

The Influence of Aarhus on Domestic and EU Law:

Access to Information

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Introduction

1. The United Nations Economic Commission for Europe (“UNECE”) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”) has played a pivotal role in the development of European Union (“EU”) legislation on access to environmental information. It was highly influential in the enactment of Directive 2003/4/EC, following the more limited success of Directive 90/313/EEC. Of particular interest is its direct influence on the treatment of environmental information by EU institutions through both the fact that the EU has signed the Aarhus Convention and the Convention’s influence on Regulation 1367/2006. Directive 2003/4/EC has been implemented in domestic law by the Environmental Information Regulations 2004 (the “2004 Regulations”). The influence of the Aarhus Convention is thus deep and fundamental in both EU and domestic law.
2. This paper examines the influence of the Aarhus Convention on EU and domestic law in three stages:
 - (1) An overview of the structural influence of Aarhus on the development of EU environmental information legislation and subsequently domestic environmental information legislation;
 - (2) An examination of the case-law on the Aarhus Convention in the Court of Justice of the European Union (“CJEU”); and
 - (3) An examination of domestic case-law concerning the Aarhus Convention.

The Influence of the Aarhus Convention on EU Environmental Information Legislation

3. The story of contemporary EU legislation on access to environmental information can only be understood by placing it in the context of the signing of the Aarhus Convention.
4. EU action in this field began much earlier. The European Community (“EC”) Action Programme on the Environment of 1987 had called for devising “ways of improving public access to information held by environmental authorities”¹. This was followed by a Resolution of 19 October 1987 on the continuation and implementation of an EC policy and action programme

¹ OJ No C 70, 18.3.1987, p3.

on the environment², which declared the importance of concentrating Community action on certain priority areas, including better access to information on the environment. Similarly, the European Parliament had stressed in its Opinion on the fourth action programme by the EC on the environment³ that “access to information for all must be made possible by a specific Community programme”.

5. The result was the enactment of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. The objective of the Directive was to “ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available”: Article 1. The obligation on Member States was, subject to exceptions set out in Article 3(2), to:

“[...] ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.”

[Article 3(1)]

6. The deadline for responding to requests was “as soon as possible and at the latest within two months”: Article 3(4).

7. “Information relating to the environment” was defined in Article 2(a) as meaning:

“any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes”.

8. “Public authorities” were defined by Article 2(b) to mean:

“any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity”.

9. Member States were required to implement the Directive by 31 December 1992 at the latest. There was provision in Article 8 for Member States to report to the Commission four years after the implementation date on “the experience gained in the light of which the Commission shall

² OJ No C 289, 29.10.87, p3.

³ OJ No C 156, 15.6.1987, p138.

make a report to the European Parliament and the Council together with any proposal for revision which it may consider appropriate”.

10. The Directive was not a wholehearted success. The Commission wrote to the (then) fifteen Member States reminding them of their four-year reporting obligations on 25 July 1996. It provided them with a questionnaire listing the matters which, at a minimum, the national reports were expected to cover. The reminder did not have the desired effect, as by 31 December 1996 only one report had been sent to the Commission⁴. A reminder was sent to the Member States concerned at the beginning of 1997, urging them to send the reports as soon as possible. This was to no effect. The Commission subsequently launched multiple infraction proceedings in the course of 1997 against the recalcitrant Member States. Perhaps unsurprisingly, this had the desired effect. However, in the Commission’s opinion the reports “varied in the amount of useful detail provided”⁵.
11. Having eventually received the reports from Member States, the Commission collated the common concerns expressed in the Directive and summarised them as being that⁶:
 - (1) The definition of “information relating to the environment” in Article 2(a) was being strictly interpreted with the result that requests for information on radiation and nuclear energy were being refused, as well as requests for the financial analysis underpinning environment projects;
 - (2) In some cases, the term “public authorities” in Article 2(b) was being strictly interpreted, as was the concept of “responsibilities relating to the environment” in Article 6;
 - (3) The Article 3 exceptions were being applied too broadly;
 - (4) There were failures to comply with the two-month time limit for dealing with requests;
 - (5) There complaints about delays and the cost of review proceedings; and
 - (6) There were complaints about charging, both in terms of the amount charged and the fact that charges were levied when requests were refused.

⁴ Commission, Report on the experience gained in the application of Directive 90/313/EEC. COM (2000) 400 of 29 June 2000, at p3.

⁵ Ibid., p4. The Commission concluded that “Most of the reports contained no, or only very limited, statistical data. Some included a significant amount of data relevant to the national experience but from which no firm conclusions can be drawn at the Community level.”

⁶ At pp4-5.

12. The Commission then noted the recent signing of the Aarhus Convention, including by the EC. In a passage which provides an interesting insight into the development of the Convention, as well as into the importance of the involvement of NGOs in the process, the Commission stated that⁷:

“Although the first draft of the provisions in the Convention relating to access to environmental information were largely inspired by the Directive, subsequent negotiations highlighted the weaknesses or shortcomings of the latter in the light of experience gained in its application. NGOs concerned with the environment participated actively and constructively in the negotiations on an equal footing with national delegations. The Commission considers that the final text of the Convention represents a clear advance on the provisions of the Directive.”

13. In light of the weaknesses that had been identified in Directive 90/313/EEC, the Commission proposed a replacement Directive in the following terms⁸:

“In the light of the foregoing, the Commission considers it desirable to replace the Directive with a new Directive on freedom of access to environmental information. A proposal for such a new Directive accompanies this report. The Commission’s proposal aims to correct the shortcomings in the Directive identified above and so lead to strengthened legislation in the Member States. It also aims to align Community legislation with the Aarhus Convention so as to enable the Community to ratify that Convention. Proper implementation of any new Directive, as well as its effective application, will be of the utmost importance in securing improved rights to information across the European Union.”

14. The key provision of the Aarhus Convention which is of relevance to the development of EU legislation on environmental information is Article 4, which provides, so far as is relevant, as follows:

“1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

⁷ See pp 8-9.

⁸ P12.

3. A request for environmental information may be refused if:

- (a) The public authority to which the request is addressed does not hold the environmental information requested;
- (b) The request is manifestly unreasonable or formulated in too general a manner; or
- (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

- (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- (b) International relations, national defence or public security;
- (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
- (e) Intellectual property rights;
- (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
- (g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
- (h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3(c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities shall make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.”
15. Crucial to understanding the operation of the freedom of information provisions in Article 4 is the definition of “environmental information” in Article 2(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;”
16. Similarly of importance is the definition of “public authority” in Article 2(2):
- ““Public authority” means:
- (a) Government at national, regional and other level;
 - (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
 - (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
 - (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.
- This definition does not include bodies or institutions acting in a judicial or legislative capacity.”
17. Article 5 is also relevant, making provision for the “Collection and Dissemination of Environmental Information”. It includes measures to ensure that public authority information systems are effective in providing publicly accessible information, including the progressive provision of information on “electronic databases which are easily accessible to the public through public telecommunications networks”: Article 5(3). It also includes provision for each State Party to publish and disseminate a national report on the state of the environment at regular intervals not exceeding three or four years. The Article 5 provisions are without prejudice to the exemptions in Article 4(3) and (4).

18. A number of points of distinction between the Convention and Directive 90/313/EEC can be noted, in particular:
- (1) The extended definition of environmental information:
 - i. Defined by the Directive as *“any available information... on the state of water, air, soil, fauna, flora, land and natural sites, and on activities... or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes”*;
 - ii. By contrast, the Convention defines environmental information as information on *“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 of these elements”*, a series of *“factors”* and *“measures [...] affecting or likely to affect the elements of the environment”* and *“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 elements of the environment or [...] factors, activities or measures”*;
 - (2) An extended definition of public authorities;
 - i. Defined in the Directive as *“any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment...”*;
 - ii. The Convention definition includes national, regional and other levels of Government but also extends to *“Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”* and to *“Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person [which satisfies the definition of part of Government or a natural or legal person performing public administrative functions]”*;
 - (3) More detailed provision concerning the form in which information is to be made available;
 - (4) Shorter deadlines for making the information available;
 - (5) Limitations on the operation of the exceptions – namely though the requirement in Article 4(4) of the Convention that exceptions be interpreted in a restrictive way taking into account the public interest served by disclosure;
 - (6) Additional duties placed on national authorities for collecting and disseminating information; and
 - (7) Requiring that reviews provided by national authorities include review by a court of law, and that reviews be expeditious (see Article 9 of the Convention).

19. The European Community signed the Convention on 25 June 1998, as did the United Kingdom (“UK”). The Convention was approved on behalf of the Community by Council Decision 2005/370. On signing it, the Commission declared that:

“The European Community wishes to express its great satisfaction with the present Convention as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UNECE region, in accordance with the principle of sustainable development.

Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions.”

[Emphasis added]

20. In view of the Commission’s previous endorsement of the Convention and the EC’s expression of satisfaction with its terms, it was no surprise that it proved highly influential in the drafting of the replacement Directive envisaged by the Commission in 2000. Directive 2003/4/EC (the “Environmental Information Directive”) was the result and the new Directive is heavily based on the Convention. In its declaration at the time of approving the Convention on 17 February 2005, the EC stated that it “has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention” and went on expressly to refer to Directive 2003/4/EC. Further, the fifth recital to the 2003 Directive provides that:

“Provisions of Community law must be consistent with [the Aarhus] Convention with a view to its conclusion by the European Community.”

21. There can be no doubt, therefore, that one of the purposes of the 2003 Directive was to implement the terms of the Convention into EC (now EU) law. The provisions of the 2003 Directive are practically identical to those of the Aarhus Convention. Recital (5) recognises that “Provisions of Community law must be consistent with [the Aarhus Convention] with a view to its conclusion by the European Community”. Article 1 defines the objectives of the Directive as being:

“(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.”

22. Article 2 of the Directive includes the definitions, *inter alia*, of “environmental information” and “public authority” and is the equivalent of Article 2 in the Convention. Article 3 includes the basic principles of access to environmental information and is the equivalent of Article 4(1) and (2) of the Convention. Article 3(1) provides that:

“Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.”

23. Article 4 sets out the exceptions to the general principle in Article 3(1) and is the equivalent of Article 4(3) and (4) of the Convention.

24. The main distinctions are:

In the definition of “environmental information” in Article 2(1)

- (1) The inclusion at Article 2(1)(a) of the words “including wetlands, coastal and marine areas” to qualify “natural sites”;
- (2) The inclusion of a reference to “waste, including radioactive waste, emissions, discharges and other releases into the environment” in the list of factors at Article 2(1)(b);
- (3) The inclusion of a reference to “the contamination of the food chain” at Article 2(1)(f), dealing with the state human health and safety;

In the definition of “public authority” in Article 2(2)

- (4) A specific reference to “public advisory bodies” as being covered by the definition;
- (5) The granting of a discretion to Member States to exclude “bodies or institutions when acting in a judicial or legislative capacity” from the definition of “public authority” in Article 2(2) (as opposed to the automatic exclusion of such bodies in Article 2(2) of the Convention); and

In the exceptions

- (6) The prohibition on refusal for reasons identified in Article 4(2)(a), (d), (f), (g) and (h) (broadly, confidential public authority proceedings, confidential commercial or industrial

information, confidential personal data, protection of voluntarily supplied information and protection of the environment) where the request relates to information on emissions into the environment.

25. In addition, and reflecting the fact that the EC was itself a party to the Convention, the Convention also led to a Regulation dealing with the application of the Convention to the EC itself: Regulation 1367/2006. The 2006 Regulation applies the earlier Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents to applications for environmental information held by the Community institutions and does so by reference to the Aarhus Convention. As recital (3) states, “Provisions of Community law should be consistent with that Convention”. Recital (4) further provides that “Provision should be made to apply the requirements of the Convention to Community institutions and bodies”.

26. Recital (7) of the Regulation indicates an important extension of the scope of the Convention. It provides that:

“The Aarhus Convention defines public authorities in a broad way, the basic concept being that wherever public authority is exercised, there should be rights for individuals and their organisations. It is therefore necessary that the Community institutions and bodies covered by this Regulation be defined in the same broad and functional way. Under the Aarhus Convention, Community institutions and bodies can be excluded from the scope of application of the Convention when acting in a judicial or legislative capacity. However, for reasons of consistency with Regulations (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, the provisions on access to environmental information should apply to Community institutions and bodies acting in a legislative capacity.”

27. The objective of the Regulation, so far as access to environmental information is concerned, is set out in Article 1, so far as is relevant, as follows:

“1. The objective of this Regulation is to contribute to the implementation of the obligations under the [Aarhus Convention] by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

- (a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;
- (b) ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted;
- (c) providing for public participation concerning plans and programmes relating to the environment;
- (d) granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.

2. In applying the provisions of this Regulation, the Community institutions and bodies shall endeavour to assist and provide guidance to the public with regard to access to information, participation in decision-making and access to justice in environmental matters.”

28. “Community institution or body” is defined in Article 2(1)(c) to mean:

“any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions under Title II shall apply to Community institutions or bodies acting in a legislative capacity”

29. “Environmental information” is defined in identical terms in Article 2(1)(d) as in Article 2(1) of Directive 2003/4/EC. There is a specific obligation under Article 4 to collate and disseminate environmental information including in relation to “plans and programmes relating to the environment”. That latter phrase is defined in Article 2(1)(c) to mean plans and programmes:

“(i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;
(ii) which are required under legislative, regulatory or administrative provisions; and
(iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.

General environmental action programmes shall also be considered as plans and programmes relating to the environment.

This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection”

30. Article 3 is the mechanism by which the provisions of Regulation 1049/2001 are applied to any request to a Community institution for environmental information. It provides that:

“Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person without discrimination as to where it has its registered seat or an effective centre of its activities.”

31. Article 4 includes obligations in relation to the collection and dissemination of environmental information. Article 5 requires the Community institutions to ensure “insofar as is within their power [...] that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable”. Article 6 provides guidance on the application of the exceptions in Article 4 of Regulation 1049/2001. It provides that:

“1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation (EC) No 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.”

32. Article 2 of Regulation 1049/2001 provides for a general right of access to documents of the Community institutions. It states, so far as is relevant, that:

“1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.”

33. “Document” is defined in Article 3(a) to mean:

“any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility”

34. Article 4 sets out exceptions on the basis of which an institution “shall” refuse an application for disclosure of a document. So far as is relevant, Article 4 provides as follows:

“1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interest of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

35. By Article 4(5) Member States may request an institution not to disclose a document originating from that Member State without its prior agreement.
36. On a domestic level, the Environmental Information Directive is implemented by the Environmental Information Regulations 2004. They amount to a faithful implementation of the Directive. Regulation 2(1) explicitly states that "environmental information" has the same definition as in Article 2(1) of the Directive before setting out that definition. Regulation 2(2) defines a "public authority" to mean (a) government departments, (b) a public authority as defined in section 3 of the Freedom of Information Act 2000, (c) "any other body or person, that carries out functions of public administration" and (d) any other body or person under the control of a person in categories (a), (b) and (c) and who has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment or provides public services relating to the environment.
37. Regulation 3(3) takes advantage of the discretion in Article 2(2) of the Directive and provides that the Regulations "shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity". By regulation 3(4) both Houses of Parliament are exempted from the application of the Regulations "to the extent required for the purpose of avoiding an infringement of the privileges of either House".
38. Regulation 4 enacts the dissemination provision in Article 7 of the Directive, whilst regulation 5 enacts the access to information provision in Article 3. The exceptions are set out in regulation 12. There is no specific reference to the requirement to interpret the exceptions "in a restrictive way" as set out in Article 4 of the Directive and Article 4(4) of the Convention. However,

regulation 5(2) does provide that “A public authority shall apply a presumption in favour of disclosure”. Furthermore, regulation 2(5) provides that:

“Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.”

39. Accordingly, it is arguable that, even if the presumption in favour of disclosure in regulation 5(2) is not sufficient to import the restrictive interpretation requirement, regulation 2(5) means that the exceptions have to be interpreted in accordance with the restrictive approach in the Directive and Convention. There is no contrary indication in the text of the Regulations. In addition, the *Marleasing* approach⁹ would apply to require the exceptions to be interpreted, so far as it is possible to do so, in accordance with the Directive. Accordingly, the same restrictive interpretation would apply. As regards the Convention, although, as an unincorporated international treaty, its provisions cannot be directly applied by domestic courts, they may be taken into account in resolving ambiguities in legislation intended to give it effect: *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] Env LR 30, *per* Carnwath LJ, giving the judgment of the Court of Appeal (Laws and Maurice Kay LJJ), at paragraph 22. Accordingly, to the extent that it might be said that there was any ambiguity in the exception provisions in the Regulations, recourse could be had to the Convention to assist in interpreting them.

Case-Law of the CJEU dealing with the Aarhus Convention

40. The Directive is, broadly speaking, a faithful implementation of the Convention. In some respects, it goes further in supporting the principle of transparency and encouraging disclosure of environmental information. The result of this is that there are relatively few cases, either at the level of the CJEU or domestically, about the interaction of the Aarhus principles and EU or domestic law. In itself, that is indicative of the way that the Convention has been embraced by the EU and, subsequently, how the domestic system has faithfully reproduced the requirements of the Environmental Information Directive. Most of the cases that refer to the Convention do so in passing and are, in fact, about the principles of the Directive or domestic Regulations.
41. Nonetheless, there have now been a number of cases in the CJEU in particular which deal with the access to information provisions of the Aarhus Convention. There are five issues of particular interest which have arisen in the case-law:

⁹ Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

- (1) Scope of application of the Convention – Case C-524/09 *Ville de Lyon v. Caisse des Dépôts et Consignations* [2011] Env LR 18;
- (2) Timing of assessment and balancing of public interest – Case C-266/09 *Stichting Natuur en Milieu v. College voor de toelating van gewasbeschermingsmiddelen en biociden* [2011] Env LR 21;
- (3) Application of exceptions in cases covered by other EU legislation – Case C-552/07 *Commune de Sausheim v. Pierre Azelvandre* [2009] ECR I-987;
- (4) Legislative capacity – Case C-204/09 *Flachglas Torgau GmbH v. Germany* [2012] Env LR 26 and Case C-182/10 *Solvay v. Région Wallonne* [2012] Env LR 27; and
- (5) Cumulative exemptions – Case C-71/10 *Office of Communications v. Information Commissioner* [2012] Env LR 7.

I Scope of application of the Convention – Ville de Lyon

42. The *Ville de Lyon* case involved the interpretation of the detailed rules for access to information on greenhouse gas emission allowance trading held by administrators of national registries. The *Ville de Lyon* requested the Caisse des Dépôts et Consignations to communicate to it the volumes of the greenhouse gas emission allowances sold in 2005 by the operators of 209 urban heating sites throughout France. The *Ville de Lyon* contended that the information was useful to it for comparative purposes for the renegotiation of an agreement delegating a public service in respect of urban heating at a site in Lyon. The request was refused and although the French Committee on Access to Administrative Documents issued an opinion in favour of disclosure, the Caisse reiterated its refusal. The referring court referred a series of questions to the CJEU, one of which asked whether the information sought amounted to “information on emissions into the environment”, within the meaning of Article 4 of the Environmental Information Directive, against which the “confidentiality of commercial or industrial information” could not be invoked as an exception. In answering the question, the CJEU had to consider whether the reporting of trading data was governed by one of the derogations in Article 4 of the Directive or by the provisions of Directive 2003/87, which established a scheme for greenhouse gas emission allowance trading, and Regulation 2216/2004, adopted pursuant to that Directive.
43. The CJEU held, so far as is relevant, as follows:
 - “35. It should be noted as a preliminary point that, in adhering to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by the public authorities.

36. In adopting Directive 2003/4, the European Union intended to implement the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State of the European Union has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest.
37. In the scheme for emission allowance trading established in the European Union by Directive 2003/78, Article 17 thereof provides inter alia that decisions relating to the allocation of allowances to operators of installations authorised to emit greenhouse gases and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority are to be made available to the public in accordance with Directive 2003/4.
38. Although the EU legislature has thus integrated, within the context of Directive 2003/87, requirements on public access to that type of information, it did not thereby intend to make the reporting of all information or data having a connection with the implementation of Directive 2003/87 subject to the requirements of Directive 2003/4.
39. In that regard, it should be noted that the trading data requested by the Ville de Lyon does not come within the scope of Article 17 of Directive 2003/87, which refers to Directive 2003/4. That data is, however, referred to in Article 19 of Directive 2003/87, that is to say, data relating to transferred allowances, an accurate accounting of which is to be kept by the Member States in their respective national registries, of which the technical features and rules relating to the keeping, reporting and confidentiality of the information contained in those registries are determined by Regulation No 2216/2004.
40. Since Article 19 of Directive 2003/87 does not refer to Directive 2003/4 in the same way as in Article 17, it must be held that the EU legislature did not intend to make requests concerning trading data such as that at issue in the main proceedings subject to the general provisions of Directive 2003/4 but that, on the contrary, it sought to introduce, in respect of that data, a specific, exhaustive scheme for public reporting and confidentiality of that data.”
44. This reasoning, which starts not with the Environmental Information Directive in order to determine whether the material should be disclosed, but rather examines how the trading data was to be characterised within the “specific, exhaustive scheme” for reporting and confidentiality in the greenhouse gas emissions allowance trading directive, is in stark contrast to the reasoning of Advocate General Kokott. Her Opinion, whose reasoning was not followed by the Court, focussed much more closely on the general applicability of the Environmental Information Directive and the Aarhus Convention.
45. Advocate General Kokott began by examining whether the information sought constituted “environmental information” within the meaning of that term in the Directive. She considered, at paragraph 28, that:
- “The Court has held, with regard to the old Environmental Information Directive, Directive 90/313/EEC, that the legislature’s intention was to make the concept of “information relating

to the environment” a broad one. The Court considers the definition in Article 2(1) of the new Environmental Information Directive to be even wider and more detailed.”

46. She further supported this part of her conclusion by reference to the Treaty of Amsterdam and Article 15 of the Treaty on the Functioning of the European Union, as well as the requirement in Article 42 of the Charter of Fundamental Rights providing for access to documents. Nonetheless, she noted that neither the old nor the new Environmental Information Directive was intended to provide an unlimited right of access to environmental information. To qualify, information had to fall within a specific category: paragraph 29.
47. The Advocate General considered that such information could qualify under Article 2(1)(b) of the Directive as information on factors likely to affect the atmosphere: paragraphs 34-42. She went on to consider whether the Environmental Information Directive applied at all or whether it was displaced by a “special law” in the form of Regulation 2216/2004. In so doing, she considered the interaction between the Convention and the Directive:
- “64. Furthermore, the explanatory memorandum for the Commission proposal expressly states that Directive 2003/87 is intended to be consistent with the Aarhus Convention. This is mandatory in any case, since international agreements concluded by the Union prevail over provisions of secondary Community legislation. For that reason, secondary European Union legislation is to be interpreted as far as possible consistently with the Union’s obligations under international law.
65. In so far as it is relevant in the present case, Article 4(4) of the Aarhus Convention corresponds to Article 4(2) of the Environmental Information Directive. To regard Regulation 2216/2004 as a *lex specialis* in relation to the Environmental information Directive would therefore lead to a departure from the Aarhus Convention.”
48. Advocate General Kokott went on to use the Aarhus Convention Implementation Guide to assist in concluding that information on emissions allowance trading did not constitute information on emissions and so was not subject to the restricted exceptions in Article 4: paragraph 74. She ultimately concluded that, provided the interest in confidentiality presumed by Regulation 2216/2004 actually existed, there were not sufficient public interests in disclosure evident from the terms of the reference.
49. The approach of the Court and of the Advocate General are in stark contrast to each other. The Advocate General started by examining whether the information requested was capable of amounting to environmental information and then deciding whether there was anything to justify not applying the Environmental Information Directive. In so doing, she focused on the central role of the Aarhus Convention and the fact that it prevailed over secondary EU

legislation. She also applied the principle that secondary EU legislation was to be interpreted consistently with the EU's obligations, so far as is possible. In this way, she achieved a result which remained faithful to Aarhus.

50. The Court, on the other hand, decided that Directive 2003/87 created a special and exhaustive code which displaced the Environmental Information Directive. Despite reiterating the importance of the Convention, it effectively side-lined it by providing an analysis based on whether the later Directive 2003/87 intended "to make requests ... subject to the general provisions of Directive 2003/4". It concluded that it did not.
51. The reasoning of the CJEU in the *Ville de Lyon* case does seriously call into question the general applicability of the Environmental Information Directive and the Aarhus Convention. Despite the high level rhetoric about the centrality of those instruments in the EU system, the effect of the judgment is to relegate them to a later and more specific provision.

II Timing and balance – Stichting Natuur

52. The *Stichting Natuur* case concerned the refusal to disclose studies and reports on field trials concerning residues and effectiveness of the substance propamocarb on lettuce. An initial issue concerned when the right of access to environmental information arose: was it at the time the request was made or at the time when the decision on disclosure was taken? This would determine whether the old or the new Environmental Information Directive applied. The CJEU held, at paragraph 34, that:

"Moreover, the right of access to environmental information can crystallise only on the date on which the competent authorities have to take a decision on the request which has been made to them. Only then, as the Advocate General observes in point 28 of her Opinion, do those authorities have to assess, in the light of all the factual and legal circumstances of the case, whether or not the information requested should be supplied."

53. The fact that the right does not crystallise until the decision is taken reflects the fact that whether there is a right of access will often depend on the balancing of competing interests. Hence, it is only when the balancing exercise has been carried out that the determination can be made as to whether the information must be disclosed. Advocate General Kokott relied again on the principle that international agreements prevailed over the Community's secondary legislation: paragraph 41. Whilst she was of the view that the old Environmental Information Directive would not adequately have implemented the Convention in this regard, there was no such problem with the new one.

54. An additional issue which arose in the case was whether the balancing exercise prescribed by Article 4 of the Environmental Information Directive needed to be carried out in each particular case or whether it could be defined in a general measure adopted by the national legislature.

The CJEU held that:

“56. It is apparent from the very wording of Article 4 of Directive 2003/4 that the European Union legislature prescribed that the balancing of the interests involved was to be carried out in every particular case.

57. Neither Article 14 of Directive 91/414 nor any other provision of Directive 2003/4 suggests that the balancing of the interests involved, as prescribed in Article 4 of Directive 2003/4, could be substituted by a measure other than an examination of those interests in each individual case.

58. That does not, however, prevent the national legislature from determining, by a general provision, criteria to facilitate that comparative assessment of the interests involved, provided only that that provision does not dispense the competent authorities from actually carrying out a specific examination of each situation submitted to them in connection with a request for access to environmental information made on the basis of Directive 2003/4.”

55. So the balancing exercise must be carried out on an individual basis in every case, depending on the facts involved. But the national authorities are entitled to enact particular provisions to assist in making that assessment. The CJEU was not specific about the nature of any such provision but it could presumably include guidance on factors to be taken into account and the way that they should be balanced.

III Application of exceptions where other legislation applies - Sausheim

56. The Sausheim case concerned a dispute over the refusal by the Commune de Sausheim to release to Mr Azelvandre prefectural correspondence and planting records relating to deliberate test releases of genetically modified organisms (“GMOs”). Such releases were controlled under EU law by, first, Directive 90/220/EEC and, later, by Directive 2001/18. The latter Directive included notification requirements. It also provided for the disclosure of information relating to the description of the GMO, the identity of the notifier, the purpose of the release, the location of the release and the intended uses of the GMO. Mr Azelvandre requested information on releases, including their location, from the Commune de Sausheim. The Commune refused. The case was referred by the Conseil d’Etat. The Commune attempted to rely on the exception in the Environmental Information Directive for the protection of public order and security. The CJEU rejected that argument at paragraph 52:

“Concerning Directives 90/313 and 2003/4, it should be added that, as the Advocate General pointed out in point 56 of her Opinion, a Member State cannot invoke an exemption

provision included in those directives in order to refuse access to information which should be in the public domain under the provisions of Directives 90/220 and 2001/18.”

57. Advocate General Sharpston explained the position in more detail in her Opinion:

“55. The purpose of these directives is to provide access to information which *would not* otherwise be disclosed. It is not to provide a further basis for restricting public access to information which *would* otherwise be disclosed.

56. A Member State cannot invoke the provisions of Directives 90/313 and 2003/4 in order to refuse access to information which should be in the public domain under Directives 2001/18 and 90/220.

57. [...]

58. Where a Member State’s authorities have more information than they are required to disclose under Directive 2001/18, Directive 90/313 becomes relevant. A request for access to such information may be made under the national provisions transposing Directive 90/313.

59. A Member State may, however, then invoke the reasons set out in Article 3(2) of Directive 90/313 in order to justify a refusal to disclose information as to the location of release, provided the other requirements of that article are met. Restriction on the grounds of public security (one of the grounds identified in Article 3(2)) would, in my view, cover circumstances in which the disclosure of the specific location of a release would lead to its unlawful destruction.

60. [...]

61. Where access to information is given, that may imply accepting some enhanced risk of lower security. It is and remains open to the Community legislator to adjust the balance between promoting the development of GMO crops and enhancing public access to environmental information if experience suggests that the present balance is unworkable.”

58. *Sausheim* provides an interesting counterpoint to *Ville de Lyon*. Where the CJEU in *Ville de Lyon* gave preference to other secondary legislation over the Environmental Information Directive and the Convention, in *Sausheim* the Advocate General and the Court isolates the fundamental underlying principle of transparency and access to information and refuses to limit it by applying exceptions from the Directive which are not present in the specialised scheme under consideration. They further explain the role of the Directive and Convention in enabling disclosure where it would otherwise not occur. If there is already a specialist scheme for disclosure, then there is no need to apply the principles of the Directive.

IV Legislative capacity – Flachglas and Solvay

59. An area which has led to debate about the Environmental Information Directive and the Aarhus Convention on more than one occasion is the extent of the exception from the definition of a public authority of a body performing legislative functions. The issue arise in *Flachglas* as to whether Ministries were participating in the legislative process by tabling draft laws and giving opinions. Flachglas was seeking information about the conditions in which the German Federal Office for the Environment had adopted allocation decisions for emissions licences. To that end, it asked the Federal Ministry for the Environment, Protection of Nature and Reactor Safety to provide it with information relating to the legislative process in which a law was adopted and implemented. In particular, it asked for internal memoranda and comments produced by the Ministry and correspondence between it and the Federal Office for the Environment. It also relied on a passage from the UNECE document “The Aarhus Convention: An Implementation Guide”.

60. The CJEU held as follows:

“34. It is apparent from the order for reference and from the written and oral submissions made to the Court that this question refers only to the legislative process *stricto sensu* and not to that leading to the adoption of a provision of a lower rank than a law.

35. In addition, Flachglas Torgau’s argument based on the document published in 2000 by the [UNECE] must be rejected. [...]

36. Apart from the fact that that document’s interpretation of the Aarhus Convention is not binding, art 8 of the Convention, to which it refers, in any event does not expressly mention the participation of public authorities in drafting “laws”, so that an interpretation such as that adopted by that document cannot be derived from the wording of that article.

[...]

40. It is apparent from both the Aarhus Convention itself and Directive 2003/4, the purpose of which is to implement the Convention in EU law, that in referring to “public authorities” the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions.

41. In addition, art 2(2) of the Aarhus Convention expressly provides that the expression “public authorities” which it employs “does not include bodies or institutions acting in a judicial or legislative capacity”, without restriction.

42. [...]

43. The purpose of the first sentence of the second subparagraph of art 2(2) of Directive 2003/4 is to allow Member States to lay down appropriate rules to ensure that the process

for the adoption of legislation runs smoothly, taking into account the fact that, in the various Member States, the provision of information to citizens is, usually, adequately ensured in the legislative process.”

61. The CJEU considered that this pointed to a “functional interpretation” of the phrase “bodies or institutions acting in a [...] legislative capacity”: paragraph 49. This was all the more justified in view of the fact that the legislative process would vary between Member States and a uniform approach was therefore needed. However, the CJEU limited the application of this broad approach to such institutions by finding that the option given to Member States not to regard those bodies as “public authorities” could no longer be exercised after the legislative process had ended: paragraph 58.
62. It is worth noting that in coming to similar conclusions, Advocate General Sharpston concluded that “In the event of ambiguity, therefore, the Directive should be interpreted so as to favour transparency and access to information, and any provision limiting its scope in that regard [...] should be construed strictly”: paragraph 32. As to the utility of the Implementation Guide, the Advocate General considered that “Whilst not entirely valueless”, the evidence in it “should not be viewed as in any way decisive”: paragraph 58.
63. The Implementation Guide was again considered in *Solvay*. Two questions arose on reference to the CJEU. First, did Article 2(2) and Article 9(4) of the Aarhus Convention have to be interpreted in accordance with the guidance in the Implementation Guide? Secondly, did Article 2(2) of the Convention and Article 1(5) of Directive 85/337 (the “EIA Directive”) exclude from the scope of the Convention and Directive, an act, such as a decree, which ratified planning environmental or works consents which had been granted by administrative authorities by giving them legislative status?
64. As to the first question, the Court held, at paragraph 27, that:

“While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.”
65. As to the second question, the Court referred to its case-law on article 1(5) of the EIA Directive. It concluded that there were two conditions for the exclusion of a project from the EIA Directive (at paragraph 31):

“The first requires the details of the project to be adopted by a specific act of legislation. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process [...]”.

66. The CJEU further concluded that this approach could be applied to Article 2(2) of the Aarhus Convention: paragraph 42. This was for two reasons. First, the content of the two provisions was substantially the same. Secondly, there was nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying the same interpretation.
67. The approach of the Court in *Solvay* is, like that in *Flachglas*, a functional one. It recognises that there is a legitimate need for the process of law-making to run smoothly and that, in most Member States, this is done in such a way as to ensure adequate information is provided to the public in any event. But it still recognises the need for the objectives of the Environmental Information Directive to be achieved through the legislative process.

V Cumulative exemptions – Office of Communications

68. This was a reference from the Supreme Court. The case arose from an application to the Office of Communications for more detailed information on the local of mobile phone mast stations. Some information was accessible through a website called “Sitefinder” but a request made to the Office asked for more details. This was refused on two grounds. First, disclosure of the information would adversely affect public security as it would involve disclosure of the location of sites used to provide police and emergency service radio networks which could then be used by criminals. Secondly, disclosure was said to have an adverse effect on the intellectual property rights of mobile phone operators.
69. The question was whether, in a case where each interest viewed separately was not sufficient to justify non-disclosure, it was necessary to conduct a second exercise by looking at the interests cumulatively. The matter reached the Supreme Court: [2010] 10 UKSC 3, [2010] Env LR 20. The Court was split as to the correct answer. The majority favoured the cumulative approach. The matter was referred to the CJEU.
70. The CJEU agreed with the majority. Its reasoning was as follows:
- “27. It follows that the concept of “public interest served by disclosure”, referred to in the second sentence of the second subparagraph of art 4(2) of that directive, must be regarded as an overarching concept covering more than one ground for the disclosure of environmental information.

28. It must accordingly be held that the second sentence of the second subparagraph of art 4(2) is concerned with the weighing against each other of two overarching concepts, which means that the competent public authority may, when undertaking that exercise, evaluate cumulatively the grounds for refusal to disclose.

29. That view is not undermined by the emphasis placed in the second sentence of the second subparagraph of art 4(2) on the duty to weigh the interests involved “[i]n every particular case”. Such emphasis is intended to stress that interests must be weighed, not on the basis of a general measure, adopted by the national legislature for example, but on the basis of an actual and specific examination of each situation brought before the competent authorities in connection with a request for access to environmental information made on the basis of Directive 2003/4 [...].”

71. One argument which had been raised against the cumulative approach was that this would involve introducing another exception to the Aarhus Convention. This was rejected at paragraph 31:

“It should also be pointed out that, since the various interests served by refusal to disclose relate, as in the case on the main proceedings, to the grounds for refusal set out in art 4(2) of Directive 2003/4, taking those interests into consideration cumulatively when weighing them against the public interests served by disclosure is not likely to introduce another exception in addition to those listed in that provision. If weighing such interests against the public interests served by disclosure were to result in a refusal to disclose, it would need to be acknowledged that that restriction on access to the information requested is proportionate and accordingly justified in the light of the overall interest represented jointly by the interests served by refusal to disclose.”

72. Accordingly, the concept of “public interest” is a broad overarching one. It is not limited to a strict, individualised examination of the particular public interests against disclosure. The matter is, instead, a more broad-based – and classically judicial – exercise in the balancing of competing factors. Since the interests which are weighed cumulatively are all individually recognised in the Convention in any event, there is no question of this process introducing a new exception to the Convention.

Domestic Case-Law

73. Whilst the domestic courts have now grappled with the provisions of Aarhus on a number of occasions insofar as they concern access to justice and public participation, they have not really engaged in the same way with the environmental information provisions. As with the limited CJEU case-law, that is understandable given faithful implementation of Aarhus and the Environmental Information Directive in the Environmental Information Regulations.

74. There are however, three cases of interest in which the provisions of Aarhus on access to information did feature, albeit in the background.
75. The first is the *Office of Communications* case discussed above. As indicated, the CJEU has now given its answer and has favoured the approach of the majority, allowing for consideration of cumulative grounds of refusal to disclose in determining where the public interest lies. Of interest in the Supreme Court's judgment at the time it made the reference is the minority's concentration of the text of Article 4 of the Aarhus Convention and the use of the word "or" to distinguish between different grounds for refusal. The minority considered that this was consistent with the text of the Directive and, therefore, showed that the correct approach was one of disaggregation as opposed to accumulation.
76. The second case is *Birkett v. Department for Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, [2012] 2 CMLR 5. Mr Birkett was the founder of the Campaign for Clean Air in London. He made a request for information to Defra, relating to discussions between the previous Government and the Mayor of London on matters of air pollution and the compliance of the United Kingdom with EU air quality laws. The Department refused the request relying on the exemption in the Environmental Information Regulations for the disclosure of internal communications. Mr Birkett asked the Information Commissioner for a decision and he ordered the disclosure of the material. The Department appealed to the First-tier Tribunal (General Regulatory Chamber) (Information Rights) (the "FTT"). It continued to rely on the exemption for internal communications. However, it also raised for the first time the fact that some of the material was subject to legal advice privilege and so relied on the exemption for disclosure having an adverse effect on the course of justice, the ability of a person to receive a fair trial or the ability of the public authority to conduct an inquiry of a criminal nature and confidentiality provided by law. The question was whether it could rely on new grounds at that stage.
77. The FTT held that there was no good reason for the Department to rely on the new points at that stage and refused to consider them. The Department appealed to the Upper Tribunal, where the case was joined with an appeal involving the Home Office raising a similar issue. The Upper Tribunal accepted the Respondent's submissions. Only the Defra case proceeded to the Court of Appeal.

78. Sullivan LJ, giving the main judgment (with whom Carnwath and Lloyd LJ agreed) recalled the relationship between the Convention and the Directive. He then rejected the argument that a purposive interpretation of the Directive indicated that new grounds could not be relied on after the initial decision or review. He continued:

“20. A purposive approach to the interpretation of the Directive must consider the Directive as a whole. Three features of the environmental information regime are immediately apparent:

- (1) The relatively short time within which the initial decision to release, or to refuse to release (with reasons) must be made.
- (2) The broad scope of the review process under Article 6.
- (3) The balance that has to be struck between the public interest in the prompt release of environmental information and the need to avoid harm to the other important public interests listed in Article 12(2).

21. All three points are interrelated. The Directive does not proceed upon the unlikely premise that within such a tight timescale the public authority will always “get it right the first time”, hence the review process provided for by Article 6. While some decisions may be relatively straightforward, the question whether some information, and if so how much of that information, falls within one or more of the exceptions may well be a question of some complexity. Are documents protected by legal advice or litigation privilege, are there intellectual property rights in certain information, etc.? The exceptions are concerned with important public interests.”

79. The appeal was accordingly dismissed.

80. Finally, in *Smartsources v. Information Commissioner* [2010] UKUT 415 (AAC), the Upper Tribunal had to consider the whether a privatised water company was a “public authority” for the purposes of the Environmental Information Regulations. The Tribunal confirmed that the Regulations were designed to give effect to the UK’s obligations under the Aarhus Convention as well as under the Environmental Information Directive: paragraphs 23 and 26. The case is of interest for its detailed analysis of the application of the public authority test and the examination of whether the privatised water companies in question met that test.

Conclusion

81. It is evident that the Aarhus Convention has had a profound impact on both EU and domestic law on access to environmental information. It was instrumental in the formulation at the EU level of the contemporary legal framework for dealing with such requests which has been faithfully transposed into domestic law. The fact that the EU has embraced the Aarhus Convention so fully explains the absence of large numbers of cases analysing the interaction of

the two regimes. However, there are still a number of interesting decisions which cast light on the relationship between the Convention, the Directive and the domestic Regulations.

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