

**A practical guide to the Aarhus  
Convention – an introduction, its  
institutions, workings and hearings  
before the Compliance Committee**

**Charles Banner**  
**Landmark Chambers**

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# 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 discussed by John Litton QC)
- 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)

# The Convention institutions



# The Convention institutions



- 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





# The Meeting of the Parties

- 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 Meeting of the Parties

## - participation by NGOs



- Art. 10(5):

**“Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.”**
- Decision I/1 of the MoP sets out rules of procedure
  - Rule 27(1) gives the representatives of NGOs the right to address the MoP in relation to each agenda item
- An important opportunity for NGOs to influence the MoP’s decisions on e.g. the interpretation of the Convention and the strategies for delivering its objectives
- The next MoP will be on 30 June – 6 July 2014 in the Netherlands

# 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
  - 1 to date: Romania v. Ukraine
- 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
  - 78 to date
  - The CC is the only international body other than the ECtHR that hears complaints of states' non-compliance directly from the public

# The Compliance Committee

## - communications from the public (1)



- **Stage 1:** submission of communication by a member of the public / an NGO alleging non-compliance by a Party
  - Must be supported by corroborating information
  - See the checklist for communications at Annex II of the CC's Guidance
  - It is beneficial albeit not required for the communication to be prepared with legal assistance (Guidance p.32)
  - Communications should be as concise as possible and avoid including information that is not necessary to establish the existence and nature of the alleged non-compliance (Guidance p.33)
  - If the communication is inevitably lengthy due to the complexity of the matter, include a 3 page summary (ibid)
  - Need to specify whether steps have been taken to exhaust domestic remedies and if not why not (Guidance p.34)

# The Compliance Committee

## - communications from the public (2)



- **Stage 2:** preliminary determination by the CC on admissibility of the communication. It will be inadmissible if it is
  - anonymous
  - an abuse of the right to make such a communication
  - manifestly unreasonable (including *de minimis* matters)
  - incompatible with the Convention or Decision I/7
  - Concerning a State which is not a Party to the Convention
  - Concerning a State which has opted out of the Compliance procedure pursuant to Decision I/7 (to date no states have)
- Decision I/7 para. 21: “The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress”. See also pp.34-35 of the Guidance.

# The Compliance Committee

## - communications from the public (3)

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- **Stage 3:** (if admissible) file opened on the communication, documentation posted to UNECE website, and the Party concerned is informed
  - The Party concerned must submit its response as soon as possible and no later than five months thereafter
  - The Committee may request further information and/or may ask questions of the Party concerned
  - The Party concerned may argue that the communication is inadmissible notwithstanding the CC's preliminary determination to the contrary
  - Opportunity for further representations from communicant
  - Opportunity for interested parties to make representations

# The Compliance Committee

## - communications from the public (3)



- **Stage 4:** discussion at a meeting of the CC
  - Formal hearing at which the communicant and the Party concerned are invited to attend and present information and submissions
  - Discretion to hear interested parties / NGOs
  - “Any substantial new information” should be presented to the CC at least two weeks in advance of the meeting (Guidance, p.20)
  - The discussion stage may continue over two or more meetings if e.g. further information needs to be gathered
  - Working language is English



# The Compliance Committee

## - communications from the public (3)



- **Stage 5:** preparation of the CC's findings
  - Draft findings are prepared and sent to the communicant and Party concerned for comment
  - Also published on the website
  - Comments should not include information that could have been provided at an earlier stage of the proceedings (Guidance, p.21)
  - The findings are finalised at the first meeting of the CC after the deadline for comments
  - If the CC finds that the Party is not in compliance, it may agree upon measures which the Party should take to ensure compliance and/or make recommendations to the MoP
  - The next MoP will consider the CC's findings and may (make a declaration of non-compliance and/or specify measures which the Party concerned should take

# 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”**
  - See also *R (Edwards) v. Environment Agency* [2011] 1 WLR 79 per Lord Hope at para. 31 and *R (Garner) v. Elmbridge BC* [2011] 3 All ER 418 at per Sullivan J at para. 43
  - 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”**

# Case-law of the Compliance Committee – online resources

- The Justice & Environment website contains a free and very useful two volume PDF digest of the CC's case-law from 2004 to 2011, with selected quotes sorted Article-by-Article
  - [www.justiceandenvironment.org/publications/aarhus-2011](http://www.justiceandenvironment.org/publications/aarhus-2011)
- The UNECE's website also contains all documents relating to communications from the public, including those awaiting determination
  - <http://www.unece.org/env/pp/pubcom.html>

# Case study 1 – Port of Tyne



# Case study 1 – Port of Tyne (1)



- Communication *ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*
- Brought by ClientEarth, the Marine Conservation Society and Mr Robert Latimer
- Allegation of non-compliance with Art. 9 (access to justice) both generally and in relation to the complainants' ability to challenge a licence issued to the Port of Tyne for the disposal and protective capping of highly contaminated waste
- Issues included:
  - Were costs of JR proceedings “prohibitively expensive”?
  - Were the time limits for JR compatible with Art. 9?
  - Was the *Wednesbury* test sufficient to provide review of the “substantive legality” of the contested decision?



# Case study 1 – Port of Tyne (2)



- Communication submitted on 2 December 2008
- Preliminary ruling by CC that the communication was admissible on 17 December 2008
- Communication transmitted to the UK on 24 December 2008
- CC sent questions to both parties on 16 January 2009
- UK sought extension for its written submissions in response to communication (granted) – response submitted 28 June 2009
- Communicants provided written submissions in reply on 9 September 2009
- Hearing at the 25<sup>th</sup> Meeting of the CC on 22-25 September 2009
- Further written submissions from the parties thereafter
- Draft findings published 25 August 2010
- Final findings published at 29<sup>th</sup> Meeting of CC on 21-24 September 2010

# Case study 1 – Port of Tyne (3)



- The CC's findings comprise a sophisticated 33 page document, setting out the factual background, the national legal framework, the parties' competing submissions and the CC's conclusions
- The CC concluded:
  - “Not convinced” that the *Wednesbury* test meets the standards for review required by the Convention – application of a proportionality principle could provide an adequate standard (paras 126-127). “Expresses concern” on this issue but insufficient information before the CC for a definitive ruling (para. 128)
  - Costs rules in E&W not compliant with Art. 9, having regard in particular to the *Corner House* principles for PCOs and the potential chilling effect of a requirement for cross-undertakings in damages where injunctive relief is sought
  - Suggested amendments to the CPR on costs

# Case study 1 – Port of Tyne (4)



- The requirement for JR claims to be brought “promptly” caused significant uncertainty and the time for JR should run from the date when the claimant knew or ought to have known of the decision
- The CC’s findings were endorsed by the MoP on 29 Jun – 1 Jul 2011

# Case study 2 – Standing for challenges to EU legislation in the CJEU

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# Case study 2 – Standing for challenges $\frac{L}{C}$ to EU legislation in the CJEU (1)

- Under Art. 263 TFEU, a person may only challenge EU secondary legislation in the CJEU if he/she/it is “directly and individually concerned” by it
- The CJEU has long adopted a very restrictive approach to “individual concern” – a claimant normally needs to be in a ‘closed category’ of persons affected (e.g. a measure directed exclusively at sites with a IPPC permit as of 8.2.2013): see *Plaumann* [1964] CMLR 29
- Asked to reconsider post Charter of Fundamental Rights in *UPA* [2002] 3 CMLR 1, with AG Jacobs and the CFI supporting a more liberal approach, but the CJEU restated *Plaumann*
- This was assumed to be the end of any hope for a more liberal approach to standing for individuals and NGOs seeking to challenge EU legislation in the CJEU, absent an amendment to the Treaty
  - An amendment in relation to “regulatory acts” introduced by the Lisbon Treaty has been interpreted restrictively

# Case study 2 – Standing for challenges $\frac{L}{C}$ to EU legislation in the CJEU (2)

- *ACCC/C/2008/32 concerning compliance by the European Union*
- Complaint by ClientEarth that the “individual concern” requirement is incompatible with the EU’s obligations under Art 9 of the Convention
- Findings issued at the 32<sup>nd</sup> Meeting of the CC on 11-14 April 2011
- The CC undertakes a comprehensive review of the CJEU caselaw on standing and “individual concern”
- No finding of non-compliance because the previous cases pre-dated the entry into force of the Convention, BUT
  - **“the Committee is also convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraph 3 of the Convention” (para 88) and “a new direction of the jurisprudence of the EU courts should be established in order to ensure compliance with the Convention (para 97)**
- Prospect of environmental JR in the CJEU as a result?

Landmark  
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[cbanner@landmarkchambers.co.uk](mailto:cbanner@landmarkchambers.co.uk)