Jaspers
Joint Assistance to Support Projects in European Regions

Public Information and Participation Requirements

Access to Justice

JASPERS
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3rd Pillar of the Aarhus Convention: Access to Justice

Access to justice

It helps to enforce both:

- the information pillar (specifically, article 4 concerning information requests) and
- the public participation pillar (specifically, article 6 on public participation in decisions on specific activities)

in domestic legal systems, as well as any other provisions of the Convention that Parties specify in their domestic law to be enforced in this manner.

The access to justice pillar also provides a mechanism for the public to enforce environmental law directly.

Application of provisions on access to Justice Aarhus convention

While article 9 explicitly refers to the Convention's provisions on access to information in article 4, and public participation in decisions on specific activities in article 6, it also requires that access to justice be ensured for other decisions, acts and omissions related to the environment. The provisions on access to justice essentially apply to all matters of environmental law, but a distinction is made in the Convention between three categories of decisions, acts and omissions:

- Refusals and inadequate handling by public authorities of requests for environmental information.
- Decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities.
- All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.

Application of provisions on access to Justice Aarhus convention

Article 9, paragraph 1

Requires access to review procedures relating to information requests under article 4.

- Available to any person that has requested information
- Judicial or other independent and impartial review
- Additional expeditious and inexpensive reconsideration or review procedure
- Binding final decisions
- Reasons for decision in writing

Article 9, paragraph 2

Requires access to review procedures relating to decisions, acts or omissions subject to article 6 and other relevant provisions of the Convention.

- Judicial or other independent and impartial review of substantive or procedural legality
- Standing requirements to be determined in accordance with national law and the objective of wide access to justice
- Possibility for preliminary administrative review procedure

Application of provisions on access to Justice Aarhus convention

Article 9, paragraph 3: Requires access to review procedures for public review of acts and omissions of private persons and public authorities concerning national law relating to the environment.

- Administrative review procedures
- Judicial review procedures
- Criteria for access, if any, to be laid down in national law

Article 9, paragraph 4: Sets general minimum standards that apply to all relevant review procedures, decisions and remedies.

Adequate and effective remedies, including injunctive relief as Appropriate, Fair, Equitable, Timely, Not prohibitively expensive, Decisions given in writing, Decisions publicly accessible

Article 9, paragraph 5: Requires Parties to facilitate effective access to justice.

- Information on access to administrative and judicial review procedures
- Appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice

Access to Justice, Aarhus convention Art 9.1: What, When and Who..

Any person has access to a review procedure when he or she believes that his or her information request has not been properly dealt with in accordance with article 4.

While article 9, paragraph 1, in contrast to article 9, paragraph 2, does not explicitly refer to “substantial or procedural legality”, it is implicit that the review must include both kinds of grounds when invoked by the applicant.

Under article 9, paragraph 1, “any person” who has requested information is entitled to use the review procedures. In other words, any person who is not satisfied with the response to or handling of his or her request for information must be granted “standing” before the reviewing body to challenge decisions made under article 4.

The review procedure must be before a court of law or another “independent and impartial body established by law”. “Independent and impartial” bodies do not have to be courts, but must be at least quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity. The reviewing body must also be competent to make decisions that are binding on the public authority holding the requested information.

Access to Justice, Aarhus convention Art 9.1: Alternative to court review

The Convention requires Parties whose courts have jurisdiction over access to information disputes to also make an alternative "expeditious" and "inexpensive" review mechanism available.

Netherlands, where the applicant, wishing to appeal against a decision denying access to information, must first file a notice of objection to the same administrative authority that made the decision. If the administrative authority then confirms its refusal to supply the requested information, appeal is made directly to the court.

Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention

Access to Justice, Aarhus convention Art 9.1: Alternative to court review

Poland: a free and expeditious review can be carried out by a higher administrative body than the public authority that made the original decision. The Polish Act on Access to Public Information requires the higher administrative body to handle the appeal within one month. After the higher administrative review, the applicant still has the opportunity to take the case to an administrative court. The latter is inexpensive, but can take up to one year to reach a final decision.

United Kingdom has an Information Commissioner's Office whose mission is to uphold information rights in the public interest, by promoting openness by public bodies and data privacy for individuals. It rules on eligible complaints, gives guidance to individuals and organizations and takes appropriate action when the law is broken. In addition, a First-tier Tribunal (Information Rights) hears appeals from notices issued by the Information Commissioner under various information-related legislation

Access to Justice, Aarhus convention Art 9.2: What, When and Who

Paragraph 2 provides for access to justice regarding “any decision, act or omission” relating to public participation and decision-making under article 6. It also expressly applies to “other relevant provisions” of the Convention as provided for under national law.

The fact that a member of the public may be able to invoke article 9, paragraph 2, to challenge “any decision, act or omission” relating to public participation and decision-making does not affect the possibility that article 9, paragraph 3, may also apply

Nothing in the Convention prevents the Parties from granting standing to any person without distinction. However, the Convention requires — as a minimum — that members of the “public concerned” either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6.

Access to Justice, Aarhus convention Art 9.2: NGOs

Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium): meeting the Convention's objective of giving the public concerned wide access to justice may require a significant shift of thinking in countries where NGOs have previously lacked standing in cases because they were held not to have a sufficient interest, or an impaired right. In ACCC/C/2005/11, the Belgian judiciary had applied the general criteria for standing under Belgian law to NGOs, meaning that NGO applicants had to show a direct, personal and legitimate interest as well as a "required quality". The Compliance Committee concluded that even though the wording of the relevant Belgian laws did not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as developed before the entry into force of the Convention for Belgium, implied a too restrictive access to justice to environmental organizations, and thus did not meet the requirements of the Convention. However, since in that case there was no evidence that the jurisprudence had been maintained after the entry into force of the Convention for Belgium, the Party concerned was not found to be in non-compliance

Access to Justice, Aarhus convention Art 9.2: NGOs

An example of national criteria for standing that would clearly not be in compliance with the Convention was the former Swedish criteria for NGOs. According to former Swedish law, to be able to appeal environmental permits, environmental associations were required to be active in Sweden for more than three years and to have at least 2,000 members. This was found by the CJEU to be in violation of the EU legislation intended to implement the Aarhus Convention, since “the number of members required cannot be fixed by national law at such a level that runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope”.417 The EU Court also found that standing should be provided to the public regardless of the role — e.g., expressing their views, making comments, etc. — the public might have played during the prior administrative procedure. The Swedish law on access to justice for NGOs was subsequently changed as a result of the court decision.

Access to Justice, Aarhus convention Art 9.2: Scope of review

Members of the public have the right to challenge decisions based on substantive or procedural legality

The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality).

Findings on communication ACCC/C/2010/50 (Czech Republic): …This necessarily also includes decisions and determinations subject to article 6, paragraph 1 (b). The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process

Access to justice must indeed be provided when it is effectively possible to challenge a permit decision.

Access to Justice, Aarhus convention Art 9.2: NGOs

With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2 paragraph 5, are deemed to have a “sufficient interest” or a right capable of being impaired

ECJ C-115/09, *Trianel Case*

Whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article…..

The CJEU concluded that Directive 85/337/EEC precludes legislation by the member States which does not permit NGOs promoting environmental protection, in actions contesting permit decisions, to rely before the courts on the infringement of a rule intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals

Access to Justice, Aarhus convention
Art 9.3: public enforcement of environmental law

In its findings on communication ACCC/C/2006/18 (Denmark), the Compliance Committee acknowledged the rather broad range of possibilities for the Parties to ensure procedures to challenge acts and omissions contravening provisions of national law relating to the environment. The communicant had complained that he did not have any means of challenging an act of culling bird species by a public authority in Denmark. The Committee held that access to justice under paragraph 3 requires more than a right to address an administrative authority about an illegal activity. To conclude whether the Party concerned failed to comply with the Convention, the Committee paid attention to Danish law in general, in order to consider whether any other members of the public had the right to challenge the decision in question or whether national law effectively barred members of the public in general from challenging such acts.

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Access to Justice, Aarhus convention Art 9.4: fair, equitable and timely

In communication ACCC/C/2008/23 (United Kingdom), the communicants alleged that a court order requiring them to pay the public authorities' legal costs was unfair and inequitable under article 9, paragraph 4. The Compliance Committee held that it was the defendant operator's refusal to cooperate in naming an expert that led to the public authorities having to attend the hearing, incurring the legal costs as a result. In the circumstances, the Committee considered that the subsequent court order that the communicants pay the whole of the public authorities' legal costs (without the operator being ordered to contribute at all) was unfair and inequitable and constituted stricto sensu non-compliance with article 9, paragraph 4, of the Convention.

Access to Justice, Aarhus convention Art 9.4: fair, equitable and timely

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee emphasized that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention…. However, the evidence presented to the Committee demonstrated clearly that in practice if a natural or legal person lost in the court of first instance against a public authority, and then appealed the decision and lost again, the related costs were being imposed on the appellant.

The Committee stressed that if the trend referred to reflected a general practice of courts of appeal in the Party concerned in such cases that constituted non-compliance with article 9, paragraph 4, of the Convention

Access to Justice, Aarhus convention Art 9.4: fair, equitable and timely

In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee held the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, and thus also subject to the requirements of article 9, paragraph 4, of the Convention. The Committee stressed that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, held that in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee held that the manner in which the costs were allocated in that case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance.

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Access to Justice, Aarhus convention Art 9.4: fair, equitable and timely

In its findings on communication ACCC/C/2009/36 (Spain), the Compliance Committee considered that, by instituting a system on legal aid which excluded small NGOs from receiving legal aid, the Party concerned had failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention, and had not taken into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5, of the Convention.

Access to Justice, Aarhus convention Art 9.4: costs and good practices

In Sweden, members of the public may appeal acts and decisions by public authorities in environmental matters to a superior administrative authority or to a court free of charge. Moreover, the person seeking administrative or judicial review of the case does not risk paying the costs for the public authority or the operator of the activity in case the appeal is lost. This applies, for instance, when requests for environmental information have been denied, when neighbours find a decision by a public authority on precautionary measures for a hazardous activity too weak and when permits for a hazardous activity have been appealed. In addition there is no requirement for persons appealing such acts and decisions to be accompanied by a lawyer

In Slovakia, NGOs and other parties or participants are exempt from paying court fees for judicial review of the lawfulness of decisions by administrative bodies.

Access to Justice, Aarhus convention Art 9.4: costs and good practices

In Austria, an appeal of a refusal of access to information is free of charge and the plaintiff does not need a lawyer to launch an appeal.

Cost coverage:

"reverse cost shifting". or "costs follow the event"

Access to Justice /ECJ rulings

C-570/13 Caroline Gruber *(request for a preliminary ruling)*,

The dispute:

16 On 21 February 2012, the UVK granted EMA, pursuant to the Gewerbeordnung, a development consent for the construction and operation of a retail park in Klagenfurt am Wörthersee (Austria), with a total floor space of 11 437.58 m2, on land bordering property belonging to Ms Gruber.

17 Ms Gruber brought an action for annulment of that decision before the referring court, on the ground, in particular, that that consent should have been made contingent on an environmental impact assessment ('an EIA') being carried out, pursuant to the UVP-G 2000.

18 In support of that action, she pleaded the unlawfulness of the decision of the Province of Carinthia's government of 21 July 2010, by which that government declared, on the basis of Paragraph 3(7) of the UVP-G 2000, that no EIA needed to be carried out in relation to the project at issue ('the EIA declaratory decision').

Public Participation

19 According to the objections raised by Ms Gruber on 8 March 2011, the EIA declaratory decision is open to challenge in the light of the inaccuracy of the data and measurements used when calculating the absence of a health risk caused by that retail park. In addition, Ms Gruber, who did not have a right to bring an action in her capacity as a neighbour against that type of decision, informed the referring court that a copy of that decision was given to her only after its adoption.

20 The UVK states that the EIA declaratory decision had become final, for want of being challenged within the period for bringing an action by those persons so entitled. According to the UVK, it was bound by that decision, given its binding effect, and could not carry out any assessment of the content of that decision at the stage of the procedure for granting development consent.

21 The referring court states that, although the Gewerbeordnung grants neighbours the right to raise objections during the consent procedure for the construction and operation of a commercial facility or bring an action against the final decision consenting to construction and operation, where that facility endangers their lives, health or property, they do not have the right to bring an action directly against the prior decision of a government not to carry out an EIA in respect of that facility.

22 That court states that Paragraph 3(7) of the UVP-G 2000 reserves

Public Participation

22 That court states that Paragraph 3(7) of the UVP-G 2000 reserves the status of parties to the procedure only to the project applicant, the participating authorities, the ombudsman for the environment and the municipality concerned, and, consequently, limits the possibility of intervening in the procedure leading to the adoption of an EIA declaratory decision and of bringing an action against that decision.

23 The referring court explains that, despite the fact that the neighbours of the project, such as Ms Gruber, do not have the status of parties to the procedure leading to the adoption of an EIA declaratory decision, they are bound, like national authorities and courts, by such a decision which has become final.

24 That court asks whether the binding effect of EIA declaratory decisions in subsequent proceedings is compatible with EU law.

Public Participation

C-570/13 Caroline Gruber *(request for a preliminary ruling)*, environment

The ruling:

Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as precluding national legislation, such as that at issue in the main proceedings pursuant to which an administrative decision declaring that a particular project does not require an environmental impact assessment, which is binding on neighbours who were precluded from bringing an action against that administrative decision, where those neighbours, who are part of the 'public concerned' within the meaning of Article 1(2) of that directive, satisfy the criteria laid down by national law concerning 'sufficient interest' or 'impairment of a right'. It is for the referring court to verify whether that condition is fulfilled in the case before it. Where it is so fulfilled, that court must hold that the administrative decision not to carry out such an assessment is not binding on those neighbours.

Access to Justice / Compliance Committee

Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4,

First, the communicant informs the Committee of situations in practice where construction or exploitation permits for activities listed in annex I to the Convention were issued without a prior EIA procedure, although this was required by law (see the cases referred to above in paras. 43–44). The communicant asserts that in these cases there was a lack of access to justice for the members of the public concerned. The Party concerned emphasizes that a construction or exploitation permit, issued without a prior mandatory EIA decision, as well as implementation of an activity on the basis of such permits, would be illegal. Be that as it may, since environmental organizations, as well as other members of the public concerned, do not have access to a review procedure before a court of law or another independent and impartial body established by law to challenge such final permits for annex I activities, when EIA decisions are missing, the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

Access to Justice / Compliance Committee

Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4,

Secondly, there are situations where the EIA statements are issued and these are subject to appeal, but the subsequent/final decisions are not subject to appeal by members of the public concerned, including organizations, even if those decisions are not in conformity with the conditions and measures contained in the EIA decision. This means that even if all the environmental aspects of a proposed activity were covered by the EIA decision, there is no possibility for members of the public, including environmental organizations, to challenge the legality of a final permit that did not respect that EIA decision. Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention.