

Public Information and Participation Requirements

Aarhus Convention and EU legislation
Environmental Information, Public and Public
Concerned

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“Environmental information”

Article 2, paragraph 3, does not define “**environmental information**” in an exhaustive manner but rather **breaks down its scope** into **three categories** and within each category provides an **illustrative list**.

Any information in written, visual, aural, electronic or any other material form.

Paper documents, photographs, illustrations, video and audio recordings and computer files are all examples of the material forms that information can take.

The Convention guarantees access to information. The “material form” language is not meant to restrict the definition of environmental information to finished products or other documentation as that may be formally understood. Information in raw and unprocessed form (sometimes referred to as “raw data”) is covered by the definition as well as documents.

“Environmental information on:.....”

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

“Public”

The definition of “**public**” should be interpreted as applying the “**any person**” principle;

Associations, organizations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention’s objective of securing broad access to its rights.

The term “**public**” in article 2, paragraph 4, is not in itself subject to any conditions or restrictions.

*the “**public**” are entitled to exercise those rights **irrespective** of whether they personally are “**affected**” or otherwise have an interest. Articles 4, 5, 6, paragraph 7 and 9, and article 8 are examples of provisions which follow this approach.*

“Public”

- The active distribution of information, under article 5, will not be sufficient if the information is distributed to a few natural and/or legal persons.
- When a public hearing, enquiry or other opportunity for the public to comment is organized under article 6, paragraph 7, it is not sufficient to allow one or several organizations, selected randomly or because they are best-known to the governmental officials, to submit comments.
- Any member of the public must be granted the right to submit comments

Parties that traditionally allow for the public to be considered in a representative fashion — that is, where certain persons have been granted authority to act as representatives of the opinion of the public or a part of it — must adopt a different approach towards the rights of the public.

“Public concerned”

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

The term **“public concerned”** refers to a **subset of the public** at large who have a special relationship to a particular environmental decision-making procedure. To be a member of the “public concerned” in a particular case, the member of the public must be likely to be affected by the environmental decision-making, or the member of the public must have an interest in the environmental decision-making.

The term can be found in article **6 on public participation in decisions on specific activities**, and the related **access to justice provision, article 9, paragraph 2**.

“Public concerned”

While narrower than the “public,” the “**public concerned**” is nevertheless **still very broad**.

For example, in cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country will be members of the “public concerned” for the purposes of article 6. Moreover, in its findings on communication ACCC/C/2004/03 (Ukraine), the Committee observed that “foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.

“Public concerned”

Criterion of being **affected**: This is very much related to the nature of the activity in question

the case of pipelines, the public concerned is usually in practice counted in the thousands, while in the case of nuclear power stations the competent authorities may consider the public concerned to count as many as several hundred thousand people across several countries

Criterion of having an **interest** ≠ having a legal interest, or sufficient interest

Having an **interest** encompasses both

- having a legal interest and
- a factual interest

“Public concerned”

NGOs: Article 2, paragraph 5, explicitly includes within the category of the interested public, **NGOs whose statutory goals include promoting environmental protection**, so long as they meet “any requirements under national law”.

Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or activities.

“Environmental protection” can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3.

For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5.

“Public concerned”

The reference to “meeting any requirements under national law” should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide “appropriate recognition” for NGOs.

For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, par. 9.

Furthermore, the requirement “to have been active” in itself might be overly exclusive in countries that have permitted the formation of NGOs for only a relatively short period of time, and where they are therefore relatively undeveloped.

“Public concerned”

In Case **C-263/08 (Sweden)**, the ECJ considered whether the requirement then found in Sweden’s Environmental Act that NGOs must have at least 2,000 members to appeal a development consent was too restrictive in relation to EU Directive 85/337 and the Aarhus Convention.

The ECJ held that Directive 85/337 leaves it to national law to determine the conditions for access to justice for NGOs. However, national law must ensure wide access to justice. It held that it was conceivable that a requirement that an environmental NGO have a minimum number of members may be relevant in order to ensure that the association does in fact exist and that it is active.

However, the number of members required cannot be fixed at such a level that it runs counter to the objective of facilitating judicial review of projects which fall within the scope of the Directive. Furthermore, the Directive covers projects more limited in size which locally based associations are better placed to deal with.

“Public concerned”

In fact, the Swedish legislation effectively deprived local associations of any judicial remedy, as only two Swedish associations had at least 2,000 members.

The ECJ held that while local associations might contact one of those two associations and ask them to bring an appeal, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 because the two large associations entitled to bring an appeal might not have the same interest in projects of limited size and moreover they would be likely to receive numerous requests of that kind.

In 2009, Slovenia amended its legislation to remove the requirement that NGOs promoting environmental protection undergo a financial audit of operations in order to qualify as the “public concerned” under article 2,par5

“Public concerned”

ACCC/C/2010/50, 29/12/2012 Czech republic

65. The public participation provisions in article 6 of the Convention mostly refer to the “public concerned”, i.e., a subset of the public at large. The members of the public concerned are defined in article 2, paragraph 5, of the Convention on the basis of the criteria of “affected or likely to be affected by”, or “having an interest in”, the environmental decision-making. Hence, the definition of the Convention is partly based on the concept of “being affected” or “having an interest”, concepts which are also found in the Czech legal system.

66. While narrower than the definition of “the public”, the definition of “the public concerned” under the Convention is still very broad. Whether a member of the public is affected by a project depends on the nature and size of the activity.

“Public concerned”

ACCC/C/2010/50, 29/12/2012 Czech republic

65.....For instance, the construction and operation of a nuclear power plant may affect more people within the country and in neighbouring countries than the construction of a tanning plant or a slaughterhouse.

Also, whether members of the public have an interest in the decisionmaking depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity.

Importantly, this provision of the Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned.

Rather, article 2, paragraph 5, deems NGOs promoting environmental protection and meeting any requirements under national law to have such an interest.

“Public concerned”

ACCC/C/2010/50, 29/12/2012 Czech republic

67. A tenant is a person who holds, or possesses for a time, land, a house/apartment/office or the like, from another person (usually the owner), usually for rent. An activity may affect the social or environmental rights of the tenants, especially if they have been or will be tenants for a long period of time. In that case, to a certain extent, the interests of the tenants would amount to the interests of the owners.

Although the relationship of the tenant to the object is always intermediated, since tenants, even short term tenants, may be affected by the proposed activity, they should generally be considered to be within the definition of the public concerned under article 2, paragraph 5, of the Convention and should therefore enjoy the same rights as other members of the public concerned.

“Public concerned”

ACCC/C/2010/50, 29/12/2012 Czech republic

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89. The Committee finds that:

(a) Through its restrictive interpretation of “the public concerned” in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the system of the Party concerned fails to provide for effective public participation during the whole decision-making process, and thus is not in compliance with article 6, paragraph 3 of the Convention (see para. 70 above);

“Public concerned”

*United Kingdom ACCC/C/2009/38;
ECE/MP.PP/C.1/2011/2/Add.10*

The Committee notes that article 4 of the Convention refers to the “public”, whereas article 6 of the Convention to the “public concerned”.

However, the Convention makes no further distinction between members of the public concerned.

Thus, all members of the public concerned are equally entitled to enjoy the rights under the Convention.