

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Access to Information

The information pillar 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:

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.

'Any person' right: 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.

Broad definition of 'environmental 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.

Time limits: 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.

Form of information: 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.

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

Exemptions: 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.

Public interest test: 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: 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.

Onward referral of requests: 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. 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. It also contains several more specific provisions:

Internet access: 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.

State-of-the-environment reporting: Parties are required to produce national reports on the state of the environment at regular intervals not exceeding four years.

Pollutant release and transfer registers (PRTRs): PRTRs have proven to be a highly effective and relatively low cost means of gathering environmental information from the private sector and putting it into the public domain, thereby exerting a downward pressure on levels of pollution. However, very few countries in the region have established PRTRs. The Convention requires Parties to take steps to progressively establish such registers.

Emergency situations: Public authorities are 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.

Public Participation

The Convention sets out minimum requirements for public participation in various categories of environmental decision-making.

Specific projects or activities

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. Decision-making on genetically modified organisms (GMOs) is not included on the Annex I list. However, Parties are required to apply the provisions of the article to decision-making on the deliberate release of GMOs to the environment 'to the extent feasible and appropriate'. Furthermore, the

issue of GMOs is given emphasis in both the preamble and the accompanying Resolution.

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.

Programmes, plans and policies

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.

General rules and regulations

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.

Access to Justice

The third pillar of the Convention (Article 9) aims to provide access to justice in three contexts:

- review procedures with respect to information requests;
- review procedures with respect to specific (project-type) decisions which are subject to public participation requirements;
- 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.

Access to information appeals: A person whose request for information has not been dealt with to their 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 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.

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').

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.

Other access to justice requirements: The procedures in each of the three contexts referred to above are required to be 'fair, equitable, timely and not prohibitively expensive'. Decisions must be given or recorded in writing, and in the case of court decisions, made publicly accessible. Assistance mechanisms to remove or reduce financial and other barriers to access to justice are to be considered.