

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Task Force on Access to Justice

Eleventh meeting

Geneva, 27-28 February 2018

Item 2 of the provisional agenda

Thematic focus: Enabling effective access

to justice in cases on the right to environmental information

Information paper N3

Selected considerations, findings and reports of the Aarhus Convention Compliance Committee relating to the implementation of article 9, paragraph 1, and other relevant provisions of the Aarhus Convention

Prepared by the secretariat¹

This background paper is not intended to be exhaustive but to outline a selection of considerations, findings and reports of the Aarhus Convention Compliance Committee² (hereinafter – the Committee) in regard to item 2 of the agenda of the eleventh meeting of the Task Force on Access to Justice under the auspices of the Aarhus Convention.

Specifically, it lists the relevant information with respect to the implementation of article 9, paragraph 1, and other relevant provisions of the Aarhus Convention. Participants are invited to consult this document in advance of the meeting in order to gain an overview of the relevant considerations, findings and reports of the Aarhus Convention Compliance Committee.

Participants will be invited to share challenges, good practices, lessons learned and information on recent legislative and practical developments as well as identify needs in relation to this subject.

¹ The document was not formally edited.

² Available from <http://www.unece.org/env/pp/cc.html>

Case/Report	Consideration and evaluation by the Committee (for cases) / Comments (for Committee Reports to MOP)	Findings and recommendations of the Committee
Reports of the Compliance Committee to the Meeting of the Parties		
<p>Report by the Committee to the fourth session of the Meeting of the Parties ECE/MP.PP/2011/11</p> <p><i>“Fairness” of remedies</i></p>	<p>The Committee also stresses that “fairness” of remedies in judicial review cases under article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, finds that in determining fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs (ACCC/C/2008/27 (United Kingdom), para. 45).</p> <p>(See document ECE/MP.PP/2011/11, para. 109)</p>	
<p>Report by the Committee to the fourth session of the Meeting of the Parties ECE/MP.PP/2011/11</p> <p><i>Monitoring of the effectiveness of the review procedure</i></p> <p><i>Timeliness of judicial review procedure</i></p>	<p>The Committee is of the view that it is not sufficient if the Parties merely to ensure that the requirements of article 9, paragraphs 4 and 5, are reflected in national legislation. The Parties, in keeping with the objective of the Convention to provide effective access to justice, should also look carefully at how these provisions are actually implemented. In that regard, while the requirements set by law may not as such be problematic under the Convention, the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications, for instance, meet the requirements of article 9, paragraph 4 (see ACCC/C/2008/33 (United Kingdom), paras. 138–139). In the view of the Committee, reliance of such discretion may result in inadequate implementation of the provisions of the Convention and clear time limits should be set by the Party concerned.</p> <p>(See document ECE/MP.PP/2011/11, para. 110)</p>	
<p>Report by the Committee to the sixth session of the Meeting of the Parties ECE/MP.PP/2017/32</p> <p><i>Reasons for refusing an</i></p>	<p>The Committee points out that the duty to state reasons for refusing an information request under article 4, paragraph 7, is of great importance, not least to enable the applicant to be in a position to challenge the refusal under the procedures stipulated in article 9, paragraph 1, of the Convention. It is, therefore, inadequate if these reasons are only provided at a very late stage,</p>	

<p><i>information request – article 4, paragraph 7</i></p>	<p>as the applicant will potentially only then be able to fully formulate the grounds for challenging the decision.³⁹ Likewise, the statement of reasons provides higher administrative authorities and the court with a better basis to assess whether the officials have correctly implemented the law.</p> <p>(See document ECE/MP.PP/2017/32, para. 27)</p>	
<p>Report by the Committee to the sixth session of the Meeting of the Parties ECE/MP.PP/2017/32</p> <p><i>“Fair” review procedures require reasoned decisions – article 9, paragraph 4</i></p>	<p>It is clear to the Committee that the requirement in article 9, paragraph 4, for review procedures to be “fair” should be read as a requirement to ensure that claimants are able to know the reasons for the decision of the review body, inter alia, to enable the claimants to challenge that decision where they so choose.</p> <p>(See document ECE/MP.PP/2017/32, para. 64)</p>	
<p>Report by the Committee to the sixth session of the Meeting of the Parties ECE/MP.PP/2017/32</p> <p><i>Timeliness of review procedures regarding requests for access to information – article 9, paragraphs 1 and 4</i></p>	<p>Article 9, paragraph 4, of the Convention requires that the procedures referred to in article 9, paragraphs 1 to 3, of the Convention provide, inter alia, adequate and effective remedies and are fair, equitable and timely. This provision is applicable to all remedies within the scope of article 9 of the Convention, including those referred to in the second sentence of article 9, paragraph 1. The second sentence of article 9, paragraph 1, sets out that procedures within its scope should be “expeditious”, a reference lacking in regard to the other remedies in article 9 of the Convention. Such procedures will potentially be used prior to seeking review by a court of law as detailed in the first sentence of article 9, paragraph 1, which may justify the imposition of the additional requirement on authorities to act without undue delay. The Committee notes in that regard that time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure.</p> <p>In this context, the Committee notes that a number of the Parties to the Convention impose explicit deadlines for public authorities to reconsider a refusal of an information request. While article 4, paragraphs 2 and 7, do not directly apply to such reconsideration, the Committee sees no reason why a public authority should need more time to reconsider its decision at the request of an ombudsman, a court or the original applicant, than when deciding a request for information by a member of the public in the first place. Accordingly, when considering in these contexts whether the</p>	

	<p>procedure is “expeditious” or “timely” under article 9, paragraphs 1 and 4, respectively, the time limits set out in article 4, paragraphs 2 and 7, are indicative.</p> <p>(See document ECE/MP.PP/2017/32, paras. 70 and 71)</p>	
Relevant considerations, findings and recommendations of the Compliance Committee		
<p>ACCC/C/2004/01 (Document ECE/MP.PP/C.1/2005/2/Add.1)</p> <p><i>Access to an expeditious review procedure</i></p> <p><i>Lack of framework on access to justice provisions of the Convention</i></p>	<p>The Convention, in its article 9, paragraph 1, requires the Parties to ensure that any procedure for appealing failure to access information is expeditious. However, as the time and number of determinations with regard to jurisdiction in this case demonstrate, there appears to be lack of regulations providing clear guidance to the judiciary as to the meaning of an expeditious procedure in cases related to access to information.</p> <p>Finally, as events described in paragraph 11 above demonstrate, the requirement of article 9, paragraph 1, to ensure that any person (including a legal person, as set out in the definition of the public in article 2, paragraph 5, of the Convention) whose request for information under article 4 has not been dealt with in accordance with the provisions of that article has access to an expeditious review procedure, has not been properly transposed into the national legislation.</p> <p>The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation.</p> <p>(See document ECE/MP.PP/C.1/2005/2/Add.1, paras. 21-23)</p>	<p>The Committee also finds that the lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information was not in compliance with article 9, paragraph 1.</p> <p>The Committee further finds that the lack of clear regulation and guidance with regard to the obligations of bodies performing public functions to provide information to the public and with regard to the implementation of article 9, paragraph 1, constitutes non-compliance with the obligations established in article 3, paragraph 1, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2005/2/Add.1, paras. 26 and 27)</p>
<p>ACCC/C/2008/30 (Document ECE/MP.PP/C.1/2009/6/Add.3)</p>	<p>If a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, of the Convention, then doubts arise as to the binding nature of the decisions of the courts within a given</p>	<p>The Committee also finds that the failure of the public authority to fully execute the final decision of the court implies non-</p>

<p><i>Binding nature of court decisions</i></p>	<p>legal system. Taking into account article 9, paragraph 1, which implies that the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities, the failure of the public authority to fully execute the final decision of the court of law implies non-compliance of the Party concerned with article 9, paragraph 1, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2009/6/Add.3, para. 35)</p>	<p>compliance of the Party concerned with article 9, paragraph 1, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2009/6/Add.3, para. 41)</p> <p>[Recommendation to the Party concerned] to take effective legislative and/or practical measures for better monitoring of the execution by public authorities of final court decisions under article 9, paragraph 1, of the Convention;</p> <p>(See document ECE/MP.PP/C.1/2009/6/Add.3, para. 42 (b))</p>
<p>ACCC/C/2010/48 (Document ECE/MP.PP/C.1/2012/4)</p> <p><i>A refusal in writing</i></p>	<p>According to article 4, paragraph 7, of the Convention, a refusal in writing shall be made as soon as possible and at the latest within one month. It should also state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. It follows that one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an “effective” and “timely” basis, as required by article 9, paragraph 4. The possibilities for a review procedure seem to be significantly delayed by the system envisaged under domestic law, i.e., that a separate request is necessary to obtain an “official notification” that would enable the applicant to seek the remedies under article 9. Moreover, if this request is not satisfied due to failure of authorities to provide an official notification, a further request (devolution request) has to be submitted. The Committee finds that the Party concerned, by maintaining this system, where a specific form (“official notification”) must be requested in order to be used before the courts, and where authorities may fail to comply with such a request, is not in compliance with article 4, paragraph 7, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2012/4, para. 56)</p>	<p>The Committee finds that the requirement for a separate “official notification” as a precondition for an appeal of a denial of an information request is not in compliance with article 4, paragraph 7, of the Convention (see para. 56).</p> <p>The Committee finds that the Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention (see para. 59).</p> <p>(See document ECE/MP.PP/C.1/2012/4, paras. 78-79)</p> <p>[Recommendation to the Party concerned] to take the necessary legislative, regulatory, and administrative measures and practical</p>

		<p>arrangements to ensure that:</p> <p>(i) The procedure for having a refusal of a request for information reviewed is simplified for the requester. This could preferably be done by requiring any written refusal of a request for information to have the legal status of an “official notification” and that any such refusal is to be made as soon as possible, and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request;</p> <p>(ii) The available review procedures for persons who consider that their request for information under article 4 has been ignored, wrongfully refused or inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, are timely and expeditious;</p> <p>(See document ECE/MP.PP/C.1/2012/4, paras. 81 (a) (i) and (ii) of)</p>
<p>ACCC/C/2012/51 (Document ECE/MP.PP/C.1/2014/12)</p> <p><i>Cases related to classified information</i></p>	<p>The communicant did not substantiate how the requirements in the law of the Party concerned that judges assigned to hear cases related to classified information must be certified to do so as such result in delayed, ineffective or unfair procedures. Therefore the Committee does not find that the Party concerned failed to comply with article 9, paragraph 4, with respect to access to justice in these respects.</p> <p>(See document ECE/MP.PP/C.1/2014/12, para. 101)</p>	
<p>ACCC/C/2012/51 (Document ECE/MP.PP/C.1/2014/12)</p> <p><i>Access to courts decisions</i></p>	<p>With respect to the allegations regarding the accessibility of court decisions, the Committee notes that the Party concerned referred to a number of arrangements already undertaken or planned to be undertaken to provide full accessibility to court decisions. The requirements in article 9, paragraph 4, are limited to the procedures referred to in article 9, paragraphs 1, 2 and 3,</p>	

	<p>of the Convention. However, any reasons not to disclose a decision relating to the matters governed by the Convention, such as data protection, should be considered under the article 4 of the Convention and not under article 9, paragraph 4. Therefore the Committee finds that the Party concerned did not fail to comply with the requirement of article 9, paragraph 4, that decisions be publicly accessible.</p> <p>(See document ECE/MP.PP/C.1/2014/12, para. 103)</p>	
<p>ACCC/C/2012/69 (Document ECE/MP.PP/C.1/2015/10)</p> <p><i>Reasons for refusal</i></p>	<p>Article 4, paragraph 7, of the Convention contains explicit requirements, inter alia, that refusals must be in writing if the information request was in writing or the applicant so requests and also that the reasons for a refusal must be stated.</p> <p>The Committee notes that providing a statement of reasons under article 4, paragraph 7, not only helps the administration and the public to understand the Convention, but also provides higher administrative authorities and the court with a better basis to assess whether the officials have correctly implemented the law. Under the Romanian legal system where declassification of information takes additional time, a statement of reasons for a refusal of a request for information can also reduce the duration of a procedure.</p> <p>In at least two other cases which were brought before the Committee, Romanian authorities left the requests for access to environmental information unanswered without stating the reasons for refusal.²⁵</p> <p>For the above-mentioned reasons, the Committee finds that, by failing to provide reasons for the refusal of the request for the mining related information in 2010 (see para. 28), the Party concerned failed to comply with article 4, paragraph 7, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2015/10, paras. 71-74)</p>	<p>By failing to provide reasons for the refusal of the request for the mining-related information in 2010, the Party concerned failed to comply with article 4, paragraph 7 of the Convention (para. 74);</p> <p>(See document ECE/MP.PP/C.1/2015/10, para. 92 (d))</p> <p>[Recommendation to the Party concerned] Take the necessary legislative, regulatory or administrative measures and practical arrangements, as appropriate, to ensure the correct implementation of the Convention with respect to article 4, paragraph 7: the requirement to provide reasoned statements for refusing a request for access to information;</p> <p>(See document ECE/MP.PP/C.1/2015/10, para. 93 (a) (iv))</p>
<p>ACCC/C/2012/69 (Document ECE/MP.PP/C.1/2015/10)</p> <p><i>Timeliness of court procedures for access to information</i></p>	<p>Article 9, paragraph 1, of the Convention requires Parties to ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused in part or in full, inadequately answered, etc., has access to a review procedure before a court of law or</p>	<p>The Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective</p>

	<p>another independent and impartial body established by law. Article 9, paragraph 4, requires that the procedures referred to in article 9, paragraphs 1, 2 and 3, be, inter alia, timely.</p> <p>In the view of the Committee, the jurisprudence of the European Court of Human Rights deals with cases of greater variety than access to environmental information cases. For that reason the Committee does not find the European Court of Human Rights jurisprudence to be directly applicable when considering allegations under article 9, paragraph 4, in relation to article 9, paragraph 1, of the Convention. However, some of the criteria used by the European Court of Human Rights, such as the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant, are relevant here also. In the light of the first of these criteria, the Committee considers that an access to environmental information case would generally be neither factually nor legally complex. The Committee notes that the National Agency for Mineral Resources did not lodge a defence to the first instance court proceedings regarding access to mining-related information—i.e., the factual and legal complexity of the case apparently did not motivate the defendant to make a submission before the court. As for the second criterion, in both of the communicants' court proceedings subject to the present communication the requested information could have helped the applicants to more effectively participate in the repeat procedure for EIA of the mining project. Therefore, the issues at stake required timely final decisions.</p> <p>Article 9, paragraph 1, of the Convention clearly recognizes the particular need for the speedy resolution of review procedures concerning information requests in comparison to other types of review procedures, and the fact that overloaded court systems may struggle to be able to meet these needs. In the circumstances where a Party provides for the review of information requests by a court of law, article 9, paragraph 1, requires the Party to ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. The Committee has not received any information from the parties to indicate whether or not such an alternative expeditious procedure exists in the Party concerned, and if it does, why the communicants did not use it.</p>	<p>remedy, as required by article 9, paragraph 4 (para. 90).</p> <p>(See document ECE/MP.PP/C.1/2015/10, para. 92(f))</p> <p>[Recommendation to the Party concerned] Take the necessary legislative, regulatory or administrative measures and practical arrangements, as appropriate, to:</p> <p>Review its legal framework and undertake the necessary legislative, regulatory and administrative measures to ensure that the court procedures for access to environmental information are timely and provide adequate and effective remedies.</p> <p>Provide adequate practical arrangements or measures to ensure that the activities listed in subparagraphs (a), (b) and (c) above are carried out with broad participation of the public authorities and the public concerned</p> <p>(See document ECE/MP.PP/C.1/2015/10, para. 93 (c) and (d))</p>
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	<p>Thus, in the light of the duration of the communicants' eight cited court procedures concerning access to environmental information, and bearing in mind that the Party concerned did not provide any examples of access to environmental information court procedures that were completed in a considerably shorter time, the Committee finds that the Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4, of the Convention.</p> <p>(See document ECE/MP.PP/C.1/2015/10, para. 84, 87, 89, and 90)</p>	
<p>ACCC/C/2013/93 (Document ECE/MP.PP/C.1/2017/16)</p> <p><i>Stating reasons/ time limits for refusal, Parliamentary Ombudsman as review body, "Expeditious" and "timely" review procedure</i></p>	<p>The Committee notes that the duty to state reasons is of great importance, not least to enable the applicant to be in a position to challenge the refusal for information under the procedures stipulated in article 9, paragraph 1 of the Convention. It is, therefore, inadequate if these reasons are only provided at a very late stage, as the applicant will potentially only then be able to fully formulate the grounds for challenging the decision</p> <p>(See document ECE/MP.PP/C.1/2017/16, para. 82)</p> <p>The Committee considers that, under the legal framework of the Party concerned, the Parliamentary Ombudsman is an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under article 4 of the Convention. The Committee therefore finds that the Parliamentary Ombudsman of the Party concerned constitutes a review procedure within the scope of the second sentence of article 9, paragraph 1, of the Convention.</p> <p>While the Committee does not find the lengthy procedures following the Ombudsman's request to amount to non-compliance with article 4, paragraph 7, of the Convention, it will now examine whether this procedure complied with article 9 of the Convention. Article 9, paragraph 4, requires that the procedures referred to in article 9, paragraphs 1 to 3, of the Convention provide, inter alia, adequate and effective remedies and are fair, equitable and timely. This provision is applicable to all remedies within the scope of article 9 of the Convention, including those referred to in the second sentence of article 9, paragraph 1.</p>	<p>The Committee finds that that the review procedure before the Parliamentary Ombudsman failed to comply with the requirements set out in article 9, paragraph 1, second sentence, to be "expeditious" and the requirement in article 9, paragraph 4, to be "timely".</p> <p>Taking into consideration that no evidence has been presented to substantiate that the non-compliance with article 9, paragraphs 1 and 4, was due to a systemic error, the Committee refrains from presenting any recommendations in the present case.</p> <p>(See document ECE/MP.PP/C.1/2017/16, paras. 94 and 95)</p>

	<p>The second sentence of article 9, paragraph 1, requires that procedures within the scope of that sentence be “expeditious”, a reference lacking in regard to the other remedies in article 9 of the Convention. Procedures under article 9, paragraph 1, second sentence, will potentially be used prior to seeking review by a court of law pursuant to the first sentence of article 9, paragraph 1, which may justify the imposition of the additional requirement on authorities to act without undue delay. The Committee notes in that regard that time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure.</p> <p>The Committee sees no reason why a public authority should need more time to reconsider its decision at the request of an Ombudsman, a court or the original applicant than when deciding a request for information by a member of the public in the first place. Accordingly, when considering in these contexts whether the procedure is “expeditious” or “timely” under article 9, paragraphs 1 and 4, respectively, the time limits set out in article 4, paragraphs 2 and 7, are indicative.</p> <p>Considering the time taken (nearly two-and-a-half years) for the completion of the Ombudsman procedure, and in particular the time taken for the Ministry’s reconsideration decision (11 months) and the Ombudsman’s final conclusion (nearly 8 months thereafter), the Committee finds that in this case the Party concerned failed to comply with the requirements in article 9, paragraph 1, second sentence, and article 9, paragraph 4, of the Convention to ensure an “expeditious” and “timely” procedure.</p> <p>(See document ECE/MP.PP/C.1/2017/16, paras. 86- 91)</p>	
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