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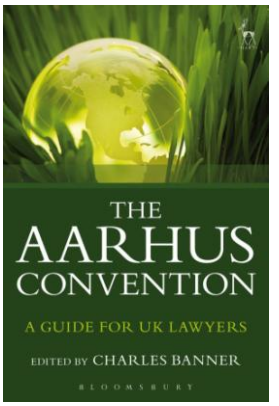

Overview of the Convention and the key features of the Second Pillar (access to justice)

Charles Banner – 12 October 2015

Aarhus Convention: key facts

- Full title: *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*
- Negotiated and now overseen by the United Nations Economic Commission for Europe (UNECE), one of the five regional commissions of the UN
- Authentic texts: English, Russian, French
- Adopted in 25 June 1998 in the Danish city of Aarhus
- Entered into force on 30 October 2001
- EU acceded on 17 Feb 2005
- UK acceded on 23 Feb 2005
- 46 parties as of 26 September 2012 (all European / CIS)
- Non UNECE states are able to join (see Decision II/9 of the MoP)

Overview of the rights conferred by the Convention

The Convention requires the parties to confer the following rights on the public with regard to the environment:

- the right to receive environmental information that is held by public authorities ("**access to environmental information**"): Articles 4-5 (to be discussed by David Blundell)
- the right to participate in environmental decision-making ("**public participation in environmental decision-making**"): Articles 6-8 (to be outlined below)
- the right to review procedures to challenge certain public decisions that have been made in relation to the environment ("**access to justice**"): Article 9 (to be discussed by James Maurici QC)

Application of the Convention in the UK

- The **international dimension** – non-compliance can be the subject of a communication to the Aarhus Convention Compliance Committee (see further below).
- The **EU dimension** – several EU Directives transpose elements of the Convention into directly effective EU law (see in particular the EIA Directive, IE Directive, SEA Directive & Environmental Information Directive).
  - EU law requires these Directives to be interpreted harmoniously with the Convention insofar as is possible (***Bettati***).
  - The CJEU has regard to the Compliance Committee's case-law when called to interpret EU law provisions transposing the Convention ***(Edwards***).
- The **domestic dimension**
  - Domestic legislation implementing aspects of the Convention and the relevant EU legislation (subject to the ***Marleasing*** principle).
  - A non-binding but material factor where no transposing UK or EU legislation (see ***Morgan***, ***Austin*** & ***Venn***).

The Convention institutions

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- Art. 10: at least once every two years there must be a **Meeting of the Parties** ("MoP") to keep under continuous review the implementation of the Convention.
- The **Aarhus Convention Compliance Committee** ("CC") was established in 2002 pursuant to Art. 15
- Art. 12 establishes the **Convention Secretariat** with various organisational responsibilities (e.g. convening the MoP)

The Meeting of the Parties

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- Art. 10(2): the MoP may, inter alia:
  - Review the policies for and legal/methodological approaches to access to information, public participation and access to justice in environmental matters with a view to improving them
  - Establish any subsidiary bodies as they deem necessary
  - Prepare, where appropriate, protocols to the Convention
  - Consider and adopt proposals for amendments to the Convention
- Art 16: if a dispute arises between two or more parties arises about the interpretation of the Convention, *"they shall seek a solution by negotiation or by any other means of dispute settlement"* failing which the matter may be referred to the ICJ
- The MoP also occasionally issues decisions on interpretation on its own initiative: e.g. Decision III/1 on the interpretation of Art. 14 (regarding the procedure for amending the Convention)

The Compliance Committee

The Compliance Committee

- Established in 2002 pursuant to Art. 15 which requires the MoP to:
  - **" …establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."**
- Governing documents:
  - Decision I/7 of the MoP (the 'constitution' of the CC) as amended by Decision II/5
  - The CC's *Guidance on the Aarhus Convention Compliance Mechanism*
  - Available on the UNECE website
- Meets a minimum of once per year (usually 4-5 times / year)

The Compliance Committee - membership

- 9 members (no more than 1 from the same state)
- Nomination by a Party/Signatory/NGO -> election by the MoP
- Term of office runs from election until the second MoP thereafter (in practice this means c. 4 years)
- Eligibility criteria:
  - Must be a national of a Party/Signatory to the Convention
  - "Persons of high moral character and recognised competence in the fields to which the Convention relates, including persons having legal experience"
- Decision II/7 Annex I-8 *"In the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience"*

The Compliance Committee - jurisdiction

- Submissions by Parties about the non-compliance of another Party with the Convention
  - 2 to date: Romania v. Ukraine (2004) and Lithuania v Belarus (2015)
- Submissions by a Party to the effect that, despite its best endeavours, it is or will be unable to comply with the Convention
  - 0 to date
- A referral by the Secretariat about the non-compliance of a Party with the Convention
  - 0 to date
- Communications from members of the public, including NGOs about the non-compliance of a Party with the Convention
  - Over 130 to date (24 in 2014 alone)
  - NB exhaustion of domestic remedies normally appropriate first

Case-law of the Compliance Committee – effect

- The CC's findings are not legally binding. They are reported to the MoP which decides whether to endorse them (see Decision I/7 Annex I-37).
- But they have persuasive force:
  - *Walton v. Scottish Ministers* [2012] UKSC 44 per Lord Carnwath at para. 100:

    "Although the Convention is not part of domestic law as such (except where incorporated through European directives), …the decisions of the Committee deserve respect on issues relating to standards of public participation"
  - AG Kokott in Case C-260/11 *Edwards* at para. 8 (& 44-46):

    "**In considering the requirements of the Convention "reference should be made to the decision-making practice of the Aarhus Convention Compliance Committee"**

The Second Pillar – public participation in environmental decision-making

The public participation rights

- **Article 6:** public participation in decisions to permit specific activities
- **Article 7:** public participation in decisions relating to *"plans, programmes and policies relating to the environment"*
- **Article 8:** public participation in the preparation of *"executive regulations and/or generally applicable legally binding normative instruments"*

Article 6: specific activities

- Applies to:
  - all *"decisions on whether to permit"* proposed activities listed in Annex I (NB broader concept than planning permission)
  - all *"decisions on proposed activities not listed in Annex I which may have a significant effect on the environment"*
- Sets out a number of specific requirements which must be satisfied in order to secure early and effective public participation in such decisions: see Art.6(2)-(10) [a copy is in your delegate packs].
- Transposed (at least partially) into EU law by the EIA Directive and IE Directive – and into UK law by the corresponding Regs.
- Some overlap with common law procedural fairness but Art 6 is fairly prescriptive whereas the common law requirements are more context-specific.

Article 6: ACCC case-law examples

- ACCC/C/2006/16 (Lithuania): for participation to be "effective" public authorities should provide a means of informing the public which ensures that all those who could potentially be concerned have a reasonable chance to learn about the proposal – publication in a weekly journal with limited readership was insufficient.
- ACCC/C/2009/43 (Armenia): 1 week period for examination of documents for a mining project was not a "reasonable time-frame" within the meaning of Art. 6(3)
- ACCC/C/2007/22 (France): where there has been no p.p. at an early stage of the decision-making process, and therefore the scope of any subsequent decision has already been narrowed, there must at the time of consultation be a realistic and practical possibility that options could be re-introduced.
- ACCC/C/2004/3 (Ukraine): if the decision is taken very shortly after the deadline for comments, the ACCC may infer that the requirement to take comments into account has been breached.

Article 6: UK case studies

- ACCC/C/2010/45&46 (UK) – alleged breach of Article 6 in the context of the determination of a planning application for superstore in Hythe, Kent.
  - ACCC declined to examine the general compatibility of UK planning law with Art. 6 because it had been provided with *"sufficient prima facie information to illustrate that there were opportunities for public participation during the planning process"*
  - But at para. 78 it held that the fact that some LPAs only allow for participation of members of the public via written submissions, as opposed to orally at Planning Committee meetings, was compatible with Art. 6(7).
- ***Bard Campaign v SSCLG*** [2009] EWHC 308 (Admin) Walker J suggested obiter that common law principles on fair consultation were consistent with Art. 6.
- ***Equiom v. LB Croydon*** [2014] EWHC 3660 (Admin) per Collins J at para. 18: Art 6 doesn't override a proper reliance on commercial confidentiality to justify non-disclosure of particular information, and *"there is no breach provided that the decision-maker is not given information not disclosed to an objector and is not misled"*

Article 7: plans, programmes and policies

- States parties must secure public participation *"within a transparent and fair framework, having provided the necessary information to the public"*
- Also incorporates by reference some of the Art 6 rights (early and effective participation; reasonable time-frames; duty to take into account the product of public participation) .
- Partly but not completely transposed into EU law by the SEA Directive and into UK law by the SEA Regs (see the HS2 case: SEAD applies only to "plans and programmes" which are "required" and which "set the framework for development consent").

Article 7: cases

- ***R (Greenpeace) v. SoS for Trade and Industry*** [2007] Env LR 29 – Sullivan J drew on Art. 7 as justifying the amenability to JR of a high level White Paper re new nuclear power stations & held *"it is difficult to see how anything less than 'the fullest possible consultation' would have been consistent with the Government's obligations"* under Art. 7 (at para. 51).
- ACCC/C/2012/68 (UK & EU) re National Renewable Energy Plans:
  - *"The plan was approved in a 'fast track' manner in spite of unresolved environmental issues, thus precluding open and effective public participation early, when all options were open"*
  - *"[the] authorities failed to take due account of the outcome of public participation, as evidenced by the one-page only document of comments, that ignored a significant number of informed submissions critical of the authorities' assessment of renewable potential."*
- HS2 – ongoing complaints ACCC/C/2014/100&101 (UK & EU)

Article 8: executive regulations and/or generally applicable legally binding normative instruments

- Something of an unknown:
  - Not transposed by EU or UK law
  - No Compliance Committee case-law
  - Probably applies to measures having legal (or practical?) effect which may have effects on the environment
  - Eg. safeguarding directions (?)
- Requires consultation either "directly or through representative consultative bodies" plus compliance with the Art. 6 requirements "as far as possible"

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