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 Public Participation in Decision-making

Eighth meeting
Geneva, 8-9 October 2018
Item 3 of the provisional agenda
Protection of persons exercising their rights in conformity with the provisions of the Convention

Information paper N6

Selected considerations, findings and reports of the Aarhus Convention Compliance Committee relating to the implementation of article 3, paragraph 8, of the Aarhus Convention

Prepared by the secretariat

This background paper is not intended to be exhaustive but to outline a selection of considerations, findings and reports of the Aarhus Convention Compliance Committee (hereinafter – the Committee) in regard to item 3 of the agenda of the eighth meeting of the Task Force on Public Participation in Decision-making under the auspices of the Aarhus Convention.

Specifically, it lists the relevant information with respect to the implementation of article 3, paragraph 8, of the Aarhus Convention and 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
### Reports / Cases

<table>
<thead>
<tr>
<th>Reports of the Compliance Committee to the Meeting of the Parties</th>
<th>Report on general issues of compliance (to MoPs) / consideration and evaluation by the Committee (for cases)</th>
<th>Findings and recommendations of the Committee</th>
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<tr>
<td>Report by the Committee to the second session of the Meeting of the Parties ECE/MP.PP/2005/13</td>
<td>In view of the importance of protecting the interests of third parties, the Committee has construed paragraph 29 of the annex to decision I/7 to apply to information which the communicant has requested be kept confidential not only out of the communicant's concern that he or she might be penalized, persecuted, or harassed but out of his or her concern that another person or persons might be so treated.</td>
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<td>Protection of confidentiality to prevent possible penalization, persecution or harassment</td>
<td>(See paragraph 14 of document ECE/MP.PP/2005/13)</td>
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<td>Report by the Committee to the sixth session of the Meeting of the Parties ECE/MP.PP/2017/32</td>
<td>9. The Committee considers that in order to demonstrate a breach of article 3, paragraph 8, of the Convention by the Party concerned, four elements must be established:</td>
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<td>Penalization, harassment and persecution of persons exercising their rights under the Convention</td>
<td>(a) One or more members of the public have exercised their rights in conformity with the provisions of the Convention,</td>
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<td>(b) The member of the public or those members of the public have been penalized, persecuted or harassed;</td>
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<td>(c) The penalization, persecution or harassment was related to the member(s) of the public’s exercise of their rights under the Convention;</td>
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<td>(d) The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur.3</td>
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<td>Each of these elements is discussed in more detail below.</td>
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<td>One or more members of the public have exercised their rights in conformity with the provisions of the Convention</td>
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<td>10. The Committee considers that the rights referred to in article 3, paragraph 8, encompass the broad range of rights granted to members of the public by article 1 of the Convention, namely the rights of access</td>
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3 Findings on communication ACCC/C/2014/102 (ECE/MP.PP/C.1/2017/19), para. 65.
to information, public participation in decision-making and access to justice, which contribute to the right of every person of present and future generations to live in an environment adequate to their health and well-being. The exercise of these rights would include situations in which the provisions of the Convention concerning access to information, public participation in decision-making and access to justice set out in articles 4 to 9 of the Convention are applicable and also situations covered by the general provisions of article 3 of the Convention, but is not limited to them. Accordingly, the Committee finds that article 3, paragraph 8, applies to all situations in which members of the public seek access to information, public participation or access to justice in order to protect their right to live in an environment adequate to their health or well-being.4

The member of the public or those members of the public have been penalized, persecuted or harassed

11. The terms “penalized”, “persecuted” and “harassed” are not defined in the Convention and they are to be understood according to their ordinary meaning in their context and in the light of the Convention’s object and purpose.5 As stated in The Aarhus Convention: An Implementation Guide (Aarhus Convention Implementation Guide),6 article 3, paragraph 8, “is a broadly worded provision which aims to prevent retribution of any kind.”7

12. In determining whether the treatment complained of amounts to penalization, persecution or harassment, the Committee notes the approaches taken within the framework of human rights instruments. Such instruments generally provide wide protection against human rights violations combined with possibilities for the State concerned to claim its actions served a legitimate aim or at least did not relate to the special characteristics of the person concerned. This approach envisages that, depending on the particular facts of the case at hand, an action taken by the State may be objective and reasonable, pursue a legitimate purpose and be proportional in one set of circumstances, and not in another.8

13. Whether the treatment complained of amounts to penalization, persecution or harassment must be assessed on a case-by-case basis in the light of the particular circumstances, including whether the action taken by the State is objective and reasonable, and pursues a legitimate purpose. When making this assessment, the Committee considers whether the treatment complained of could be reasonable and proportional and pursue a legitimate public purpose. If so, the treatment could be in compliance with article 3, paragraph 8, of the Convention. However, the Committee must also consider whether acts taken ostensibly

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4 Ibid., para. 66.
5 Ibid., para. 67, citing the Vienna Convention on the Law of Treaties, article 31.
8 Ibid., para. 68.
in order to serve a legitimate purpose (such as protecting public order) may in fact have another, illegitimate, purpose, for example to prevent persons from exercising their rights to participate under the Convention. If that were the case, such acts or treatment may amount to persecution, penalization and harassment within the meaning of article 3, paragraph 8, of the Convention.9

14. The Committee notes that the wording of article 3, paragraph 8, is not limited in its application to acts of public authorities as defined in article 2, paragraph 2, of the Convention, but rather covers penalization, persecution or harassment by any State body or institution, including those acting in a judicial or legislative capacity. It also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent.10

*The penalization, persecution or harassment was related to the member(s) of the public’s exercise of their rights under the Convention*

15. A key element of article 3, paragraph 8, is causation. The treatment amounting to penalization, persecution or harassment must have occurred because the communicant has sought to exercise his or her rights under the Convention. If a person has been penalized, persecuted or harassed but that was entirely unrelated to his or her exercise of his or her rights under the Convention, then there is no breach of article 3, paragraph 8.11

16. With respect to the level and burden of proof, the Committee considers that useful guidance may be drawn from the approach taken by the European Court of Human Rights to cases of alleged discrimination under article 14 of the European Convention on Human Rights. When determining whether discrimination has occurred, the European Court of Human Rights has held that the applicant is only required to show evidence of a difference in treatment, after which the onus passes to the State to demonstrate that the difference in treatment can be justified.12

17. Applying the above approach to article 3, paragraph 8, the Committee considers that the communicant must first establish a prima facie case that members of the public were penalized, persecuted or harassed because they sought to exercise their rights under the Convention. The burden of proof then moves to the Party concerned to show, on the balance of probabilities, that the penalization, persecution or

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9 Ibid., para. 69.
10 Ibid., para. 70.
11 Ibid., para. 71.
12 Ibid., para. 72, citing *Timishev v. Russia*, European Court of Human Rights, Applications 55762/00 and 55954/00 (2005), para. 57.
harassment was entirely unrelated to the fact that those persons sought to exercise their rights under the Convention.\textsuperscript{13}

\textit{The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur}

18. The final element examines the extent to which the penalization, persecution or harassment has already been fully redressed through domestic remedies, for example by compensation to the persons concerned or other appropriate means.\textsuperscript{14}

19. The Committee emphasizes the seriousness of a finding that a Party concerned is in non-compliance with article 3, paragraph 8, of the Convention. If members of the public are penalized, harassed or persecuted for exercising their rights under the Convention, it puts in grave jeopardy the implementation of the Convention as a whole by the Party concerned.\textsuperscript{15}

(See paragraphs 9-19 of document ECE/MP.PP/2017/32)

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**Relevant considerations, findings and recommendations of the Compliance Committee**

\textbf{ACCC/C/2004/05 (Document ECE/MP.PP/C.1/2005/2/Add.5)}

Finally, the Committee notes that while some of the provisions analysed are not in compliance with the requirements of the Convention, it is not possible to analyze many other provisions of the Act without more information on how they are being interpreted and implemented. This applies to whether responses from the authorities to non-compliance with the provisions of the Act could lead or are leading to non-compliance with article 3, paragraph 8, of the Convention. The Committee emphasizes in this regard that it has not been possible for it to enter into a dialogue with the Government of the Party concerned, which the Committee deeply regrets.

(See paragraph 23 of document ECE/MP.PP/C.1/2005/2/Add.5)

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\textbf{ACCC/C/2008/23 (Document ECE/MP.PP/C.1/2010/6/Add.1)}

\textit{Pursuing costs}

With regard to the communicant’s allegation under article 3, paragraph 8, the Committee has taken into consideration the events leading up to the application for the interim injunction, the order for the interim injunction dated 7 November 2008, the judgement of 21 December 2007 discharging the interim injunction, correspondence between the communicants and the Environment Agency in the period from November 2008 to January 2009, the judgement and order of the Court of Appeal dated 2 March 2009 and the correspondence between the Civil Appeals Office and the communicants and the Environment Agency

With regard to the communicants’ allegation under article 3, paragraph 8, the Committee finds that the seeking of the costs by the Environment Agency did not amount to the communicants being penalized within the meaning of article 3, paragraph 8, in this case.

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\textsuperscript{13} Ibid., para. 73.

\textsuperscript{14} Ibid., para. 74.

\textsuperscript{15} Ibid., para. 110.
AC/TF.PP-8/Inf.6

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<tr>
<th>ACCC/C/2008/27 (Document ECE/MP.PP/C.1/2010/6/Add.2)</th>
<th>The communicant alleges that the Party concerned, by pursuing the full costs of defending the judicial review proceedings, has penalized the communicant in breach of article 3, paragraph 8, of the Convention. The Committee notes that article 3, paragraph 8, does not affect the powers of national courts to award reasonable costs in judicial proceedings. The Committee takes the view that, based on the evidence before it, neither the pursuit of costs by the Party concerned or the Court’s order for such costs amounted to a penalization under article 3, paragraph 8. The Committee does not exclude that pursuing costs in certain contexts may amount to penalization or harassment within article 3, paragraph 8. (See paragraph 47 of document ECE/MP.PP/C.1/2010/6/Add.2)</th>
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<td>The communicant alleged that it was insulted and harassed by local authorities in the mass media. The communicant provided copies of press articles in support of its allegation (see para. 29 above and annexes 8–10 to the communication). Also, the communicant stressed the weight such insults may have for the individual in a small community, compared to bigger cities, to the extent that the private life of the individual is seriously attacked and his/her job may be jeopardized. The Party concerned in general stated that such behaviour from the public authorities constitutes a criminal act, but did not specifically respond to the allegations. The Committee finds that by insulting the communicant publicly in the local press and mass media for its interest in activities with potentially negative effects on the environment, and health of the local population, the public authorities, and thus the Party concerned, failed to comply with article 3, paragraph 8, of the Convention. (See paragraphs 63 and 64 of document ECE/MP.PP/C.1/2010/4/Add.2)</td>
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<td>ACCC/C/2009/37 (Document ECE/MP.PP/2011/11/Add.2)</td>
<td>The communicant and the amicus inform the Committee that one may face criminal charges and be prosecuted for the act of engaging in the activities of a group that is not registered. Furthermore, they (See paragraph 56 of document ECE/MP.PP/C.1/2010/6/Add.1)</td>
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<td>The Committee finds that, based on the evidence before it, neither the pursuit of costs by the Party concerned or the Court’s order for such costs amounted to a penalization under article 3, paragraph 8. The Committee does not exclude that pursuing costs in certain contexts may amount to penalization or harassment within article 3, paragraph 8. (See paragraph 52 of document ECE/MP.PP/C.1/2010/6/Add.2)</td>
<td>(See paragraph 63 and 64 of document ECE/MP.PP/C.1/2010/4/Add.2)</td>
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<td>ACCC/C/2011/11 (Document ECE/MP.PP/2011/11/Add.2)</td>
<td>The Committee also finds that local authority officials insulted the communicant publicly in the local mass media for its interest in activities with potentially negative effects on the environment, and thus that the Party concerned failed to comply with article 3, paragraph 8 of the Convention (…). (See paragraph 73 of document ECE/MP.PP/C.1/2010/4/Add.2)</td>
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| Restrictions on freedom of associations | argue that the current regulatory framework for the establishment of NGOs and associations is very restrictive.  
The communicant, in its communication, did not submit any allegation of noncompliance with article 3, paragraph 8, of the Convention and the Committee has not received any evidence to support such allegation, in particular any copies of the relevant provisions restricting freedom of associations or providing for criminal charges in case of involvement in group initiatives with peaceful objectives, if the group is not registered. Although in this situation the Committee is not in a position to assess whether there is any non-compliance with article 3, paragraph 8, of the Convention, the Committee, sympathizes with the communicant, who has requested that its identity be kept strictly confidential for the fear that it may be penalized, prosecuted or otherwise harassed.  
(See paragraphs 100 and 101 of document ECE/MP.PP/2011/11/Add.2) |
| ACCC/C/2009/44 (Document ECE/MP.PP/C.1/2011/6/Add.1) | The allegations concerning harassment are serious [see para. 22. - defamation, detention and house search, arrest], and the alleged facts, if sufficiently substantiated, would amount to harassment in the sense of article 3, paragraph 8, and would therefore constitute non-compliance with the provisions of the Convention. However, on the basis of the information provided, the Committee could not assess with sufficient certainty what happened exactly and therefore the Committee refrains from making a finding on this issue.  
(See paragraph 65 of document ECE/MP.PP/C.1/2011/6/Add.1) |
| ACCC/C/2014/102 (Document ECE/MP.PP/C.1/2017/19) | The Committee considers that a petition against a proposed activity that may have a significant environmental impact, such as a nuclear power plant, is a legitimate exercise of the public’s right to participate in decision-making as recognized in article 1 of the Convention. Likewise, a member of the public who provides legal assistance to persons seeking to exercise their rights in conformity with the provisions of the Convention is thereby taking part in these persons’ exercise of their rights and is consequently entitled to the protection afforded by article 3, paragraph 8, of the Convention.  
(See paragraph 80 of document ECE/MP.PP/C.1/2017/19) |
| ACCC/C/2014/102 (Document ECE/MP.PP/C.1/2017/19) | The Committee considers that an authorized street action concerning an activity covered by the Convention, such as nuclear energy, constitutes a means through which the public can raise the awareness of public authorities and the wider public regarding their concerns about the potential environmental impacts of nuclear energy. The Committee thus considers that both the organization of, and participation in, an authorized action of this nature is a legitimate exercise of the public’s right to participate in decision-making as recognized in article 1 of the Convention.  
(See paragraph 96 of document ECE/MP.PP/C.1/2017/19) |
| One or more members of the public have exercised their rights in conformity with the provisions of the Convention | Found the Party concerned in non-compliance with article 3, paragraph 8, of the Convention.  
Recommended to the Party concerned, among other things:  
(a) Take the necessary legislative, regulatory, administrative, institutional, practical or other measures to ensure that members of the public exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed for their involvement;  
(b) Disseminate the Committee’s findings and recommendations on communication ACCC/C/2014/102 to senior officials in the police, security forces, judiciary and to other relevant authorities, for their information and
action, together with a request for them to disseminate the findings to all relevant officials in order to raise awareness of their obligation to ensure compliance with article 3, paragraph 8, of the Convention:

(c) Deliver appropriate training and information programmes on human rights law relevant to article 3, paragraph 8, of the Convention, for police, security forces and the judiciary to ensure that members of the police and security forces do not exercise their powers in a manner, and identity checks and arrests for alleged public order violations are not utilized in a way, that would restrict members of the public from legitimately exercising their rights to participate in decision-making as recognized in article 1 of the Convention…