



Green Week satellite event 2013

**The Aarhus Convention  
15th Anniversary**



# The Aarhus Convention in practice

- **The Aarhus Convention (AC) compliance mechanism**
  - role and tasks of the Compliance Committee (CC)
  - CC procedure of dealing with the communications concerning compliance of Parties and preparing findings and recommendations
  - monitoring of implementation of decisions of the Meeting of the Parties on compliance
- **Selected CC and relevant CJEU case law on**
  - access to environmental information
  - public participation in environmental decision-making
  - access to justice in environmental matters
  - general principles of AC application



# Compliance Committee

- established by MoP decision I/7 on basis of art. 15 of AC
- nine independent members ([www.unece.org/env/pp/ccmembership.html](http://www.unece.org/env/pp/ccmembership.html))
- elected to serve in personal capacity by MoP for 6 year term
- regional balance
- main functions - dealing with submissions of Parties(1), referrals by Secretariat (0), communications of public (more than 80 - [www.unece.org/env/pp/pubcom.html](http://www.unece.org/env/pp/pubcom.html)), monitor, assess and facilitate the implementation of AC by parties



## CC procedure of dealing with communications

- no formal requirements x template for communications  
(<http://www.unece.org/env/pp/pubcom.html>)
- 2 “model” types of communications – systemic (legislative) failures x individual cases of non compliance (implementation)
- preliminary admissibility – criteria (exhaustion of domestic remedies not strictly applied – C/41, C/43 – relation to efficiency)
- course of procedure – written part, hearing, closed sessions, electronic decision making
- draft findings and recommendations, finalization, adoption by MoP
- implications of endorsed findings – not retroactive - strategy to rectify deficits in legislation and practice (cases)
- monitoring of implementation of MoP decisions – reports, additional information, role of communicant  
(<http://www.unece.org/env/pp/ccimplementation.html>)
- possibility of cautions and suspensions of rights by MoP



## Access to environmental information

- definition of environmental information (art. 2/3)
  - C/3 (Ukraine), C/21 (EU), C/30 (Moldova) – indicative list - broad interpretation, including e.g. financial/renting contracts, feasibility studies,
- provision of information upon request (art. 4/1)
  - C/1 (Kazakhstan) – information request does not have include reasons
  - S/1 and C/3 (Ukraine) – authorities shall possess info relevant to their functions; ownership of the developer not relevant
  - C/24 (Spain) – information shall be provided in requested form (rel to art 4/3/a))
- reasons for refusing information request (art. 4/3, 4/4)
  - C/21 (EU), C/30 (Moldova) – restrictive interpretation of reasons for refusing (e.g. commercial confidentiality), take into account public interest served by disclosure;
  - C/15 (Romania) – exemptions (e.g. intellectual property) hardly every applicable to EIA documentation
  - C/53 (UK) – “raw data“ on air quality shall be provided (not considered by CC as “material in course of completion“ – art. 4/1/c))



## Access to environmental information

- written refusal of a request (art. 4/7)
  - C/30 (Moldova), C/36 (Spain) – lawful grounds, information about the review procedure; active response needed – not “positive silence”
- review procedure on dealing with information request (art. 9/1)
  - C/1 (Kazakhstan) – need of expeditious, timely, clearly regulated procedures (relations to art. 3/1 a 9/4)
  - C/30 (Moldova) – if an authority can choose not to comply with court decision, there are doubts about its binding nature
  - C/21 (EU) – not every error in the procedure amounts to AC non compliance – review procedure established according to art 9/1 intended to correct the failures
- collection and dissemination of information upon request (art. 5)
  - C/15 (Romania) – Parties must establish systems ensuring adequate flow of information about activities which may significantly affect environment
- related ECJ (CJEU) case law – T 211/00, T 84/03, C-71/10



## Public participation

- applicability of art.6
  - C/8 (Armenia), C/12 (Albania), C 43 (Armenia) – name of act under national legislation not decisive, but material character and function of the act as “permit“ of annex I activity
- multiple (tiered) permitting
  - C/16 (Lithuania), C/17 (EU) – art. 6 does not require full range of PP rights must apply for every of tiered decisions; however, PP rights must be ensured with respect to “all significant environmental implications of an activity“
- application of art. 6 on other than annex I activities (art. 6/1/b))
  - C/24 (Spain) – accuracy of screening decisions not subject to provisions of AC (neither right to participate in determination process according to art. 6/1/b));  
x C/50 (Czech Republic) – fact that EIA screening decisions not subject to judicial review causes non compliance with art. 9/2 – not fully consistent



## Public participation

- informing public concerned - adequately, timely effectively (art. 6/2)
  - C/16 (Lithuania) – means of informing should ensure that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate (popular daily newspaper x official journal)
- reasonable time frames for different phases (art. 6/3)
  - C/16 (Lithuania) – 10 working days not sufficient for preparing to participate in EIA;
  - C/24 (Spain), C/36 (Spain) – specific circumstances must be taken into account (holiday period, possibility to copy documents etc.)
- early and effective PP when all options open (art. 6/4)
  - C/17 (EU) – requirement should be seen first of all within a concept of tiered decision-making; each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making; within every such procedure PP should be provided when all options are open
  - C/12 (Albania), C/43 (Armenia) – once a permit for an activity in certain location has been issued, possibility of PP in subsequent procedures cannot meet requirements of art. 6/4





## Public participation

- delegation of responsibility for ensuring PP rights on developer
  - C/37 (Belarus) – developer responsible for ensuring art. 6/6, 6/7 and 6/8 rights – not in compliance with AC
- due account of PP outcome (art.6/8), informing public about taking decision and its reasons (art. 6/9)
  - C/24 (Spain) – related - decision must include a discussion of PP outcomes
- reconsideration of conditions for permitted activity (art. 6/10)
  - C/41 (Slovakia) – if conditions of a permit issued before AC ratification is reconsidered, PP rights according to art 6 shall be granted
- PP during preparation of plans and programmes (art. 7)
  - C/12 (Albania) – PP requirements under art. 7 are subset of requirements under art. 6 – categorization of act under national law not decisive – in all cases shall be met
  - C54 (EU) – renewable energy action plans according to directive 2009/28/EC subject to art. 7 – EU responsible for proper regulatory framework granting minimum PP rights – (relation to art. 3/1) and for monitoring of its implementation



## Access to justice

- general principles
  - C/8 (Armenia) – if there is no compelling reason and clear justification, acts shall be subject to review procedure
  - C/11 (Belgium) – distinction between acts under art. 9/2 and 9/3 is relevant for specific requirements applicable; label in domestic law not decisive
- review of acts and omissions subject to art. 6 (art. 9/2) by NGOs
  - C/11 (Belgium) – envir. NGOs deemed to have sufficient interest to be granted access to review procedures - condition of sufficient interest shall be applied with the objective to grant wide access to justice
  - C/50 (Czech Republic) – possibility of NGOs to review only procedural legality of art. 6 acts contrary to art. 9/2
  - C/58 (Bulgaria) – access to review procedure of EIA decision not sufficient to meet requirements of art. 9/2, if NGOs cannot challenging final decision



## Access to justice

- review of acts and omissions subject to art. 9/3
  - C/11 (Belgium), C/18 (Denmark) – art 9/3 shall be read in conjunction with art. 1 – 3, in light of the purpose of effective judicial mechanisms available to the public; criteria, if any, laid down in national law shall be applied accordingly (not bar all or almost all NGOs from access to review procedures)
    - actio popularis not required, but access to justice should be presumption, not exception
    - CC evaluates general picture
  - C/32 (EU) – application on practice of ECJ (Plaumanns test) – if approach not changed, EU not in compliance with art. 9/3
  - C/33 (UK) – application of proportionality principle by national courts with consequence that some substantive arguments are not subject to review – shall not diminish adequate standard of review
  - C/48 (Austria) – no possibility to challenge acts and omissions of authorities and private persons according to sectoral laws contrary to art 9/3
  - C/58 (Bulgaria) – no possibility to challenge spatial plans and SEA decisions contrary to art 9/3



## Access to justice

- adequate and effective remedies (art. 9/4)
  - C/17 (EU) – access to justice only after construction started not compatible with AC – must be effectively possible to challenge the permit
  - C/24 (Spain) – if injunctive relief practically unavailable, non compliance with art 9/4
  - C/27 (UK), C/33 (UK) – imposing prohibitively expensive costs when member of public is pursuing environmental concerns is contrary to requirement of fairness;
    - absence of clear rules preventing prohibitive costs – despite various measures to mitigate costs are available, they do not ensure that cost will not exceed level which meets requirements of the AC – rely on judicial discretion
    - not considered as penalization in the sense of art. 3/8
- related ECJ (CJEU) case law – C 115/09, C 240/09, T 338/09, C-75/08, C 263/08



## General principles of AC application

- cumulative effect of national law provisions can cause non compliance (C/4, Hungary)
- from perspective of the AC, judiciary perceived as a part of state (C/6, Kazakhstan)
- if state powers delegated on private entities, they shall be treated as public authorities in sense of art. 2/2/a) (C/37, Belarus)



## General principles of AC application

- foreign or international envir. NGOs and NGOs whose members are foreign citizens can fall under the definition of public concerned (art.2/5), in accordance with principle of non discrimination (art. 3/9) (C/3+S/1, Ukraine, C/5, Turkmenistan)
- direct effect of AC in national law does not liberate the Party from duty to establish national legislative framework consistent with art. 3/1 requirements (C/2, Kazakhstan, C/17, EU)
- from AC perspective, EU legislation constitutes part of national law of an EU member state (C/18, Denmark); EU responsible for proper regulatory framework and for monitoring the implementation (C/54, EU)



Thank you!

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