - EIA seen in the context of Crystal Palace (C-508/03)
 - habitat assessment

Scope of strategic decisions covered by the Convention

- Art 7 - plans, programs and policies „relating to the environment”
 - „significance” of „relation” irrelevant!
 - „relate” = „may have effect on” ?
- Art. 8 – executive regulations and other legally binding rules that „may have a significant effect on the environment”
 - „significance” test

Strategic decisions „relating to the environment”

- Those which „may have a significant effect on the environment” and require SEA
- Those which „may have a significant effect on the environment” but do not require SEA, for example:
 - those that do not set framework for development consent
- Those which „may have effect on the environment” but effect is not „significant” , for example:
 - those that determine the use of small areas
- Those aiming to help protecting the environment

Public participation and EIA/SEA

- The Committee... acknowledges the importance of environmental assessment, whether in the form of EIA or in the form of strategic environmental assessment (SEA), for the purpose of improving the quality and the effectiveness of public participation in taking permitting decisions under article 6 of the Convention or decisions concerning plans and programmes under article 7 of the Convention”
- „under the Convention, public participation is a mandatory part of the EIA, but an EIA is not necessarily a part of public participation” (ACCC/C/2008/24 Spain)

General rules- „reasonable time-frames”

- „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”
(Art.6.3)

Time frames - issues for consideration

- Phases
 - Notification
 - Inspection of relevant documents
 - Submission of comments
 - Consideration of comments (ACC/C/3 Ukraine)
- Fixed vs diversified time frames (CCC/C/16 Lithuania)
- Timing
 - traditional holiday season (ACC/C/24 Spain)

„Time-frames” - not reasonable

- „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 CCC/C/16 Lithuania)

„Reasonable time-frames” - reasonable

- „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)

General rules - „early public participation”

- „Each Party shall provide for early public participation,
- when all options are open
- and effective public participation can take place” (Art.6.4)

Early public participation – basic issues

- Does „early...when all options are open”
 - relates to sequence of decisions (Delena Wells case)?
 - relates to particular decision (scoping in EIA)?
 - both?
- Can public participation after construction is finished be considered „early” (ACC/C/17 – EC case)?

Early public participation - Compliance Committee observations

- „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.”

Public participation procedure

- Notification –art 6.2
- Access to 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 to the public- art.6.9

Art.6.2 - notification of the public

- „The public concerned shall be informed...in an adequate...and effective manner..”

Notification – art 6.2

- Public notice or individually (case C-15 Romania)
- Early in decision-making
- Manner:
 - Adequate
 - Timely
 - Effective

Notification – basic issues

- Nor clear requirement in EU and most MS for the public to be informed in an „adequate, timely and effective manner”
- Legal issues (ACC/C/17 – EC case)
 - are „specific requirements” in EIA and IPPC Directives enough?
 - is it needed bearing in mind
 - the character of the Directive
 - direct applicability of the Convention

Notification – specific requirements in EIA Directive

- Timely („sufficient time for informing the public and for the public.. to prepare and participate effectively” – compare with the previous version of EIA Directive!)
- Adequate („nature of possible decisions”)
- Effective („bill posting...or publication in local newspapers”)

Notification - specific requirements in Poland

- 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

„Adequate”

- „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)

„Effective” - I

- „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” (Case CCC/C/16 Lithuania)

„Effective” - II

- Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies. ” (Case CCC/C/16 Lithuania)

Art.6.6 - making available relevant information

- Free of charge
- As soon as available
- Exemption from general rules on access to information under art.4
- Relation to art 6.2

Art 6.6 - content of relevant information

- All information relevant to decision-making
 - Description of site, effects and measures
 - Non-technical summary
 - Outline of main alternatives
 - Reports and advice
- Problematic issues
 - EIA Documentation and copyright (case ACC/C/15 Romania)

Possibility to submit comments – art.6.7

- Two equal methods
 - In writing
 - In public hearing
 - as appropriate
- Any comments - no need to be motivated
(ACC/C/16 Lithuania)

Due account– art.6.8

- Due account must be taken of public comments
 - obligation to read and consider seriously
 - but not always to accept all comments
- Any comments vs „reasoned or motivated comments”
- Sufficient time for authorities to consider comments ((ACC/C/3 Ukraine)

Publicising the decision- art.6.9

- Requirement
 - to notify the public promptly (ACC/C/8 Armenia)
 - about the decision
 - where it can be made available
 - to make it accessible to the public (ACC/C/3 Ukraine)
 - publicly accessible registers
 - publicly accessible records of decisions
- Together with a statement on:
 - reasons
 - considerations

Access to Justice

- Art.9.1-3: redress in 3 situations
- Art.9.4: requirements concerning
 - remedies
 - procedures
- Art.9.5: practicalities
 - information
 - assistance

Art.9.1,2 and 3: redress

- Art.9.1 (relation to Art.4) :
 - redress in case of abusing right to information
- Art.9.2 (relation to Art.6 and possibly other provisions) :
 - redress in case of abusing right to participate and/or
 - basis to challenge substantive and procedural legality
- Art.9.3 (relation to Art.1) :
 - separate right to file a public interest law suit
 - only enforcement action or catch-all provision?

Access to Justice – standing at EU level

- ECJ interpretation of „directly and individually concerned” scrutinised by ACC (ACC/32/ EC)
 - „if the jurisprudence of the EU Courts...were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention”
 - „a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention”
- Preliminary ruling „neither in itself meet the requirements of access to justice in article 9 of the Convention nor compensate for the strict jurisprudence of the EU Courts”

Access to Justice – standing, scope of the review and costs

- Problems in legislations based on „protection of rights” with addressing
 - procedural legality (ACC/31/ Germany)
 - substantive legality (ACC/50/Czech Republic)
 - general environmental issues (ACC/48/ Austria)
- Screening decisions and Art. 9 (ACC/50/Czech Republic and (ACC/48/ Austria)
- „Sufficient” vs „substantial’ interest (Case C-427/07 Commission vs Ireland)