

Carbon Capture and Storage and the Aarhus Convention

A Quick Analysis

Legal Analysis

Justice and Environment 2011

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General context

The association Justice and Environment (J&E) is a European network of environmental law organisations which was created in 2003 and was founded as non-profit association in 2004. J&E is striving to protect the environment, human health and nature by improving environmental legislation and enhancing the enforcement thereof. The Aarhus Convention (on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) and its implementation to European and national environmental law has been the major focus of J&E in the past years. J&E has published several studies and analyses on this issue (see: <http://www.justiceandenvironment.org/publications/aarhus>).

In addition to the issues related to the Aarhus Convention, J&E has developed further competence areas, amongst others the field of climate change law. Various activities such as national and comparative legal analysis have been carried out in this area of law. Since 2008 J&E is following a holistic approach in its legal work on climate change. The approach is based upon the firm belief that climate change considerations should be integrated into all environmental and spatial planning concerns, including transport, housing, economic growth, water supply and waste management, and should not be considered separately. All J&E publications in the area of climate change can be found at <http://www.justiceandenvironment.org/publications/climate-change>.

J&E sees a strong link between the rights enshrined in the Aarhus Convention and the legal responses to climate change. In accordance with our holistic approach we consider climate change an issue to be dealt with in various different legal areas and at various levels. Allowing the public to participate when elaborating and implementing the instruments to tackle climate change is essential for the acceptance but also for the quality and effectiveness of the measures. The study at hand will examine the links between Aarhus and the relatively new area of carbon capture and storage (CCS).

Overview

Member States are obliged to bring into force laws, regulations and administrative provisions to implement Directive 2009/31/EC on the geological storage of carbon dioxide (in the following: CCS Directive) from 25 June 2011 onwards. The **CCS Directive** touches upon several issues relevant to the rights granted under the Aarhus Convention and implementing EU legislation. This analysis will focus on the links between this specific area of climate law with the provisions of the Aarhus Convention.

The Aarhus Convention on Access to Information, Public Participation in decision making and Access to Justice in Environmental Matters has **three substantive pillars** as indicated in its title. The first pillar on **access to information** distinguishes between individual rights for the public to request environmental information from public authorities (Article 4) and active

information obligations by parties (and its public authorities respectively) to the Convention (Article 5). The second pillar on **public participation** enables the public to participate in decision making related to the environment both with regard to certain permitting decisions (Article 6) as well as with regard to the adoption of any plan or programme (Article 7). The third **pillar on access to justice** provides for administrative and/or judicial review procedures in case the first and second pillar of the Convention were breached (Article 9 par 1 and par 2). Furthermore, members of the public have the right to legally challenge any act and omission by private persons or public authorities that contravene national or European environmental law.

The CCS Directive makes reference to rights granted under the Aarhus Convention in various provisions.

CCS and Access to information (Articles 2, 4 and 5 of the Aarhus Convention)

General

The public access to information related to CCS and the duty of the authorities to make such information available is mentioned in the Preamble of the CCS Directive, indent 21, which states that *“Member States should make available to the public environmental information relating to geological storage of CO₂ in accordance with applicable Community legislation.”* This obligation is repeated in Art 26 of the Directive. The major piece of EU legislation in this context is Directive 2003/4/EC on public access to environmental information. This Directive contains a definition of “environmental information” in its Art 2. It is based on the Aarhus Convention’s definition in Art 2 par 3 which reads as follows [emphasis mine]:

3. “Environmental information” means any information in written, visual, aural, electronic or any other material form 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;

Such information is to be made available to the public without an interest having to be stated (Art 3 par 1 Directive 2003/4/EC and Art 4 par 1a Aarhus Convention) and may only be refused under specific exemptions (Art 4 par 1 and 2 Directive 2003/4/EC and Art 4 par 3 and 4 Aarhus Convention) which are to be interpreted in a restrictive way. Art. 7 Directive 2003/4/EC and Art 5 of the Aarhus Convention provide for the collection and dissemination of environmental information, an issue highly relevant for CCS.

CCS and Environmental information

The CCS Directive contains various provisions which relate to the obligation to provide environmental information according to Art 4 Aarhus Convention. For instance the information to be contained in the storage permit according to Art 9 CCS Directive or relevant information on the procedure of selection of storage sites (Art. 4 par 4 of the CCS Directive) shall be made available to the public upon request. The same applies for the environmental information generated in the course of a change, review, update or withdrawal of a permit (see Art 11 of the CCS Directive), the information about leakages and irregularities and the measures taken in accordance with Art 16 CCS Directive or for the reports prepared after closure of the site in accordance with Art 18 par 2 CCS Directive.

The Aarhus Convention also contains provisions on the collection and dissemination of environmental information in its Art 5. Chapter 4 of the CCS Directive contains obligations for operators and Member States, which are particularly relevant in this context. According to Art 12 par 3 lit b of the CCS Directive, the Member States are obliged to ensure that the operators keep registers of the quantities and properties of the CO₂ streams delivered and injected. Operators are also to be made responsible for the monitoring of the injection facilities on the basis of a monitoring plan which is to be updated at least every five years. The results of the monitoring as well as the quantities and properties of the CO₂ injected are to be reported to the competent authority in the Member State. Furthermore, according to Art 25 of the Directive, the competent authorities in the Member States are obliged to establish and maintain registers of the storage permits granted as well as of all closed storage sites and surrounding storage complexes. All this information should be made available to the public.

Of particular relevance for the geological storage of CO₂ is Art 5 par 1c of the Aarhus Convention. It states [emphasis mine]:

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

In the logic of the CCS Directive the operator is obliged to notify the competent authority in the event of leakage or significant irregularities (see Art 16 par 1 CCS Directive). The provision does not refer to dissemination of this information to the public. However, the general reference of Art 26 CCS Directive to Community legislation on access to environmental information does avoid a conflict with the Aarhus Convention. The necessary requirements have been transposed by Directive 2003/4/EC (see its Art 7 par 4).

All plans, reports and registers related to the geological storage of CO₂, whatever label they may carry, are measures and activities possibly affecting the environment, human health and safety as well as the conditions of human life and have thus to be considered environmental information in accordance with Art 2 par 3 Aarhus Convention and Art 2 par 1 Directive 2003/4/EC.

The general provision of Art 26 of the CCS Directive, confirms that information relating to CSS falls into the scope of the term “environmental information” as defined in other pieces of Community legislation, in particular Directive 2003/4/EC and the Aarhus Convention.

CCS and public participation

General

The Aarhus Convention obliges its Parties to provide for the possibility for the public to participate in the preparation of plans and programmes. The relevant provision is Art 7 of the Convention which reads as follows (only relevant part) [emphasis mine]:

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.

Reference is made to Art 6 par 3, 4 and 8 of the Convention, which reads as follows [emphasis mine]:

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.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

CCS and Public Participation

On the basis of and taking into account these provisions of the Aarhus Convention, the public should be allowed to participate in the selection of storage sites (see Art. 4. par 4 CCS Directive), in the drawing up of the monitoring plan (see Art 13 par 2 CCS Directive), the corrective measures plan (see Art 16 par 2 CCS Directive) and the post-closure plan (see Art 17 par 3 of the CCS Directive). Also participation in the inspections procedures under Art 15 of the CCS Directive should be foreseen and the results of the inspections (report) should be made publicly accessible. In any case public participation should be carried out in an early and effective manner in accordance with the objectives of the Aarhus Convention.

As regards public participation in the decision-making over the concrete CCS projects Directive 85/337/EEC, the “EIA Directive” (see amendments contained in Art 31 CCS Directive) contains the relevant provisions.

Next to that, it can be argued that the possibility of public participation shall also be granted in the assessment procedure pursuant to Article 33 of the CCS Directive, which inserted a

new provision 9a into the Directive 2001/80/EC, on the limitation of emissions of certain pollutants into the air from large combustion plants. The provision reads as follows [emphasis mine]:

1. Member States shall ensure that operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide, have assessed whether the following conditions are met:

- suitable storage sites are available,*
- transport facilities are technically and economically feasible*
- it is technically and economically feasible to retrofit for CO₂ capture.*

2. If the conditions in paragraph 1 are met, the competent authority shall ensure that suitable space on the installation site for the equipment necessary to capture and compress CO₂ is set aside. The competent authority shall determine whether the conditions are met on the basis of the assessment referred to in paragraph 1 and other available information, particularly concerning the protection of the environment and human health.

In case such combustion plants fall under annex I of the Aarhus Convention and under the Annexes of the EIA or IPPC directives respectively Article 6 par 1a) of the Convention would be applicable. Annex I par 22 makes clear that the Convention also applies for updates and reconsideration of permits. In case such plants are not listed in the Annexes Article 6 par 1b) could be applied. This triggers the application of the Convention for projects not listed in the Annex which “*may have a significant effect to environment*”. If Article is applicable the provisions of the public participation, as expressed in Article 6 of the Aarhus Convention shall be respected in the assessment procedure pursuant to Article 33 of the CCS Directive.

CCS and Access to Justice

General

The CCS Directive provides mainly for information rights for the public. These information rights could be enforced by means of a mechanism following the access to justice mechanism provided for by Directive 2003/4/EC and Art 9 par 1 of the Aarhus Convention respectively.

With regard to EIA and IPPC related projects the provisions on access to justice contained in the Aarhus Convention apply when substantive or procedural rights granted under the Convention in relation with participation in the decision-making procedures are infringed (Art 9 par 2 of the Convention). Through the cross-reference of the CCS-directive to the EIA-directive the relevant access to justice provisions would be applied. Regarding the Article 33 CCS-directive Art 9 par 2 of the Convention would need to be applied directly.

In addition a specific provision of the Convention (Art 9 par 3) provides for access to justice rights relating to general breaches of environmental law by private persons or public authorities. The relevant provisions of the Convention reads as follows [emphasis mine]:

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

On the basis of these provisions the public should have access to administrative or judicial procedures to challenge acts and omissions by private persons or public authorities. This counts also for plans and programmes falling under the CCS-directive. This is not reflected in the CCS Directive, but in the Environmental Liability Directive (ELD)

The Environmental Liability Directive (ELD, Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage) is in parts comparable to the CCS Directive. Both Directives aim at the prevention and remedying of environmental damages on the basis of the polluter pays and the prevention principles, which are enshrined in the EU treaties. In the ELD elements of Art 9 par 3 Aarhus Convention have been transposed. Art 12 of the ELD Directive allows for “requests for action”, amongst others, by nongovernmental organisations. If the accompanying documentation to the request describes in a plausible manner that environmental damage exists, the competent authority has to consider any such observations and requests for action.

In this context the ELD Directive also provides for a review procedure, which shall be accessible for the natural or legal persons eligible to issue a request for action¹. The relevant provision, Art 13 par 1 ELD Directive, reads as follows [emphasis mine]:

¹ 1. Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

(...)

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c). [emphasis mine]

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

In the light of the Aarhus Convention the introduction of a similar provision in the CCS Directive would be advisable. The public should also have the possibility to request action from the competent authority, in particular as regards failures of the operator to carry out monitoring measures, failure of the authority to carry out inspections, in case of leakages or irregularities at the facility and, after closure of the site, the fulfilment of obligations under the post-closure plan.

It should be noted, in this respect, that according to the ECJ judgment in case C-240/09 (Lesoochránárske zoskupenie VLK), the national courts of the EU Member States are obliged to interpret its national law, derived from EU law, in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. Therefore, the national authorities shall ensure that members of the public have the possibility to challenge decisions issued in respect to the implementation of the CCS Directive. Despite of that, introduction of a provision similar to Article 13 par 1 of the ELD Directive into the CCS Directive would help to clarify the situation.

Conclusion

As regards the obligation to provide access to environmental information, the CCS Directive generally satisfies the requirements of the Aarhus Convention by means of reference to the Community legislation applicable in this context (Art 26 CCS Directive). However, as regards public participation and access to justice, the CSS Directive does not fulfil the relevant standards. We recommend remedying the shortcomings in the course of a possible review of the Directive.

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