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An introduction to the Aarhus Convention

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I. Introduction

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process, in the framework of the United Nations Economic Commission for Europe (Geneva). The Convention, which is in force since 30 October 2001, has now been ratified by 42 Parties, including the European Community and, with the exception of Ireland, all Member States of the European Union. The GMO-Amendment to the Convention, that is not yet in force, has been ratified by 19 Parties, including the European Community and 16 of its Member States. The PRTR- Protocol, that is also not yet in force, has been ratified by 12 Parties, including the European Community and 8 of its Member States.

The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements. The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is therefore not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.

As its title suggests, the Convention contains three broad themes or 'pillars': access to information, public participation and access to justice. However, the Convention also contains a number of important general features.

II. General Features

The Convention adopts a rights-based approach. Article 1, setting out the objective of the Convention, requires Parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. It also refers to the goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being, which represents a significant step forward in international law. These rights underlie the various procedural requirements in the Convention. The Convention establishes minimum standards to be achieved but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice. The Convention prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention.

The main thrust of the obligations contained in the Convention is towards public authorities, which are defined so as to cover governmental bodies from all sectors and at all levels (national, regional, local, etc.), and bodies performing public administrative functions.

Although the Convention is not primarily focussed on the private sector, privatised bodies having public responsibilities in relation to the environment and which are under the control of the aforementioned types of public authorities are also covered by the definition.

The Meeting of the Parties to the Convention is according Article 15 required to establish, on a consensus basis, optional arrangements for reviewing compliance with the provisions of the Convention. At their first meeting in October 2002 the Parties adopted decision I/7 on review of compliance and elected the first Compliance Committee. This item will be further addressed by prof. J. Jendroska.

Finally, the Convention is open to accession by non-ECE countries, subject to approval of the Meeting of the Parties (Art. 19.3)..

III. The First Pillar: Access to Information

The information pillar – Articles 4 and 5 - covers both the 'passive' or reactive aspect of access to information, i.e. the obligation on public authorities to respond to public requests for information, and the 'active' aspect dealing with other obligations relating to providing environmental information, such as collection, updating, public dissemination and so on.

The reactive aspect is addressed in article 4, which contains the main essential elements of a system for securing the public's right to obtain information on request from public authorities. There is a presumption in favour of access. Any environmental information held by a public authority must be provided when requested by a member of the public, unless it can be shown to fall within a finite list of exempt categories. The right of access extends to any person, without his or her having to prove or state an interest or a reason for requesting the information. The scope of information covered is quite broad, encompassing a non-exhaustive list of elements of the environment (air, water, soil etc.); factors, activities or measures affecting those elements; and human health and safety, conditions of life, cultural sites and

built structures, to the extent that these are or may be affected by the aforementioned elements, factors, activities or measures.

The information must be provided as soon as possible, and at the latest within one month after submission of the request. However, this period may be extended by a further month where the volume and complexity of the information justify this. The requester must be notified of any such extension and the reasons for it.

The definition of environmental information covers information in any material form (written, visual, aural, electronic etc). There is a qualified requirement on public authorities to provide it in the form specified by the requester.

Public authorities may impose a charge for supplying information provided the charge does not exceed a 'reasonable' amount.

There are exemptions to the rule that environmental information must be provided. Public authorities may withhold information where disclosure would adversely affect various interests, e.g. national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, the confidentiality of the proceedings of public authorities; or where the information requested has been supplied voluntarily or consists of internal communications or material in the course of completion. There are however some restrictions on these exemptions, e.g. the commercial confidentiality exemption may not be invoked to withhold information on emissions which is relevant for the protection of the environment.

To prevent abuse of the exemptions by over-secretive public authorities, the Convention stipulates that the aforementioned exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account.

Refusals, and the reasons for them, are to be issued in writing where requested. A similar time limit applies as for the supply of information: one month from the date of the request, with provision for extending this by a further month where the complexity of the information justifies this.

Where a public authority does not hold the information requested, it should either direct the requester to another public authority which it believes might have the information, or transfer the request to that public authority and notify the requester of this.

The Convention also imposes active information duties on Parties (Article 5). These include quite general obligations on public authorities to be in possession of up to date environmental information which is relevant to their functions, and to make information 'effectively accessible' to the public by providing information on the type and scope of information held and the process by which it can be obtained.

The Convention also contains several more specific provisions. Parties are required to 'progressively' make environmental information publicly available in electronic databases which can easily be accessed through public telecommunications networks. The Convention specifies certain categories of information (e.g. state of the environment reports, texts of legislation related to the environment) which should be made available in this form.

Public authorities are also required to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.

IV. The Second Pillar: Public Participation in Environmental Decision-making

The Convention sets out minimum requirements for public participation in various categories of environmental decision-making (Articles 6 to 8).

Article 6 of the Convention establishes certain public participation requirements for decision-making on whether *to license or permit certain types of activity listed in Annex I to the Convention*. This list is similar to the list of activities for which an Environmental Impact Assessment or Integrated Pollution Prevention and Control licence is required under the relevant EU legislation. The requirements also apply, albeit in a slightly more ambivalent form, to decision-making on other activities which may have a significant effect on the environment. Activities serving national defence purposes may be exempted.

The public participation requirements include timely and effective notification of the public concerned, reasonable timeframes for participation, including provision for participation at an early stage, a right for the public concerned to inspect information which is relevant to the decision-making free of charge, 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.

The 'public concerned' is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making', and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law.

Article 7 requires Parties to make "appropriate practical and/or other provisions for the public to participate during the preparation of *plans and programmes relating to the environment*". It can be argued that the term 'relating to the environment' is quite broad, covering not just plans or programmes prepared by an environment ministry, but also sectoral plans (transport, energy, tourism etc.) where these have significant environmental implications.

Though the Convention is less prescriptive with respect to public participation in decision-making on plans or programmes than in the case of projects or activities, the provisions of article 6 relating to reasonable timeframes for participation, opportunities for early participation (while options are still open) and the obligation to ensure that "due account" is taken of the outcome of the participation are to be applied in respect of such plans and programmes. Article 7 also applies, in more recommendatory form, to decision-making on *policies relating to the environment*.

Article 8 applies to public participation during the preparation by public authorities of *executive regulations and other generally applicable legally binding rules* that may have a significant effect on the environment. Although the Convention does not apply to bodies

acting in a legislative capacity, this article clearly would apply to the executive stage of preparing rules and regulations even if they are later to be adopted by parliament.

V. The Third Pillar: Access to Justice

The third pillar of the Convention (article 9) aims to provide access to justice in three contexts: a) review procedures with respect to information requests, b) review procedures with respect to specific (project-type) decisions which are subject to public participation requirements, and c) challenges to breaches of environmental law in general.

Thus the inclusion of an 'access to justice' pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law.

Article 9.1 deals with Access to Justice concerning information appeals. A person whose request for information has not been dealt with to his satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law. The latter option was being included to accommodate those countries which have a well-functioning office of Ombudsperson. The Convention attempts to ensure a low threshold for such appeals by requiring that where review before a court of law is provided for (which can involve high costs), there is also access to an expeditious review procedure which is free of charge or inexpensive. Final decisions must be binding on the public authority holding the information, and the reasons must be stated in writing where information is refused.

Article 9.2. deals with Access to Justice concerning Public participation appeals. The Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6. The review may address either the substantive or the procedural legality of a decision, or both. The scope of persons entitled to pursue such an appeal is similar to, but slightly narrower than, the 'public concerned', involving a requirement to have a 'sufficient interest' or maintain impairment of a right , though the text also states that these requirements are to be interpreted in a manner which is. consistent with 'the objective of giving the public concerned wide access to justice'.

Article 9.3. concerns general violations of environmental law. The Convention requires Parties to provide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment. Such access is to be provided to members of the public 'where they meet the criteria, if any, laid down in national law' - in other words, the issue of standing is primarily to be determined at national level, as is the question of whether the procedures are judicial or administrative.

One can ask ourselves in which respect these provisions are relevant for our national judiciaries[1]. In the vast majority of the EU countries a dual judicial structure has been put in place, with on the one hand ordinary courts and tribunals, which have jurisdiction in civil and

[1] L. LAVRYSEN, *National Judges and the Convention – How the Judiciary can further the Implementation of the Third Pillar, THE AARHUS CONVENTION: HOW ARE ITS ACCESS TO JUSTICE PROVISIONS BEING IMPLEMENTED? – BRUSSELS, 2 JUNE 2008*

criminal cases, and on the other hand administrative courts and tribunals. This means that the ordinary courts and tribunals are empowered to settle civil and criminal matters, whereas the administrative courts and tribunals are empowered to settle administrative disputes. It can be expected that administrative courts will be confronted in the first place with Aarhus-related cases as the decisions and acts referred to in article 9, paragraph 1, 2 and, as far as public acts are concerned, paragraph 3, will normally fall under the jurisdiction of administrative courts. It should be pointed out, however, that the powers of the administrative courts might differ from Member State to Member State[2]. Due to the different legal history and legal culture, the various legal systems of Member States have taken different approaches for legal standing. They range from an extensive approach where standing is broadly recognised by way of an "*actio popularis*", to a very restrictive approach allowing standing only in cases where the impairment of and individual legally granted right can be shown[3]. In most of the countries the legislation uses a rather vague formula in describing the conditions to have standing. E.g. in Belgium a natural or legal person that asks for suspension or annulment of an administrative act or a regulation by the Supreme Administrative Court (the Council of State) must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be directly and unfavourably affected by the challenged act or regulation. This concept can however be interpreted broadly or narrowly. As we look at the Belgian situation more or less the same criterion applies for the Supreme Administrative Court as for the Constitutional Court. Just by now, the Constitutional Court has nearly never declined an environmental NGO for lack of standing. As the Supreme Administrative Court is concerned there are some variations in time and even between the different Chambers. There were the Council of State developed a broad view on standing for NGO's in the eighties, there was later on some tendency to become stricter, maybe under influence of an ever growing case-load. Were the Chambers dealing with environmental legislation generally continued to have a broad view, the Chambers dealing with land use planning legislation developed gradually a stricter view. Meanwhile the Aarhus Compliance Committee found that if the jurisprudence of the Council of State is not altered in that respect, Belgium will fail to comply with article 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans[4].

As we have seen, according to article 9, paragraph 3, of the Aarhus Convention Member States must also ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons which contravene provisions of its national law relating to the environment. If one opts for judicial procedures, such procedures will be in most Member States of the competence of the ordinary judiciary. Here we face similar problems of standing and the views taken by ordinary courts are often even narrower than those of the administrative courts. In some of our jurisdictions there is a large access to civil courts, while in others (e.g. The Netherlands, Belgium, and France) the legislator introduced special provisions to allow Environmental NGO's to ask for injunctions or, even, damages. But the impression remains that in the majority of the Member States the

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[2] L. LAVRYSEN, "The Role of National Judges in Environmental Law", in Th. ORMOND/M. FÜHR, *Environmental Law and Policy at the Turn to the 21ste Century*, Lexxion, Berlin, 2006, 85.

[3] See on, this subject: MILIEU ENVIRONMENTAL LAW & POLICY, *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, September 2007, 6-11.

[4] AARHUS COMPLIANCE COMMITTEE, *Findings and Recommendations, Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium)*.

situation is far from satisfactory and that a legislative intervention is necessary if the courts cannot or are not willing to review their jurisprudence on standing[5].

Finally, there is article 9, paragraph 4, that sets particular quality standards for the different procedures provided for in the other paragraphs of that article. These procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. These requirements are maybe the most difficult of all to fulfil. In a lot of Member States the judiciary is facing an important backlog. Waiting long time for a final decision, in some cases more than 5 years, is daily reality in more than one jurisdiction. In such circumstances only interim relief is an adequate solution, but unfortunately the conditions under which one can obtain interim measures are often very severe and not in accordance with the Treaty requirements. In other countries judicial procedures and lawyers fees are very costly. I think these issues are difficult to solve by the judges themselves and raise more general questions of judicial management, state investment in the judiciary and appropriate legal aid schemes. I think we need long term work programs to solve these problems in an acceptable way. And off course these are cross cutting issues that exceeds largely the environmental sector, e.g. the fees shifting issues.

Finally, I would like to mention that the European Community has adopted legislation to implement the first and the second pillar of the Aarhus Convention. That is not the case yet for the third pillar. On 24 October 2003, the European Commission has tabled a Proposal for a Directive on access to justice in environmental matters, but till now this proposal hasn't won sufficient support from the Member States. We think nevertheless that this initiative of the Commission should be supported, because it will contribute to a better implementation of the Aarhus-Convention and, it will fulfil some shortcomings in controlling the application of environmental law. In some respects it is going further than the requirements of the Aarhus Convention and ensures in that respect a harmonization of legislation and practice within the Community based on a high level of environmental protection. The proposal will be discussed in more detail in a coming session.

[5] See; MILIEU ENVIRONMENTAL LAW & POLICY, *o.c.*, 11-16.