MINISTERUL MEDIULUI

GUIDE TO PUBLIC AUTHORITIES FOR PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION

The UNECE Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) has been opened for signature on 25th June 1998 during the Fourth Ministerial Conference "Environment for Europe". The Convention has been signed by 39 states and it has been ratified by 47 states. Romania ratified the Aarhus Convention by Law no. 86/2000 which entered into force on the 11th of July 2000.

The purpose of this Guide is to ensure that public institutions and authorities are properly informed of the rights and obligations established by the Aarhus Convention, focusing on providing guidance to civil servants involved in the process of addressing requests for access to environmental information regarding the unitary and effective application of its provisions. The Guide aims to facilitate access to the basic concepts of the Aarhus Convention in the process of addressing requests for environmental information requests, in accordance with the provisions of art. 4 of the Aarhus Convention. It will be sent to public authorities dealing with requests for environmental information and it is intended to raise awareness among them in relation to information of public interest, access to environmental information and classified information, especially regarding information considered to be professional secrets.

The Guide will include relevant examples from practice regarding the application of the provisions of the Aarhus Convention, in particular regarding **art. 2 para. (3)**, governing the definition of *"environmental information"* and **art. 4 paras. (3) and (4)**, which regulates the exceptions from providing access to information requested by a member of the public.

For the correct interpretation of the provisions of the convention, this document is elaborated based on the Aarhus Convention Implementation Guide[1] elaborated by the Aarhus Convention Secretariat, as well as on the national provisions and the provisions of the European Union, which transpose the provisions of the convention, as well as the relevant jurisprudence in this field.

WHAT IS THE SCOPE OF THE AARHUS CONVENTION?

Article 1 of the Aarhus Convention provides that every Party to the Convention must guarantee the right to access to information, public participation in decision-making and access to justice in environmental matters, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to their health and well-being. The Aarhus Convention highlights the link between environmental rights and

[1] Which can be found on the webpage https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf as well as on the webpage http://www.mmediu.ro/app/webroot/uploads/files/6_Aarhus_Implementation_Guide_interactive_eng.pdf

human rights, focusing on the fact that sustainable development can be maintained only by involving all interested factors and by strengthening the interaction between the public and public authorities at all levels.

In order to achieve these objectives, the Aarhus Convention stands on three pillars:

- ensuring the public has a greater access to environmental information of public authorities;
- ensuring public participation in environmental decision-making;
- ensuring wider access to justice in environmental matters in cases regarding infringement of the right to access to environmental information, as well as of the right to public participation in decision-making.

Based on the fact that the pillars of the Aarhus Convention imply a wide range of public institutions and authorities, it is necessary to ensure the compatibility of legislative measures and other implementing measures of the Convention, on one hand and the conduct of public institutions and authorities involved in their implementation, on the other hand.

WHY ACCESS TO ENVIRONMENTAL INFORMATION?

Access to environmental information is the first of the pillars of the Aarhus Convention, rightfully analysed with priority, since public participation in decision-making depends on ensuring access to information to the members of the public. However, the public can request access to environmental information for a series of reasons, and not only for participating in the decision-making process, based on the fact that this principle is consecrated not only at the international and European Union level, but also through the national provisions encompassed in a wide range of legal acts, for example, Law no. 544/2001 on free access to information of public interest, Government Decision no. 878/2005 on public access to environmental information, Order of the Minister of Waters and Environmental Protection no. 1182/2002 for the approval of the methodology of the management and the supplement of the information on environment held by the public authorities for the environmental protection.

Public access to information, generally speaking, is recognized as a fundamental human right encompassed in international instruments. For example, article 10 of the European Convention on Human Rights highlights the fact that *"freedom of expression shall include freedom to hold opinions and to receive and impart information and ideas."*

The access to information pillar has two components: passive and active. The first component (passive) refers to the public's right to request environmental information from public authorities and the obligation of the latter to provide such information in response to this request, as stated in article 4 of the Aarhus Convention. The second component (active) refers to the right of the members of the public to receive environmental information and the obligation of public authorities to disseminate information of public interest, without a specific request being addressed in this regard, as stated in article 5 of the Aarhus Convention.

At the national level, lato sensu, according to **article 1 of Law no. 544/2001 on free access to information of public interest**, *"free access of a person to any information of public interest [...] is one of the fundamental principles of the relationship between persons and public authorities, in conformity with the Romanian Constitution and with the international documents ratified by the Romanian Parliament."* Stricto sensu, according to **art. 1 para. (2) of Government Decision no. 878/2005 on public access to environmental information**, *"environmental information is progressively disseminated and brought to public access/ disposal for the aim of achieving the wider possible and systematic accessibility and dissemination of such information."*

WHAT DOES *PUBLIC AUTHORITY* MEAN AS REGULATED BY THE AARHUS CONVENTION?

The definition of ***"public authority"*** is very important for achieving the scope of the convention and it is divided in four categories, in order to ensure as broad coverage as possible:

a) *government at national, regional and other level*

The term **"government"** includes agencies, institutions, departments, bodies etc. of political power at all geographical and administrative levels. It is important to underline the fact that these entities are not only environmental authorities, provided that their activity and responsibilities are irrelevant in this regard. In this context, all public authorities, regardless their functions are covered by this article.

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);*

d) *the institutions of any regional economic integration organization which is a Party to the Convention.*

Regional economic integration organizations are defined by the Aarhus Convention as representing entities constituted by States which are members of the Economic Commission for Europe, which have transferred their competence over matters governed by the Aarhus Convention, including the competence to enter into treaties in respect to these matters. The only such organization is the European Union, which is a Party to the Aarhus Convention since its adoption on the 17th of February 2005. The institutions of the European Union, such as: the European Parliament, the Council of the European Union, the European Commission, the European Economic and Social Committee, the European Committee of the Regions, the European Investment Bank, bodies, offices and agencies of the European Union are public authorities in the light of article 2 para. (2) of the Convention.

For example, at national level, the activity of public authorities which interferes with the activity of environmental protection authorities that have been identified are: the Ministry of Environment and its subsidiary authorities, Ministry of Regional Development and Public Administration (including townhalls), the Ministry of Waters and Forests, the Ministry of Agriculture and Rural Development, the Ministry of Economy, the Ministry of Energy, the Ministry of Transport, the Ministry for the Business Environment, Commerce and Entrepreneurship, the Ministry of Health, the Ministry of Culture and National Identity, the Ministry of Communications and Information Society, the Ministry of Tourism, the National Agency for Natural Resources, the Nuclear Agency, the National Commission for Nuclear Activities Control, the National Institute of Public Health, the Lower Danube River Administration, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Ministry of Public Finance, the Ministry of Justice.

This list does not exclude the possibility that any other public authority can collect and process environmental information.

WHAT IS *ENVIRONMENTAL INFORMATION*?

The Convention recognizes the importance of the integration of environmental issues in decision-making at governmental level, as well as the necessity that public authorities hold clear, complete and updated environmental information.

The aim of the Aarhus Convention is not that of defining the term ***"environmental information"*** in an exhaustive manner, allowing a certain level of interpretation on behalf of the public authorities, but rather offers, in accordance with article 2 para. (3), a wide definition divided into three categories:

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 and 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 analysis 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).*

Public authorities shall not narrow the level of interpretation of the notion *"environmental information"*. Environmental information can be found in any form: written, visual, audio, electronic or any other material form.

The definition does not include bodies or institutions acting in a judicial or legislative capacity. This exception applies not only to national parliaments or courts of justice, but also

to executive bodies, only for those situations when they perform legislative or judicial functions. However, authorities performing such functions can voluntarily ensure access to information which is subject to such procedures, without being considered non-compliant with the provisions of the Convention.

WHO CAN REQUEST ENVIRONMENTAL INFORMATION?

Environmental information can be requested by any natural or legal person, and, according to the national legal provisions and with the practice in this field, by any organization, association or their groups, including entities without legal personality, without an interest having to be stated. Access to environmental information must be ensured to the categories of persons previously mentioned, regardless of citizenship, nationality, domicile or residence.

WHAT IS A REQUEST FOR ENVIRONMENTAL INFORMATION?

A *request* for environmental information can represent any communication from a member of the public to a national authority for such information.

The Convention does not provide for a specific form of such a request, meaning that any request, written or oral, will be considered valid. However, a clearer content of the request helps in avoiding delays from public authorities in providing an answer, especially when the relevance for the environment of the requested information cannot be easily established.

A situation where public authorities from Romania did not correctly interpret the requested information as representing *"environmental information"* had been analysed, for example, in the Compliance Committee's findings and recommendations with regard to communication ACCC/C/2012/69[2] concerning compliance by Romania. Public authorities refused to provide access to the requested information on the grounds that it does not fall within the definition of *"environmental information"* in article 2, paragraph (3) of the Convention. More exactly, the arguments for the refusal were those that the archaeological discharge certificate, as well as the accompanying documentation, including the archaeological study, cannot be considered as representing *"environmental information"* as defined by the Convention. Moreover, it had been stated that neither the mining licences, nor other information regarding the mining activity represent environmental information. However, based on the Compliance Committee's analysis and interpretation, all these documents represent *"environmental information"*.

The Committee recalls the fact that de definition of *"environmental information"* in the Convention includes, inter alia, any information of any material form on *"cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment."* Therefore, the archaeological study contains information on the state of cultural sites and built structures (in this case, the Roman ruins), which may be affected by

[2] Document ECE/MP.PP/C.1/2015/10

activities or measures, including administrative measures. For example, the archaeological discharge certificate represents *environmental information*, as provided in art. 2 para. (3), because it is an administrative measure which affects or is likely to affect the state of the elements of the environment (for example, soil, land, landscape and natural sites). The Committee considers that the definition of environmental information is wide enough to include the archaeological study.

The Convention does not establish criteria regarding requests of environmental information, but provides that the refusal for providing is justified when the request is manifestly unreasonable or formulated in too general a manner.

IS JUSTIFYING AN INTEREST NECESSARY WHEN REQUESTING ENVIRONMENTAL INFORMATION?

Public authorities must provide access to environmental information, by also ensuring compliance with the national legal provisions and to also provide the public with copies of the actual documentation containing or comprising such information, without an interest having to be stated.

Public authorities shall not impose any condition regarding the existence of an interest on behalf of the member of the public who requested the information, and, therefore, the refusal to provide such information by a public authority based on the lack of such interest or because it was not provided with a reason for such a request is not allowed under the provisions of the Convention.

WHAT FORM SHALL THE ENVIRONMENTAL INFORMATION DISCLOSED BY A PUBLIC AUTHORITY HAVE?

As a rule, public authorities shall provide the environmental information in the form requested by the members of the public (on paper, electronic form, video material, recording etc.).

However, the Convention provides certain exceptions to the requirement that information should be provided in the form requested by a member of the public:

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.

In the light of this exception, several benefits can be highlighted for the public authority having the requested environmental information in a different form than the one specified by the member of the public. For example, if the public authority has the information in electronic form, and a member of the public requests for the written form, on paper, providing it by the public authority could be done much faster in the electronic form, with lower costs or no costs at all.

ii. The information is already publicly available in another form – from this perspective, we need to underline the fact that the public authority shall provide the information already publicly available in another form, when it is not easily accessible to the member of the public who requested it. Therefore, it is necessary that the information is accessible, and its form is the functional equivalent of the form requested (for example, it cannot be a summary).

WHEN SHALL THE ENVIRONMENTAL INFORMATION BE DISCLOSED BY A PUBLIC AUTHORITY?

As a rule, environmental information which had been requested by a member of the public shall be made available by the public authority as soon as possible and at the latest within one month after the request has been submitted.

"As soon as possible" – practice has shown than this term can differ depending on the organizational aspects of each public authority, but, in more general terms, it shall be understood as representing a few days from the date of the submission of the request for environmental information to that public authority.

By exception, if the volume and the complexity of the information justify an extension of this period, the environmental information can be made available at the latest within two months after the request. In this case, the member of the public needs to be informed by the public authority about the extension of this timeframe, but also about the reasons which led to such an extension. In this regard, criteria could be established regarding qualifying the requested information as presenting a certain level of complexity or implying a volume which justifies the extension of the term up to two months. The national legislation completes the provisions of the Aarhus Convention regarding the extension of the term for providing a response up to two months, establishing deadlines for public authorities to comply with for justifying the timeframe for providing a reply. In this regard, **Government Decision no. 878/2005** on public access to environmental information provides that *"in such cases the requester is informed, as soon as possible and at the latest within one month, about the extension of the deadline for providing a response and the reasons which justify such an extension."*

The Aarhus Convention does not clearly establish the moment these terms begin, referring to the moment of the submission of the request of environmental information by a member of the public. The provisions of the Convention are completed by provisions encompassed in the national legislation in force. For example, **Government Decision no. 878/2005** on public access to environmental information provides, in article 4, para. (2), that the term starts from the date of receiving the request by the public authority, more exactly, from the date of its registration.

WHEN CAN A REQUEST FOR ENVIRONMENTAL INFORMATION BE REFUSED BY A PUBLIC AUTHORITY?

The Aarhus Convention provides situations when the public authority can refuse providing environmental information to a member of the public. Therefore, such a refusal is permitted in the following cases:

1. **the public authority to which the request is addressed does not hold the environmental information requested;**

The information held by a public authority shall not be limited to information that was generated by or falls within the competence of the public authority, but also includes the environmental information relevant for its functions[3]. However, in the situation the public authority does not hold the requested environmental information, it has two possibilities:

- it shall inform the applicant, as soon as possible, regarding the public authority which may hold the environmental information;
- it can transfer the request, as soon as possible, directly to the correct public authority and notify the applicant that it has done so[4].

At national level, **Government Decision no. 878/2005** on public access to environmental information establishes a timeframe of maximum 15 days after the date of the request in order to proceed according to the abovementioned provisions.

However, it is important to note that the public authority to which the request is addressed and which does not hold the requested environmental information, does not have the obligation to guarantee that the public authority which holds it will make it available to the applicant.

2. **the request is manifestly unreasonable or formulated in too general a manner**

The Aarhus Convention does not establish criteria for considering a request *"manifestly unreasonable"*, but this situation cannot refer to the volume and complexity of the information, because such cases may only justify an extension of the timeframe the public authority shall provide the requested environmental information to two months, as mentioned before.

Public authorities can, as well, refuse a request for environmental information if it is *formulated in too general a manner*. The Convention does not define this criterion, but an example in this regard could be the request by a member of the public for all documents regarding a specific animal breed. Such a request can be considered too general, therefore, the public authority, taking into account the national legal provisions (which are more restrictive in this case) shall request further information in order to identify it and only in the situation where the applicant has not transmitted this information in time, the public authority has the right to refuse the request.

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[3] According to the provisions of article 5, para. (1), letter (a) of the Aarhus Convention

[4] An example in this regard in the jurisprudence of the courts of justice in Romania is analysed in Civil Decision no. 2104/2012 of Court of Appeal Constanța (http://www.rolii.ro/hotarari/589a1a1ae490098c0a000411)

The Convention highlights the obligation of the Parties that, through their officialities and public authorities, to assist and to guide the public with the aim of facilitating access to information[5]. By doing so, situations when a request is manifestly unreasonable or formulated in too general a manner could be avoided.

Government Decision no. 878/2005 on public access to environmental information

ART. 5 (1) *In case the request is too general, unclear or it does not allow for the identification of the requested information, the public authority asks the applicant, as soon as possible and at the latest within one month after the request has been submitted, to specify what he/she is requesting. In this regard, the public authority also helps the applicant through providing information related to the use of public registers containing environmental information held by it.*

(2) *The public authority can refuse the request for information on the basis that the request is formulated in too general a manner, if the applicant had not specified what he/she requests, according to para. (1), within two months since the public authority transmitted the specifying indications.*

3. 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

The Aarhus Convention does not define *"documents in course of completion"*. However, it relates to the process of preparation of the information or the documents containing such information, and not to any decision-making process for the purpose of which the given information or document has been prepared. More exactly, a request for raw environmental information (for example, data collected from an air quality monitoring station) cannot be refused on the grounds that it is material in course of completion for its publication after validation and processing. Moreover, the existence of documents containing *draft* environmental information (not yet finalized or the decision referring to such information has not been issued) does not justify the refusal on the basis of this exception, and therefore they shall be made available. For the correct interpretation of the words *"in course of completion",* the provisions of the Convention are intended to clarify this aspect, for example regarding public participation in decision-making where certain draft documents must be accessible for public review: draft of documents such as permits, environmental impact assessments, policies, programmes, plans and executive regulations that are open for comment under the Convention cannot be considered "materials in the course of completion" under this exception.

For example, in the findings and recommendations of the Aarhus Convention Compliance Committee, ACCC/C/2010/51[6] regarding Romania, the Committee stated that

[5] Article 3, para. (3) – Aarhus Convention
[6] Document ECE/MP.PP/C.1/2014/12

"material in the course of completion" relates to the process of preparation of information or a document and not the entire decision-making process for the purpose of which given information or documentation has been prepared.

Government Decision no. 878/2005 on public access to environmental information

ART. 11 (2) *In case a request for environmental information is refused for the reason that it is a material in course of completion, the public authority shall inform the applicant about the name of the public authority which makes the material and the approximate date of its finalization.*

Regarding **"internal communications"**, the opinions and declarations expressed by public authorities in their capacity of consultative entities in the process of decision-making are not subject to this exception. Moreover, once a particular information has been disclosed by the public authority to a third party, whoever the third party is, it cannot be claimed to be an "internal communication".

WHAT ARE THE REASONS FOR A REFUSAL OF A REQUEST OF ENVIRONMENTAL INFORMATION TAKING INTO ACCOUNT THE EFFECT THE DISCLOUSE COULD HAVE?

A request for environmental information can be refused in certain situations, if the disclosure would have negative effects on other information, rights, interests or aspects. It is important to mention that in any case, the public interest served by disclosure shall be compared with the interest satisfied by keeping the confidentiality.

1. The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

The Aarhus Convention does not define *"proceedings of public authorities",* but it can be interpreted as relating to proceedings concerning the internal operation of a public authority and not to deliberations made in its field of competence. In this regard, public authorities do not have a right to unilaterally decide whether a proceeding is confidential or not for refusing access to environmental information, but it is necessary that national legislation defines and establishes some criteria for determining the confidentiality.

2. International relations, national defence or public security;

When providing environmental information would adversely affect international relations, national defence or public security, public authorities shall analyse whether, by disclosing environmental information, one of these elements, which are not defined by the Convention, is affected.

3. **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**

"The course of justice" refers to ongoing proceedings in front of a court, proceedings which are susceptible to be affected by the disclosure of the requested information.

The right of a person to receive a fair trial is a fundamental right, consecrated at international level (for example, the European Convention on Human Rights[7]), as well as at the European Union level (for example, The Charter of Fundamental Rights of the European Union[8]) and at the national level (through constitutional provisions[9]) and through other legal provisions). In case the disclosure of the requested environmental information would adversely affect exercising this right, the public authority can refuse to disclose it. This provision must be interpreted in the light of the provisions regarding the rights of the accused person.

Public authorities may refuse disclosing environmental information when such a request has been submitted to it, if this would adversely affect the conduct of an enquiry of a criminal or disciplinary nature. It is important to state that neither the provisions of the convention, nor the national provisions include all types of enquiries; for example, civil and administrative enquiries are not covered by this exception.

4. **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;**

This exception from disclosing environmental information aims to protect certain legit economic interest of private entities, as well as of public entities or of the State itself.

For this exception to be applicable, allowing public authorities to refuse a request for information, national legislation shall clearly provide the significance and the type of commercial and industrial secrets. Moreover, the confidentiality shall lead to the protection of a legitimate economic interest. For example, a State-run enterprise operating in a monopolistic manner could hardly prevail of the confidentiality of commercial information, since there are no companies which could benefit from the disclosure of such information.

Law no. 182/2002 on the protection of classified information, defines[10] series of important terms for determining the confidential nature of certain information, as follows:

- ***Classified information*** *– any information, data, documents of interest for the national security, which must be protected because of their degree of importance and the consequences that might arise due to their unauthorized disclosure or dissemination;*

[7] The European Convention on Human Rights – article 6
[8] The Charter of Fundamental Rights of the European Union – art. 47
[9] Constitution of Romania – art. 21
[10] Law no. 182/2002 on the protection of classified information, article 15

- ***State secret information*** *– any information related to the national security whose disclosure could be detrimental to the national security and state defence;*
  - → ***Top secret with high importance*** *– information whose unauthorized disclosure may bring about damage of an exceptional gravity to the national security;*
  - → ***Top secret*** *– information whose unauthorized disclosure may bring about serious damage to the national security;*
  - → ***Secret*** *– information whose unauthorized disclosure may bring about damage to the national security.*
- ***Secret of service*** *– any information whose disclosure could harm a legal person under public or private law.*

Any information related to *"emissions into the environment"* will be disclosed, regardless the quantity of such emissions. In this regard, public authorities do not have the right to refuse a request for information related to emissions into the environment, by invoking one of the exemptions provided by the convention. This matter is also reflected in **Government Decision no. 878/2005** on public access to environmental information[11].

According to **Directive 2010/75/EU** of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control), ***"emission"*** means *"the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land."* Similarly, **the Emergency Ordinance no. 195/2005 on environmental protection** defines the notion of ***"emission"*** as meaning *"the direct or indirect release of substances, from punctual and diffuse sources, of substances, vibrations, electromagnetic and ionizing radiations, heat or noise into the air, water or land."*

Case C-422/14 Bayer CropScience and Stiching de Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden of the European Court of Justice

Para. 71. Nothing in the Aarhus Convention [...] permits the view that the concept of *"emissions into the environment"* should be restricted to emissions emanating from certain industrial installations.

Para. 72. [...] Such a restriction would be contrary to the express wording of point (d) of the first subparagraph of Article 4(4) of that convention. That provision states that information on emissions which is relevant for the protection of the environment must be disclosed. Information concerning emissions emanating from sources other than industrial installations, such as those resulting from the application of plant protection products or biocides, are just as relevant to environmental protection as information relating to emissions of industrial origin.

[11] Government Decision no. 878/2005, article 12 para. (4)

Para. 75. It follows from the above that it is not necessary to make a distinction between the concept of *"emissions into the environment"* and those of *"discharges"* and *"releases"* or to confine that concept to the emissions covered by Directive 2010/75, excluding the release of products or substances into the environment emanating from sources other than industrial installations.

Para. 79. *"Emissions into the environment"* covers emissions which are actually released into the environment at the time of the application of the product or substance in question and foreseeable emissions from that product or that substance into the environment under normal or realistic conditions of use of that product or substance corresponding to those under which the authorisation to place the product in question on the market is granted and which prevail in the area where that product is intended for use.

5. Intellectual property rights

The concept of intellectual property rights includes copyright (regarding art, literature, music etc.), patents (ideas and inventions), trademarks (symbols, names), commercial secrets, databases, drawings and industrial designs.

Public authorities have the right to refuse disclosing environmental information on the basis that intellectual property rights would be adversely affected, when this refusal is founded and justified.

For example, in the findings and recommendations of the Aarhus Convention Compliance Committee, ACCC/C/2005/15[12], regarding Romania, it examined the legality of qualifying an environmental impact assessment documentation as representing the property of the person that undertook the documentation. The Compliance Committee concluded that environmental impact assessment studies are prepared for the purposes of the public file in administrative procedure and, based on it, the environmental agreement is issued, which is an administrative act representing environmental information, because it is an administrative measure[13]. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.

Moreover, in the findings and recommendations of the Aarhus Convention Compliance Committee, ACCC/C/2012/69[14], regarding Romania, it stated the fact access to an archaeological study shall not be refused on the ground that the study is the intellectual property of the archaeologist who carried out the study, especially when this study is the basis for issuing the archaeological discharge certificate. In this regard, an archaeological study should be treated similarly to EIA studies.

6. 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

[12] Document ECE/MP.PP/2008/5/Add.7

[13] Art. 2, para. (3), letter b) – Aarhus Convention

[14] Ibid. p.1

Public authorities shall ensure that by disclosing environmental information, the provisions regarding the protection of personal data are complied with and, therefore, the rights protected by these provisions are not infringed. This exception does not refer to legal persons, such as companies or organizations, but it aims to protect documents such as employee records, salary history, health records.

Public authorities from Romania shall comply not only with national legislation regarding the protection of personal data, but also with the provisions encompassed in European Union legal acts.

Government Decision no. 878/2005 on public access to environmental information

ART. 14 *When applying the provisions of art. 12 para. (1) letter f), public authorities take into consideration the provisions of Law no. 677/2001 on the protection of persons rights regarding processing of personal data and the free movement of such data, published in the Official Monitor of Romania, Part I, no. 790 from 12th December 2001, with further amendments and completions.*

High Court of Cassation and Justice – Decision no. 37/2015 – The panel on Reviews in the interest of law

When information of public interest and information related to personal data are encompassed in the same document, regardless of its form and the way this information is expressed, access to public interest information shall be provided by marking out information related to personal data; denying access to public interest information, where personal data information is marked out, is unjustified.

7. 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;

This exception is meant to encourage the voluntary flow of information from private persons to public authorities. It applies only in situations where the third party has voluntarily supplied such information to public authorities and for which that party had not consented to the release of the material. For example, if the third party had been legally obliged to provide such information, the requirements provided by this exception are not met.

8. **The environment to which the information relates, such as the breeding sites of rare species**

Public authorities may refuse disclosing environmental information to the public, if such disclosure would adversely affect the environment. The aim of this exception is to allow the government, through its authorities, the possibility to protect, for example, certain sites, such as the breeding sited of rare species.

HOW SHALL PUBLIC AUTHORITIES PROCEED IN THE SITUATION OF A REQUEST FOR CONFIDENTIAL INFORMATION?

Regarding the confidentiality of the information requested by the public, the Aarhus Convention provides the obligation of a public authority to separate confidential information from non-confidential information when dealing with information requests, without prejudice to its possible confidentiality exempted. More exactly, public authorities shall, whenever possible, disclose that part of the environmental information which can be made available and which does not have a confidential nature.

In practice, public authorities shall mark out the confidential information which cannot be disclosed to the public. Limiting public access to confidential environmental information cannot be interpreted as denying access to such information.

For example, in the findings and recommendations of the Aarhus Convention Compliance Committee, ACCC/C/2012/69[15], the Committee found Romania to be in non-compliance with the provisions of the convention because access to information regarding mining licences had been denied on the ground that the disclosure would adversely affect the confidentiality of commercial and industrial information, based on two reasons:

- confidential information had not been separated from non-confidential information;
- the grounds for refusal of a request for information had not been brought to the applicant's attention – the public authority had not provided any response.

Regarding the disclosure of information which are subject to a procedure for failure of a Member State to fulfil an obligation under the European Union Law (the infringement procedure)

Case C-514/11P and C-605/11P Liga para a Protecção da Natureza (LPN) and Republic of Finland v the European Commission and others

*"**Para. 63**. The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would […] be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State*

[15] Ibid, p. 1

concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings.

Para. 65. *[…] It can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations.*

Para. 66. *That general presumption does not exclude the possibility of demonstrating that a given document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest justifying the disclosure of the document concerned."*

HOW SHALL PUBLIC AUTHORITIES INTERPRET THESE EXCEPTIONS?

The grounds for refusal covered by the Aarhus Convention shall be interpreted restrictively, taking into account the satisfaction of the public interest in the disclosure of the information, on one hand, and the possibility that the information requested is related to emissions into the environment, on the other hand. The fact that the requested environmental information falls under one of the categories of exceptions mentioned above is not sufficient to justify invoking the exception.

The European Court of Human Rights is one of the international courts that has considered on several occasions the balancing exercise of satisfying the public interest by disclosing information and the refusal to disclose such information on the grounds that it falls within one of the exceptions provided for in the Aarhus Convention. For example, in **Case McGinley and Egan v. The United Kingdom of Great Britain and Northern Ireland**, the Court has analysed the relevance of article 8 of the European Convention on Human Rights in justifying the disclosure of information. In this regard, in the case, the fact that exposure to high radiation levels has been hidden, while having a serious and long-lasting effect on human health, is justified to create a state of restlessness over the population. The Court considers that, since documents containing information could be essential for applicants to determine the level of radiation at which they might had been exposed and could contribute to providing the population with that information, they have an interest under Article 8 of the European Convention on Human Rights to gain access to this information. The Court has ruled that in situations where a national government carries out hazardous activities such as those involving radiation and which could have adverse health consequences for those involved in those activities, respect for privacy under Article 8 of the European Convention on Human Rights requires the establishment of an efficient and accessible procedure to enable these people to search for all relevant information.

European Convention on Human Rights - Article 8. Right to respect for private and family life

"**(1)** *Everyone has the right to respect for his private and family life, him home and his correspondence.*

(2) *There shall be no interreference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the preservation of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Moreover, in Case **Taşkin and others v. Turcia** it has been pointed out by the Court that article 8 of the European Convention on Human Rights applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the European Convention on Human Rights[16]

The jurisprudence of the Court of Justice of the European Union has also analysed on multiple occasions the way the overriding public interest and the nondisclosure of certain information could be balanced. An example in this regard is Case T-306/12 Darius Nicolai Spirlea and Mihaela Spirlea v. the European Commission, where the Court stated that *"a statement of purely general considerations is not sufficient to establish that an overriding public interest outweighs the reasons justifying a refusal to disclose the documents.[17]"*

The public interest should be analyzed on a case by case examination when determining which one of the exceptions is applicable.

Case C-266/09 European Commission v. the Netherlands of the Court of Justice of the European Union

Para. 59 *"The balancing exercise […] between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved."*

[16] Case Taşkin and others v. Turcia – para 113

[17] Case T-306/12 Darius Nicolai Spirlea and Mihaela Spirlea v. the European Commission, para 92

Public authorities shall explicitly specify how the public interested served by the disclosure of environmental information has been taken into account. In this regard, a relevant indicator in balancing these two elements is represented by human health. When the activities undertaken have adverse impact on human health, the overriding public interest should be presumed as a matter of good practice. For example, in the case of installations for intensive rearing of poultry or pigs, the smell can represent an important environmental issue which is likely to adversely affect the health of the population living in the proximity of these farms.

For example, **Regulation (EC) No. 1367/2006** *of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies* presumes that an overriding public interest in disclosure shall be deemed to exist where the information requested relates emissions into the environment.

Case T-264/04 WWF European Policy programme v. the Council of the European Union of the Court of First Instance

Para. 39. *"[…] In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical."*

HOW SHALL THE PUBLIC AUTHORITY RESPOND TO THE APPLICANT IN CASE OF A REFUSAL?

The refusal of a request shall be addressed in writing, if the request was made in writing or the applicant so requests. In any case, a refusal shall state the reasons for it and give information on access to the review procedure provided for in accordance with the provisions of the Convention.

As well as the disclosure of environmental information to a member of the public, the refusal shall also 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 has been submitted.

Moreover, the applicant shall be informed of any extension and of the reasons justifying it. This obligation is applicable to oral refusals, as well as to written refusal. A complete justification of the reasons for the refusal may offer the applicant the possibility to rephrase and to resubmit the request. The reasons for refusal could include: determining the fact that the requested information is subject to one of the exceptions, but only after balancing the overriding public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose such information; the fact that the request had been formulated in too general a manner or that the public authority to which the request is addressed does not hold the environmental information requested and it does not have knowledge of other public authority holding the information.

ARE THERE ANY CHARGES FOR PROVIDING ENVIRONMENTAL INFORMATION BY THE PUBLIC AURTHORITY?

Public authorities have the right to make a charge for supplying information, but such charge shall not exceed a reasonable amount. In order to achieve the objective of ensuring access to environmental information for members of the public, information shall also be accessible in terms of costs or, where possible, free of charge.

Public authorities intending to establish such a system shall make a publicly available list containing all 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.

At national level, charges for providing environmental information are listed in Annex G of **Order of the Minister of Waters and Environmental Protection np. 1182/2002 for the approval of the Methodology of the management and the supplement of the information on environment held by the public authorities for the environmental protection**. Access to lists and public registers which are made available to the public, as well as on-spot examination of the requested information is free of charge. The costs which are levied cover only the charges for making copies and for processing the information, which will be covered by the applicant.

For a correct understanding of what constitutes a *"reasonable cost",* which has also been included in the European legal acts, the jurisprudence of the Court of Justice of the European Union is relevant in this regard, mainly **Case C-217/97 European Commission v. the Federal Republic of Germany**. In this case, the Court stated that any interpretation of what constitutes *"a reasonable cost"* which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected[18]. Member States are not authorized to pass on to those seeking information the entire amount of the costs, in particular indirect ones (for example, the salaries of the staff), actually incurred for the State budget in conducting an information search[19].

HOW CAN THE PUBLIC APPEAL A RESPONSE OF A PUBLIC AUTHORITY REGARDING A REQUEST FOR ENVIRONMENTAL INFORMATION?

Any member of the public who requested an environmental information and who considers that his or her request has been wrongfully refused, whether in part or in full, ignored or inadequately answered, can file a preliminary complaint to the head of the public authority, with the aim of reviewing the acts and omissions. Moreover, the Convention provides for access to a review procedure before a court of law or another independent and impartial body established by law. In any case, the scope of such review procedures cannot be limited only to either substantive or procedural aspects, as both aspects shall be analyzed.

[18] Case C-217/97 European Commission v. the Federal Republic of Germany, para. 47
[19] Case C-217/97 European Commission v. the Federal Republic of Germany, para. 48

The Convention does not condition the applicant's access to a judicial review procedure to the initial exhaustion of administrative remedies, but it does not oppose to a provision in this regard in case such a requirement exists under national law. In Romania, the two remedies are separated and they not interdependent. For example, in Decision no. 118/2010 of Timișoara Court of Appeal, the court stated that the national provisions transposing those of the Aarhus Convention[20] provide *"the possibility, and not the obligation of a preliminary administrative review procedure"*. As a consequence, a judicial review procedure before the court for administrative appeal, for example, can be triggered independently of the exhaustion of the preliminary administrative procedure.

By exception, **Law no. 292/2018 on the assessment of the effects of certain public and private projects on the environment** provides the obligation for the public, as it is defined by law, to preliminarily address the issuing public authority of the screening stage or the higher public authority along the chain of command, requesting it to revoke, in whole or in part, the decision. The request must be registered within 30 days from the date the respective decision has been brought to the public knowledge, and the public authority has the obligation to provide a response to the preliminary complaint within 30 days from the date of its registration by that public authority. The procedure for resolving the preliminary complaint shall be timely, equitable and fair and it shall not be prohibitively expensive.

The Aarhus Convention analyzes the pillar of access to justice in environmental matters from two perspectives: regarding public access to environmental information and regarding public participation in environmental decision-making. Taking into consideration the second perspective, the convention provides that members of the public shall be guaranteed access to a review procedure before a court of law and/or another independent and impartial body established by law, with the aim to challenge the legitimacy of any decision, act or omission subject to the provisions on public participation in environmental decision-making. Unlike access to justice regarding access to information, in this case the member of the public shall prove having a sufficient interest or, alternatively, maintaining impairment of a right.

As an example, **Law no. 292/2018 on the assessment of the impact of certain public and private projects on the environment** regulates access to justice for any person who is a member of the public concerned or who considers himself/herself to be harmed in his or her right or interest. They may challenge before the Administrative Litigations Court the acts, decisions and omissions of competent public authorities relating to decision-making in environmental matters. The Administrative Litigations Court shall rule on substantial matters, as well as on procedural matters of public participation in environmental decision-making.

As regards public participation during the preparation of plans, programmes and policies relating to the environment, each Party shall make all appropriate practical measures and/or other provisions for the public to participate during the preparation of the plans, programmes and policies relating to the environment. Public participation shall be ensured within a transparent and fair framework, having provided the necessary information to the public. The potential public shall be identified by the public authority, taking into account the objectives of the Aarhus Convention and the national legislation in force which transposes its

[20] For example, art. 22 para. (1) of Law no. 544/2001 on free access to information of public interest, or art. 16 para. (1) of Government Decision no. 878/2005 on public access to environmental information

provisions. The public authority shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Non-governmental organizations which fall within the specific definition of the public provided by the Convention shall be deemed to have a sufficient interest or to have rights capable of being impaired, thus fulfilling the requirements regarding standing.

Case C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV versus Bezirksregierung Arnsberg of the Court of Justice of the European Union

Para. 38. With regard to the conditions of the admissibility of the review procedures, two possibilities are provided: the admissibility of an action may be conditional to *"a sufficient interest in bringing the action"* or on the applicant alleging *"the impairment of a right"*, depending on which of those conditions is adopted n the national legislation.

Para. 40. With regard to actions brought by environmental protection organizations [...] such organizations must be regarded as having either a sufficient interest or rights which may be impaired, depending of which of those conditions of admissibility is adopted in the national legislation.

Para. 46. If […] those organizations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness is such organizations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. […] That very largely deprives those organizations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.

Para. 47. It follows that the concept of *"impairment of a right"* cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation.

The system of administrative procedures is not intended to infringe the applicant's right to appeal to a court of justice, but in practice it has been demonstrated that this preliminary procedure has been able to resolve the complaint in a timely manner, thus avoiding judicial proceedings. Through the preliminary administrative procedure, decisions on access to information can be considered by the public authority in question or through an administrative procedure, such means being much faster and more accessible in terms of costs.

The Convention emphasizes the need that such mechanisms (administrative or judicial) are not burdensome in terms of cost and, where possible, free of charge or inexpensive. A court appeal can be time-consuming and expensive and access to information is often needed quickly.

When the applicant has not received any reply to his/her preliminary complaint within the legal timeframe, he/she can take legal action before the jurisdictional Administrative Litigations Court for the examination of the acts and omissions by public authorities in question. Moreover, a third party considering himself/herself aggrieved with respect to a right or a legitimate interest, he/she may take a legal action before the competent Administrative Litigations Court with regard to the disclosure of environmental information.

The preliminary complaint addressed to the head of the public authority in question is settled in Romania in accordance with the provisions of **Law no. 544/2004 on Administrative Litigations** and it is free of charge.

Law no. 544/2004 on Administrative Litigations – preliminary complaint

Art. 7. (1) Before approaching the jurisdictional Administrative Litigations Court, the person considering him/herself aggrieved with respect to a right or legitimate interest, by a specific administrative act shall request the issuing public authority, or higher authority along the chain of command, within 30 days of notice of such decision, to rescind, all or part of such decision.

Art. 8. (1) A person aggrieved with respect to a right or a legitimate interest acknowledged by law, by an unilateral administrative decision, who is dissatisfied with the response received to his/her preliminary complaint or who has not received any reply within 30 days of submission date, may take legal action before the jurisdictional Administrative Litigations Court, requesting the rescinding of all or part of the administrative decision in contention, reparations for the loss sustained and retributory damages. Such legal action before an Administrative Litigations Court may also be taken by the party that feels aggrieved with respect to a legitimate right through the failure of the administration to provide resolution of his/her case within the legal deadline or through the unjustified refusal to have his/her petition resolved, as well as through the refusal to perform a certain administrative operation needed for the exercise or protection of a right or legitimate interest.

The final decision taken in accordance with the provisions on access to justice in matters relating to public access to environmental information is an enforceable title and is binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused.

This brochure is informative and represents a guide for the guidance and training of all civil servants involved in the procedure of disclosing environmental information as a result of a request from the public.

It will be made available to the public on the Ministry of Environment website, in electronic form, and at the headquarters of the Ministry of Environment, on paper.