The Second Pillar
Public Participation in Decision Making

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Introduction

1. The second pillar of the Aarhus Convention relates to the public's participation in environmental decision making. It reflects the 8th and 9th paragraphs of the preamble and the Objective set out in Article 1 of the Convention.

2. Unlike the first pillar, which has been implemented by the European Union through Directive 2003/4/EEC and transposed in England and Wales through the Environmental Information Regulations 2004, the requirements for public participation set out in Articles 6 and 7 are implemented through Directive 2003/35/EC for public participation in the drawing up of plans and programmes (and the amendments it makes to the EIA Directive[1])[2] which is given effect to in our domestic law through a raft of primary and secondary legislation relating to the different areas which engage environmental decision making[3].

3. Although the Convention has not been directly implemented as part of our domestic law, the UK is a party to the Convention and the UK courts have

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[1] Now codified in 2011/92/EU.

[2] However, see Advocate General Kokott's Opinion in ***Inter-Environnement Bruxelles ASBL & Others v Région de Bruxelles-Capitale*** **(Case C-567/10) [2012] Env. L.R. 30** at **§23** where she said:-

> "However, the SEA Directive does not contain any indication that it is designed to transpose art.7 of the Aarhus Convention. Rather, recital 10 in the preamble to Directive 2003/35 shows that, in this regard, the Convention is to be transposed only in relation to plans and programmes under EU law—more specifically by Directive 2003/35 in relation to certain measures but, in future, by specific rules laid down in the relevant legislative act. Article 2(5) of Directive 2003/35 simply makes it clear that an environmental assessment in accordance with the SEA Directive is sufficient from the point of view of public participation."

[3] See defra's Aarhus Convention Implementation Report April 2008 available at http://archive.defra.gov.uk/environment/policy/international/aarhus/pdf/compliance-report.pdf.

acknowledged that due deference should be given to the decisions of the Compliance Committee[4].

Article 2 definitions

4. A distinction is made for the purposes of the Convention between "the public" and the "public concerned". The "public" is defined in paragraph 4 as meaning:-

> "… one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups";

whereas, the "public concerned" is defined more narrowly as meaning:-

> "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

Article 6

5. Article 6 applies to decisions relating to those *activities* which (a) are listed in annex I to the Convention; and (b) which, although not listed in annex I, may have a significant effect on the environment. The annex I activities reflect the broad types of development projects set out in Annex I to the EIA Directive albeit that the thresholds vary. Non-annex I activities which have a significant effect on the environment plainly includes development falling within Annex II to the EIA Directive but is not constrained by the indicative thresholds in the EIA Regs[5] transposing the EIA Directive and is, therefore, arguably wider.

6. Article 6, paragraph 2 sets out a requirement to give notice to the public concerned early in an environmental decision-making procedure of the matters identified in paragraph 2; and paragraph 3 provides that such public participation procedures should include reasonable time-frames for the different phases in the decision making process. Article 6, paragraph 4 further

4 See ***Walton v The Scottish Ministers*** **[2012] UKSC 44** at **§100**.

5 Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824.

requires that early public participation should be "when all options are open and effective participation can take place".

7. Article 6, paragraph 5 requires parties to the Convention to encourage applicants to engage with the public concerned before applying for a permit for the activities to which Article 6 applies.

8. Article 6, paragraph 6 requires the competent public authority to give the public concerned access, free of charge and as soon as it becomes available (but subject to Articles 3 and 4), to all information relevant to the decision making process to which Article 6 applies and specifies a minimum level of information.

9. Article 6, paragraph 7 provides as follows:-

> "Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity."

10. It should be noted that the Convention rights granted under paragraph 7 are in contrast to the other Article 6 rights and apply to the "public" and not to simply to the "public concerned". Thus, any member of the public is entitled to submit comments etc. during the public participation procedures and the public authority cannot reject such comments on the grounds that the person submitting them is not a member of the public concerned[6].

11. Article 6, paragraph 8 requires due account of the outcome of public participation to be taken into account when a decision is taken and paragraph 9 seeks to ensure that the public is promptly informed of the decision along with the reasons and consideration on which the decision was based. Article 6, paragraph 10 requires the provisions of paragraphs 2 to 9 to be applied where a public authority reconsiders the operating conditions for an activity within

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[6] In ***R (on the Application of Halebank Parish Council) v Halton Borough Council*** (2012) (unreported) HHJ Raynor QC held that a parish council was a member of the public in granting a PCO.

the scope of Article 6, paragraph 1. Article 6, paragraph 11 relates to the release of GMOs into the environment.

Article 7

12. Article 7 is concerned with the public's participation in the preparation of *plans*, *programmes* and *policies* relating to the environment. However, it imposes different requirements depending on whether what is being prepared is (a) a plan or programme; or (b) a policy.

13. As regards plans/programmes, Article 7 requires the Convention Party to make appropriate practical and/or other provisions for the public to participate during the preparation of the plan or programme but within that broad framework expressly applies the provisions in paragraphs 3, 4 and 8 of Article 6. Notably, the right to submit comments in Article 6, paragraph 7 (whether in writing or at a hearing) is not expressly incorporated into Article 7. This does not mean that the right for the public to comment is excluded but that the Convention does not seek to constrain the procedure for public participation in relation to the plans/programmes to the submission of comments in writing or at a public hearing and gives the Convention parties flexibility in defining the exact procedures for participation. The public participation procedures required through the SEA Directive is one method of implementing Article 7.

14. So far as policies are concerned, the requirements of Article 7 are less prescriptive and only require the Convention party to endeavour to provide opportunities for public participation in the preparation of policies relating to the environment to the extent appropriate.

Domestic law – Article 6

15. As noted above, the public participation requirements of Articles 6 and 7 are given effect to by the many statutory provisions and regulations dealing with discrete areas relating to decisions taken by public bodies where the impact on the environment is engaged. Typically, and in the context of development projects which engage the EIA Directive (i.e. non-annex I activities which

nonetheless may have a significant effect on the environment) those provisions allow for notification and publicity to be given to the public of the proposed project, a period during which representations can be made by the public followed by the public body making a decision.

16. In the context of development control decisions falling within the scope of the Town and Country Planning Act 1990, the procedural requirements are set out in the Town and Country Planning (Development Management Procedure) (England) Order 2010 ("the DMPO 2010"). Thus, article 11 requires an applicant for planning permission to give notice to the landowner to which the application relates and article 13 requires the local planning authority to publicise an application for permission for EIA development by site display for not less than 21 days and by notice in a local newspaper. The notice must also contain the information set out in art. 13(7) including:-

- the address/location of the proposed development;
- a description of the development;
- the date by which any representations must be made;
- where/when the application may be inspected; and
- how representations may be made about the application.

17. Thereafter, article 28 requires the local planning authority to take into account any representations made about an application within 21 days and the local planning authority cannot determine the application in less than 21 days beginning with the date when the art. 13 notice was displayed and has up to 16 weeks to do so in relation to EIA development[7]. Article 31 requires the local planning authority to give notice of its decision on the application for planning permission (including its reasons) and, in relation to EIA development, that the environmental information has been taken into consideration by the authority.

18. The procedural requirements in the DMPO 2010 therefore arguably ensure compliance with the requirements of Article 6 of the Convention and there is

[7] See reg 61(2) of the EIA Regs 2011.

no decision of the UK courts where a claimant has successfully challenged a decision to grant planning permission on grounds relating to a failure to engage the public and/or a breach of Article 6 of the Convention where there has been compliance with the publicity and consultation requirement of the DMPO 2010 or its predecessor[8].

19. In the ***Walton*** case, Mr Walton challenged the road orders made authorising the construction of a new road network around Aberdeen referred to as the AWPR. In addition to the domestic proceedings, Mr Walton also submitted a communication to the Aarhus Compliance Committee alleging, *inter alia*, a breach of Article 6 for failing to seek comment on the proposed route in an open way and failing to invite the public to submit comments, information, analyses or opinions on the proposed route[9].

20. In rejecting the communication as regards the alleged non-compliance with Article 6, paragraph 4 the Committee noted that the public "had a number of opportunities during the ongoing participation process over the years to make submissions that the AWPR not be built, and to have those submissions taken into account". Moreover, the Committee was unable to conclude that there had been non-compliance with Article 6, paragraph 7 even though it expressed a concern that there had been no *informal* consultation as regards the final route selection and decision to upgrade the road from a single to a dual lane carriageway. It also found that there had been public participation through the statutory authorization process following the publication of the draft Schemes and Orders and the subsequent statutory consultation. In the Supreme Court, Lord Carnwath referred to the findings of the Compliance Committee and in dismissing Mr Walton's domestic law fairness ground of challenge said at paragraph 101 that:-

> "It seems therefore that this case has not disclosed any defects in domestic procedures judged by European standards."

8 The Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419)

9 See §§3 and 50 - 57 of the Compliance Committee's Report adopted on 25 February 2011 ACCC/C/2009/38.

21. However, the Compliance Committee is considering further communications relating to Article 6 from Mr Ewing (ACCC/C/2011/60) and the Kent Environment and Community Network ("KECN") (ACCC/C/2010/45). In both cases the Committee has determined that the communications are admissible although there has been considerable further correspondence and additional information submitted in relation to each case between the communicant, the UK and the Committee. Between them, these communications identify two particular matters which engage Article 6. The first relates to the procedures adopted by local planning authorities for allowing members of the public to speak at planning committee meetings. The second, is concerned with third party rights of appeal.

Determination of applications

22. Local planning authorities have power under section 101 of the Local Government Act 1972 to make arrangements for discharging their function of determining planning applications and that function is generally discharged by the authority through a committee, sub-committee or an officer of the authority. Schemes of delegation vary widely, but the very great majority of planning applications are determined by officers of the authority[10] rather than a committee or sub-committee. Those applications which are determined by committee are invariably for larger and more controversial development proposals which are more likely to be within the scope of the Convention (e.g. annex I activities or EIA development).

23. Any member of the public is able to make written representations in response to a planning application and the local planning authority is obliged to take those representations into account in determining the application. However, there is no statutory right for objectors to make oral representations when applications are determined by, for example, a planning committee at a meeting. As a matter of practice, many local planning authorities do allow third parties to address the committee as part of the process of determining

[10] About 90% of all planning decisions are taken by individual officers – see **Planning Law 12th edition**, Victor Moore & Michael Purdue at §12.03.

applications but there are significant variations between local planning authorities.

24. Some do not allow members of the public to make oral representations at all albeit the meeting is a public one and in such authority areas the application is determined on the basis of the report prepared by the planning officer and discussion amongst the members of the committee (e.g. Westminster City Council).

25. Other authorities allow objectors to speak but, where they do so, generally impose a strict limit on the amount of time given to objectors. Frequently, third parties are given no more than 2 or 3 minutes and rarely are they allowed to speak for more than 5 minutes. In many authorities they are required to have registered to speak before the meeting. Take the London Borough of Camden as an example. There the Development Control Committee permits oral representations to be made (referred to as "deputations") in the following circumstances[11]:-

- the person wishing to speak must have a planning related interest that could be affected directly by the matter under consideration (e.g. local groups and neighbouring occupiers);
- a request to speak must be made by email, fax or letter by 9 am the day before the meeting and must be accompanied by a statement not more than 2 sides of A4 paper;
- the person wishing to speak is limited to 5 minutes and can only raise the issues set out in the deputation statement;
- where there is more than one deputation on the same item the 5 minutes is shared between the deputations; and
- if the time limit is exceeded, the Chair will immediately call for an end to the speech.

26. The Article 6, paragraph 7 right is to a procedure for public participation which allows the public (not simply members of the public concerned) to submit in writing or, as appropriate, at a public hearing any comments etc.

[11] See the LB Camden publication - Planning Applications Putting forward your views to the Development Control Committee.

The Implementation Guide to the Aarhus Convention[12] acknowledges that paragraph 7 provides for two possible means for the submission of comments etc. and there is no requirement for a public body to provide both. However, the Guide does say in relation to public hearings or inquiries that they:-

> "… offer the opportunity for the applicant to present the project, and respond to questions and comments. The public hearing also provides a venue for dialogue amongst stakeholders."

27. The Guide also includes the following Note:-

> "**Public hearings**
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> In most UN/ECE countries, public hearings may be held withinthe EIA process and other decision-making procedures. The hearings should be held after a sufficient period of time from the moment of notification to allow the public to study the materials and other information relevant to the proposed activity, and to come up with opinions, suggestions, comments, alternatives or questions. Public hearings usually bring members of the public together with the public authority responsible for decision-making and the applicant or proponent of the proposed activity. Experts and other authorities may also be involved in the hearing. Such meeting is an opportunity for the public to submit, in writing or orally, the comments, information, analyses or opinions that it considers relevant to the proposed activity."

28. It seems at the very least arguable, and the Compliance Committee will have to decide, whether a public authority which holds a public meeting as part of its procedure for determining applications relating to Article 6 activities is complying with Article 6, paragraph 7 where it holds a meeting which is open to the public but does not at that meeting permit any oral representations to be made by members of the public (e.g. Westminster CC); or proscribes the right to be heard at the meeting to a limited section of the public and prescribes how the representations are to be made (e.g. LB Camden). Indeed, one of Mr Ewing's complaints to the Compliance Committee is that LB Camden has refused his deputation requests because he didn't live in the

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[12] In ***Solvay v Région Wallonne*** **(Case C-182/10) [2012] Env. L.R. 27** the ECJ said at **§28** 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."

immediate locality and therefore didn't qualify for the right to make a deputation notwithstanding that he had made written representations. As a member of the public he has a right to make representations whether or not he has a direct interest.

29. The contrary view is that if there is an adequate procedure which allows any member of the public to make written comments etc. on the application (which under the DMPO 2010 there is) that is sufficient for the purposes of Article 6, paragraph 7; and the fact that the public authority additionally includes as part of its procedures a public meeting (which of itself does not meet the requirements of paragraph 7) does not mean that there is a breach of Article 6.

Third Party rights of appeal

30. Applicants who are refused planning permission (or are unhappy with the conditions imposed on the grant of a planning permission) have a statutory right of appeal. However, there is no such right given to objectors to appeal against a local planning authority's decision to grant planning permission. An objector might, if the project is one of more than local significance, persuade the Secretary of State to "call in" the application for his own determination under section 77 of the TCPA 1990[13]. And, if the application is called in, the Secretary of State normally holds a Public Inquiry at which the merits of the proposed development will be considered with a full opportunity usually given to the public to make written and oral representations at the Inquiry. However, where an objector fails to have an application called in and planning permission is granted by the local planning authority, his only remedy is to challenge the decision to grant permission through judicial review. Save where the decision is ***Wednesbury*** unreasonable, the Court will be unconcerned

[13] ***In R(Adlard) v Secretary of State*** **[2002] EWCA Civ 735** dismissed a challenge to the Secretary of State's decision not to call in an application for a controversial new 30,000 seat stadium in Fulham and held that Article 6 of the European Convention on Human Rights was not breached by the absence in the statutory planning scheme for the provision of an oral hearing before permission was granted but made clear that exceptionally a local planning authority might be acting unfairly by denying an objector an oral hearing – see **§§31 & 32**.

with the merits of the development and limit its consideration to the lawfulness of the decision making process.

31. In the absence of an Article 6, paragraph 7 compliant public hearing or inquiry prior to the determination of the Convention activity the argument in favour of giving third parties a right to appeal (including full consideration of the merits) against the grant of planning permission in relation to activities that fall within the scope of the Convention has some force. Although the absence of any such right is more relevant to Article 9 and the Convention's third pillar (access to justice) the creation of a right for third parties to have the merits of proposed development examined at a public inquiry, at which their comments could be expressed and taken into account, would further the public participation requirements of Article 6[14].

32. In addition to these two aspects of our domestic law and procedures, there are 3 other matters which deserve some consideration in the context of Article 6. The first is the system of wildlife licensing. The second is the statutory period given to the public to make representations on planning applications. The third is the application of Article 6 in a multi-stage consent procedure (e.g. the grant of outline planning permission followed by the subsequent approval of reserved matters).

Environmental licensing

33. Under the Wild Birds and Habitats Directives protection is given to a host of birds, animals and habitats. These have then been transposed into our domestic legislation through the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 (SI 2010/490). However, in addition to these two principal conservations regimes there are a number of species specific acts under which licences may be granted in certain circumstances for activities that affect wildlife and are otherwise prohibited.

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14 The Law Commission is currently considering responses to its Consultation Paper on Wildlife Law including the option of a right of appeal for applicants and third parties in the context of wildlife licensing – see Chapter 10.

34. A feature of the current statutory regimes is the absence of any requirement for the publicity of and consultation on applications for licenses, as is required in relation to planning applications. Moreover, where annex 1 development cannot proceed without the appropriate wildlife licences being granted or the development does not fall within annex 1 but, nonetheless, a decision to grant the licence may have a significant effect on the environment, there is a case to be made that the public participation requirements of Article 6 should be applied and, in the absence of any statutory regime requiring the publication, consultation and ability of the public to make representations in relation to the grant of a licence that there is non-compliance with Article 6, paragraphs 2, 3, 4, 5, 6, 7, 8 and/or 9. One possible solution would be to introduce a statutory appeal regime in the context of wildlife licensing. However, to comply with Article 6, paragraph 7 the right would have to be given to any member of the public and not simply the applicant or third parties as members of the public concerned (a wider right than the Law Commission proposes as its third option[15]).

Consultation periods

35. Article 6, paragraph 3 requires that the public participation procedure should include reasonable time-frames for different phases and allows for sufficient time for informing the public and for the public to prepare and participate effectively in the decision-making process.

36. The DMPO 2010 provides for a period of not less than 21 days following publication of the requisite notice notwithstanding that in relation to EIA applications the time given to the local planning authority to determine the application is 16 weeks. In many cases, 21 days may be adequate for members of the public to inspect the application documents and be in a position to make considered comments in writing. Moreover, local authorities do not generally exclude from consideration representations that are made after the consultation period has ended but before a decision is taken. However, there are also cases where the scale, location or impact of the development is such

15 See §10.4 of the Law Commission's Wildlife Law Consultation Paper.

that a large amount of information is submitted with the application and it is unrealistic to expect members of the public to be able to inspect or obtain, and then read and understand, the information in order to make informed comments and representations. In such cases, giving the public only 21 days within which to make representations may not be adequate to ensure effective public participation as required by Article 6[16].

37. A similar point might be made in relation to the availability of the reports prepared for local planning authority development control committees. Publication of the report 5 working days before the meeting may be adequate in most cases but it may be wholly unrealistic to expect the public to absorb the contents of an officer's report into a large and complex scheme (which may run to hundreds of pages and have annexed to it further documents) before an application is considered at a planning committee meeting.

Multi-stage consent procedures

38. In the ***Barker***[17] case, the ECJ held in relation to the EIA Directive that where the national law provides for a multi-stage consent procedure involving a principal decision (e.g. the grant of an outline consent) and an implementing decision (e.g. reserved matters approval) environmental assessment may be necessary in respect of a project even after the grant of the outline decision and before the approval of reserved matters. In such a case, the ES would have to be produced and published in accordance with the EIA Regs 2011 implementing the EIA Directive. However, the submission of an application for approval of reserved matters is not an application for planning permission and the publicity and consultation requirements in the DMPO 2010 (which otherwise ensure compliance with Article 6) do not apply in relation to such applications. Consequently, and by analogy with the ECJ's decision in ***Barker***, there is scope to argue that applications for reserved matters where they are concerned with activities within the scope of Article 6, paragraph 1

16 In ***R (on the Application of Halebank Parish Council) v Halton Borough Council* [2012] EWHC 1889** Gilbart J observed that the public participation requirement in Article 6 of the EIA Directive might not be met where the minimum consultation period under the DMPO 2010 had been complied with if in the circumstances of a particular case that period did not allow for an effective opportunity for participation – see **§§61 – 63**.

17 ***R (Barker) v Bromley London Borough Council* (Case C-290/03) [2006] QB 764**.

should be subject to the same public participation procedures as the principal application for outline planning permission to ensure compliance with Article 6.

39. A similar difficulty arising from the absence of any statutory regime might occur even where there is a single consent. ***In R (Midcounties Cooperative Limited) v Wyre Forest District Council*** **[2010] EWCA Civ 841** the local planning authority granted planning permission and imposed a badly worded condition which was intended to restrict the sales floor area of a proposed supermarket to a certain size. The claim failed in part because the owners and local planning authority had also entered into a section 106 agreement that limited the net sales area in a manner which was clear. This allowed the CA to hold that the planning permission and condition together with the s.106 provided a clear and certain form of control of the intended sales area. However, in reaching that conclusion Laws LJ at paragraph 25 said:-

> "It is true that the restriction imposed by the s.106 agreement does not have all the force of a planning condition. If it is desired to develop land without fulfilling an extant planning condition, a fresh application for permission must be made pursuant to s.73(1) of the 1990 Act to develop the land without complying with the condition; and "[o]n such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted" (s.73(2)). A s.106 agreement, by contrast, can be varied by further agreement, and can be discharged on application made to that effect after five years (s.106A)."

40. As with reserved matters applications, an application to vary or discharge a s. 106 agreement does not require advertisement and/or consultation under the statutory planning regime although a decision taken in relation to the discharge or variation of a s. 106 may be one which requires the public to be given the opportunity to participate in the manner contemplated by Article 6.

Domestic law - Article 7

41. An early example of reliance being placed in a domestic law context on Article 7 is ***R (Greenpeace Ltd) v Secretary of State for Trade and Industry***[18] in which Greenpeace sought to challenge the Government's

[18] **[2007] EWHC 311**.

decision to support nuclear new build in the Energy Review having earlier promised in a White Paper the "fullest public consultation" before the Government reached any decision to change its policy not to support new build nuclear. There were no statutory or other established procedural rules for taking such strategic policy decisions and the Court accepted that in the absence of such rules it may well be very difficult for a claimant to establish procedural impropriety[19]. In considering the justiciability of the claim, Sullivan J (as he then was) referred to the Convention and observed that in the development of policy in the environmental field "consultation is no longer a privilege to be granted or withheld at will by the executive"[20] and, given the importance of the decision, that it was difficult to see how anything less that the "fullest public consultation" would have been consistent with the Government's obligations under the Convention[21].

42. In 2009, the provisions of Article 7 were relied on again in the context of a challenge to the inclusion of land at Long Marston in a short list of proposed Eco-towns[22]. The claimant (Bard) alleged that the Secretary of State had failed adequately to consult in breach of the common law requirements, the SEA Directive and Article 7 of the Convention. The Secretary of State disputed the relevance of the Convention on the basis that it had not been incorporated into UK law. However, the Court concluded that it did not need to decide that question because the Convention did not add to the common law position for the purposes of that case.

Dated 8 February 2013

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19 See **§54**.
20 See **§48**.
21 See **§51**.
22 ***R (The Bard Campaign) v Secretary of State for Communities*** **[2009] EWHC 308**.