

# Understanding the Aarhus Convention and implications for NPP

Thomas ALGE  
European ECO-Forum  
OEKOBUERO

*Workshop Vienna,  
26. November 2009*



- Ad hoc Coalition of environmental citizens organizations
- In the “Pan European region” (UNECE region..)
- Established in framework of “Environment for Europe” process in 1993

[www.eco-forum.org](http://www.eco-forum.org)  
[www.participate.org](http://www.participate.org)



## OEKOBUEURO

- 15 Austrian member organisations like Greenpeace CEE, FoE Austria (GLOBAL 2000), WWF Austria..

[www.oekobuero.at](http://www.oekobuero.at)

## Justice and Environment

Network of NGOs with environmental law focus

13 European member organisations

CEE and SEE base

[www.justiceandenvironment.org](http://www.justiceandenvironment.org)



## Aarhus and NPP - overview

1. The idea behind Aarhus
2. Three pillars of the Convention
3. Compliance mechanism
4. Mochovce case

## 1. The Aarhus spirit: The 1990 window of opportunity

-1989 aftermath

- Environmental democracy and justice became important

- Serious environmental problems in EECCA, CEE + SEE

- Some EU countries very progressive proposals

- New democracies open for transparency

## 1. Development

- **1990 UN-ECE conference: proposal to develop “environmental rights” documents**

- 1991 Environment for Europe process launched

- 1992 Rio principle 10

- **1995 Sofia guidelines**

- 1996 to 1998 negotiations

- **1998 adoption**

- 2001 entry into force

- **2004 Compliance Committee installed**

- 2008 MOP3

- Strong role of NGOs

## 1. The Aarhus spirit

- Environment is owned by public, not government, thus it is not justified to
  - not disclose environmental information
  - exclude public from environment related decision making
  - exclude public from access to justice in environmental matters

## 1. The Aarhus spirit

- „- Links environmental rights and **human rights**
- Acknowledges that we owe an obligation to **future generations**
- Establishes that **sustainable development** can be achieved only through the involvement of all stakeholders
- Links **government accountability** and environmental protection
- Focuses on interactions between the **public and public authorities** in a democratic context.“
- [www.unece.org/env/pp](http://www.unece.org/env/pp)

## 1. The Aarhus spirit

- Would not be possible today
- Growing resistance
- EU not progressive any more
- EU dominates (27 of 42 parties)

## 2. The Convention and its three pillars

Access to information

Public participation

Access to Justice

## First pillar: Access to information

### **Article 4: Information upon request**

- No interest to be stated
- Answer within 4 weeks
- Access to Justice (Art 9 par 1)

## First pillar: Access to information

### **Refusal of information**

- National defence or public security
- Commercial or industrial information
- Intellectual property
- ...

*“shall be interpreted in a restrictive way, taking into account the public interest served by disclosure” + whether relating to “emissions into the environment”.*

## First pillar: Access to information

### Refusal of information

- Compliance Committee (ACCC), Case 15  
Romania:

Committee “*doubts very much*” that (intellectual property) exemption “*could ever be applicable*” with regard to EIA-documentation

## Second pillar: Public Participation

Article 6: PP in decisions on specific activities  
- most specific and elaborated

Article 7: PP regarding plans and programmes

Article 8: Regulations and laws  
- more soft law

## Second pillar: Public Participation

### **Article 6: PP in decisions on specific activities**

- basically EIA and IPPC installations  
(reference in Annex I)

Make available “all information relevant to the decision-making”, including

- Physical and technical characteristics, including estimate of residues and emissions
- Significant environmental effects
- Measures to prevent, reduce effects..

## Second pillar: Public Participation

### **Key provisions**

- “Early and effective”
- “When all options are still open”
- “due account” shall be taken of PP in final decision
- Right to legally challenge outcome (Art 9/2 or 9/3)

## Third pillar: Access to Justice

Art 9 par 1: Information requests  
- anyone has right to challenge

Art 9 par 2: Article 6 decisions  
- NGOs and public concerned

## Third pillar: Access to Justice

Art 9 par 3: “acts and omissions by private persons and authorities that contravene environmental law”

- “Members of the public” (including NGOs) have right to challenge

## Implementation in EU

- **Different directives** on first and second pillars, including access to justice (most relevant EIA directive 85/337/EEC and environmental information directive 2003/4/EC)
- **EU level (regarding EU Institutions)**
  - Regulation 1367/2006/EC (Aarhus regulation)
  - Decision 2008/59/EC (specification of Aarhus Regulation)
  - Decision 2008/401/EC (Euratom specification)

## 4. Compliance mechanism

- In place since 2004
- Committee Members adopted by MOP
- Personal capacity
- Progressive case law developed
- “Public trigger”
- Full transparency

## 4. Compliance mechanism

### **Procedure**

- “Communication” submitted to ACCC
- Admissibility decision by ACCC in next meeting (once a quarter year)
- Questions to party concerned + communicant
- Public hearing in Geneva
- Draft decision, final decision
- Adoption at next MoP

### **Statistics**

#### **No of NEW Cases**

2004:	10	
2005:	5	
2006:	3	
2007:	4	
2008:	13	
2009 (June):	6	(9 until September)
Total:	41	

### Statistics

#### Total cases

Total	41
Closed	24
Pending	17

#### Admissibility

Admissible	31	76%
Not admissible	9	22%
Not decided	1	2%

### Statistics

#### Compliance (% of closed cases)

Admitted cases closed	16	
Admitted cases in compliance	6	37,5%
Non compliance (incl Belgium)	10	62,5%

**Average time** from communication to decision is approx 15 to 18 months

**Non compliance** is also non compliance with **EC treaty** since EC is party to the Convention

## 4. The Mochovce case at the Compliance Committee

- Submitted and admitted in July 2009
- ACCC asked questions to Slovak Republic and communicant: Deadline end November
- Public hearing expected in March 2010
- Decision between June and Sept 2010

## The Mochovce case

### **Legal issues**

- Does the NPP extension fall under the Convention?
- Permitting procedures took place in 2008 without public participation (PP)
- Construction started without prior PP
- The now pending EIA does not cure non compliance

## The Mochovce case

### Legal issues

Does the NPP extension fall under the Convention?

Yes, different legal bases in AC

1. Art 6 par 10 covers updating and reconsideration of permits
2. Annex I par 20: EIA necessary according to EIA directive
3. Annex 1 par 22: "Change and extension of activities" the meet criteria/thresholds for new project

## The Mochovce case

### Legal issues

Permitting procedures took place in 2008 without public participation (PP)

- PP is necessary when "permitting procedures" for certain activities are carried out (Art 6 par 1)
- Aarhus does not regulate PP in EIA procedures (though in practice often the same)
- Thus the fact that now EIA is carried out has no implications on the pending case

## The Mochovce case

### Legal issues

Constructions started without any PP

- PP has to be "early and effective", when all options are still open (Art 6 par 4)
- ACCC: EIA directive provides for PP before constructions start
- ACCC: PP necessary at different (major) permitting stages (concept of tiered/consecutive decision making) such as
  - Authorizing basic parameters and location
  - Technical design
  - Technical details
  - Not sufficient to have "fully fledged" PP only at one of the stages if not possible to change prior stages

## The Mochovce case

### Legal issues

Constructions started without any PP;  
consequences according to ACCC

- Not possible that "events on the ground have effectively eliminated alternative options" before PP
- "When there is no realistic possibility for certain technological choices to be accepted" this is not compatible with AC

## Contact

[thomas.alge@oekobuero.at](mailto:thomas.alge@oekobuero.at)

[www.oekobuero.at](http://www.oekobuero.at)

[www.participate.org](http://www.participate.org)

[www.justiceandenvironment.org](http://www.justiceandenvironment.org)