

The Continuing Refinement of the Aarhus Convention

UCC 2018

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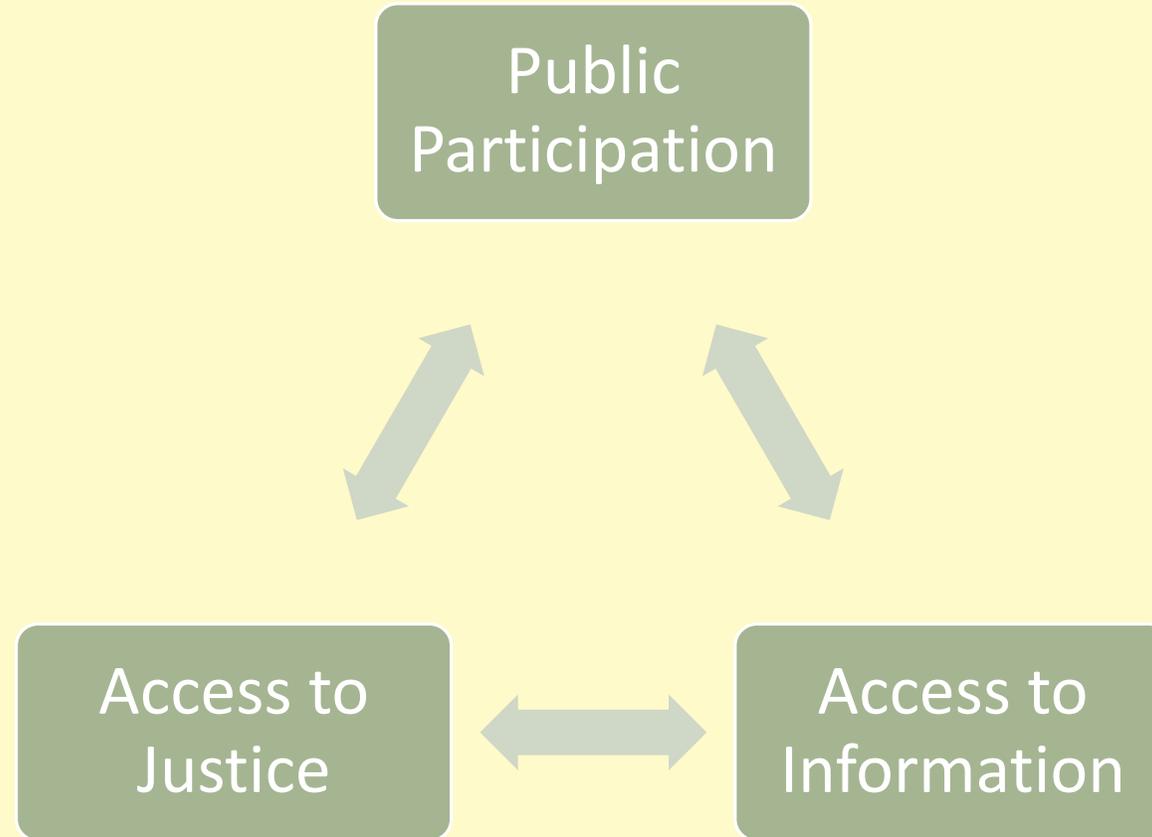
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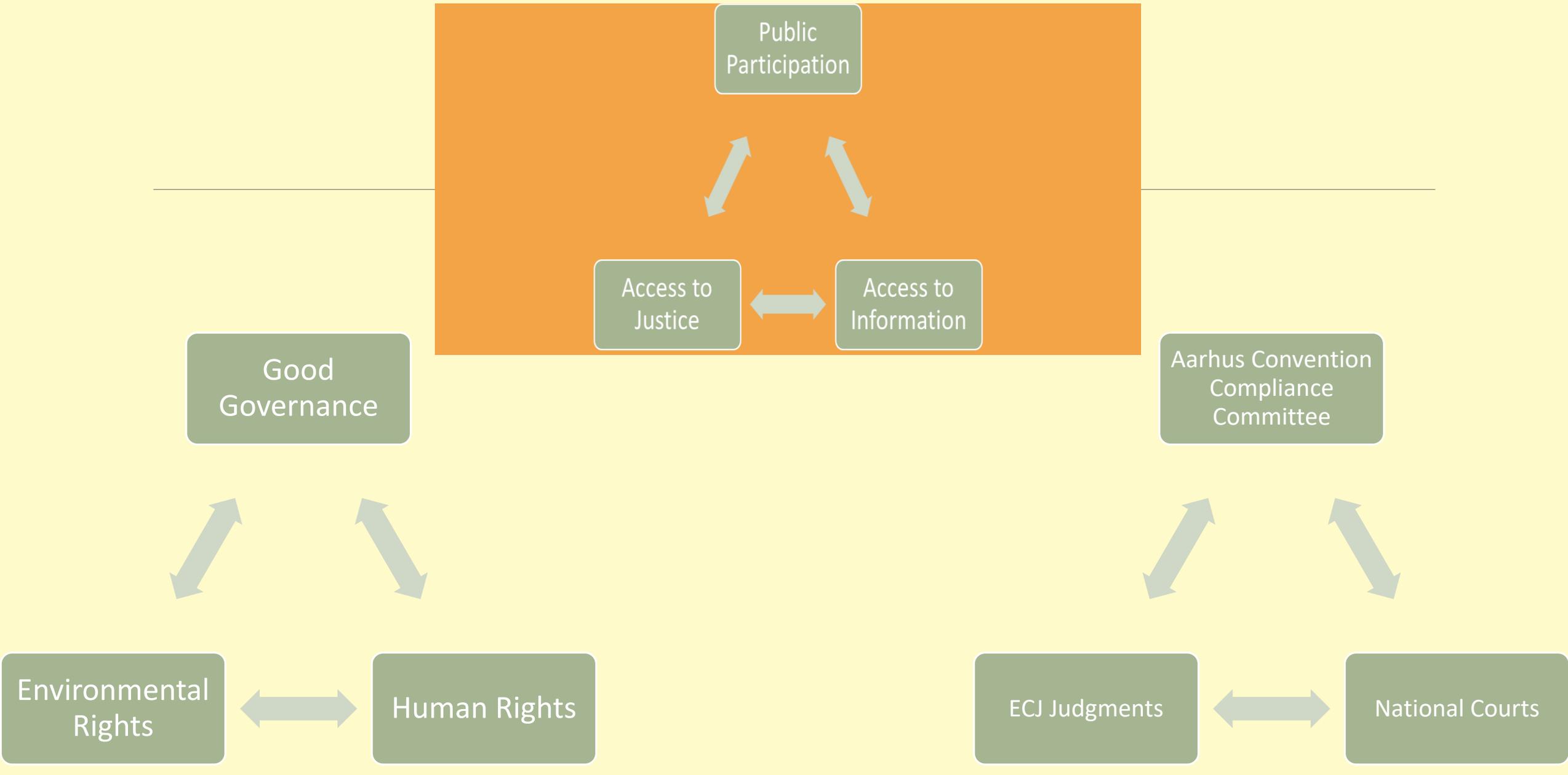
What this paper considers:

1. What are the bodies that influence the shape and meaning of the Convention and how do they do this?
2. The Compliance Committee – How it works and its decisions.
3. The CJEU and the Aarhus Convention?
4. The Irish Courts and the Aarhus Convention?
5. Some Comments on Ireland's Compliance.
6. Conclusion

The Aarhus Convention 1998 UNECE

<https://www.unece.org/env/pp/treatytext.html>





Convention Bodies

1. NGOs
2. Meeting of the Parties
3. Compliance Committee
4. Task Force on Access to Justice
5. Task Force on Access to Information
6. Task Force on Public Participation

Special Role of NGOs

- Instrumental in negotiating the text of the Convention.
- Integrally involved in the meeting of the parties and all negotiations that take place on any issues relevant to the Convention.
- Right to nominate members of the Compliance Committee alongside Parties.
- Submit the bulk of Communications to the Compliance Committees.
- Unique in International Law.

Art 10 (5). Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

Meeting of the Parties





Compliance Committee

- Are its decisions precedential? No
- Guide as to how that particularly constituted committee viewed the convention.
- But the practice of refusing a communication if the point had been previously decided sets that particular view point in stone.
- Draft Guide to the Aarhus Convention Compliance Committee 2018
[https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide to the AC CC for CC56 clean.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_AC_CC_for_CC56_clean.pdf)

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- Non-confrontational, non-judicial and consultative nature to review compliance with the Convention;
 - Allow for public involvement and may include the option of considering communications from members of the public on matters related to the Convention.
 - Basis of its jurisdiction – Art 15 of the Convention and Decision I/7 first session MOP (Lucca, October 2002).



**Chair: Jonas
Ebbesson (Sweden)**



Vice Chair: Aine Ryall



**Vice Chair: Mr. Alexander
Kodjabashev (Bulgaria)**



**Ms. Fruzsina Bögös
(Hungary)**



**Mr. Marc Clément
(France)**



**Ms. Heghine Grigoryan
(Armenia)**



**Mr. Jerzy Jendrośka
(Poland)**



**Mr. Peter Oliver (United
Kingdom)**



**Mr. Dmytro Skrylnikov
(Ukraine)**

5 Ways to initiate the procedure

- a) a Party may make a submission about compliance by another Party;
- b) a Party may make a submission concerning its own compliance;
- c) the secretariat may make a referral to the Committee;
- d) **members of the public** may make communications concerning a Party's compliance with the Convention;
- e) the Meeting of the Parties may request the Committee to examine a Party's compliance with the Convention.



Interaction between the CC and the MoP

- Decisions of the Compliance Committee are not finalised until they are unanimously approved by the MoP.
- Consensus based decision making process – generally works.
- But:
- **C32/2008** EU Communication by Client Earth regarding standing rights before the ECJ. The EU pulled its (considerable) voting power to bear to block the adoption of the findings against it. When consensus could not be reached negotiations were conducted (including all the countries, NGOs and any interested observers). In the end it was agreed to adjourn the Findings of the Compliance Committee to the next MoP, to give the EU Commission representatives an opportunity to go back and negotiate.
- Perhaps preferable to outright rejection.
- Also **C91 UK** Hinkely Point EIA complaint. Failure to provide for transboundary EIA.



Task Forces

- Expert committees of academics, lawyers and environmental specialists.
- Two main functions:
 - Issue recommendations to improve implementation in their area.
 - Gather and publicise examples of good practice in the area by Parties.
- Three:
 - Task for on Access to Information
 - Task force on Public Participation
 - Task for on Access to Justice.

Task for on Public Participation

Maastricht Guidelines on Public Participation <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppppdm/ppdm-recs.html> :

- Design of Public Participation
- Carrying out.
- Identifying the public concerned
- The Zero Option
- Transboundary Consultation

Task for on Information

- Recommendations on the more effective use of electronic information tools to provide public access to environmental information, Published: December 2005.
- <https://www.unece.org/environmental-policy/conventions/public-participation/publications/public-participation/2005/envppaarhuseit-recommendations/doc.html>

The Aarhus Convention: An Implementation Guide (2nd Ed.) 2014

- Official UN Interpretation of the Convention.
- Also contains analysis of the decisions of the Compliance Committee.
- Mentioned in ECJ Judgements as an explanatory document that can be taken into account for the purposes of interpreting the Convention (NOT a legally binding interpretation or normative instrument). (Fish Legal Case C-279/12, R.(Edwards) v Environment Agency (C-260/11)).
- Also mentioned in Irish Judgements (Conway v AG & NRA, 24th Feb 2017, Clarke J.)
- https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Compliance Committee Decisions

1. ACCC/C/2004/01, by Green Salvation (Kazakhstan) (Nuclear Waste Case)
2. ACCC/C/2004/02, by Green Salvation (Kazakhstan) (High Voltage Power Line Case)
3. ACCC/S/2004/01 by Romania and ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine) (Bystre Canal)
4. ACCC/C/2012/77 – UK Costs case (National Nuclear Power Strategy)
5. ACCC/2013/91 – UK Transboundary Public Participation (Hinkley Point Case)
6. ACCC/C/2008/32 (part II) (European Union) – C32 Client Earth Standing Case

Communication ACCC/C/2004/01, by Green Salvation (Kazakhstan).



- In 2001 the President of a Nuclear Energy company National Atomic Company Kazatomprom, proposed a legislative amendment for a scheme which would import nuclear waste for disposal in Kazakhstan and use the money from this towards the disposal of domestic nuclear waste.
- The President referred in a press release to a feasibility study.
- In 2002 NGO Green Salvation, the Communicant here, sought a copy of the feasibility study and it was not provided.
- Court proceedings were ultimately unsuccessful on technical standing grounds.

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- The Communication was lodged in February 2004 alleging breaches of access to information, access to information for participation and access to justice for a denial of access to information under Article 4.
 - The Respondent argued the NGO were not the “Public Concerned” under Article 2(5), the information sought did not relate to any ongoing decision making procedure (as the matter was not currently under consideration by the Government), and that the company Kazatomprom was not a “public authority” within the meaning of Article 2(2).

The Compliance Committee determined:

1. That the applicant fell within the definition of “the public” within the meaning of Article 2(4).
2. The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation to the environment, and performing public functions under the control of a public authority. The company is also fully owned by the State. (Article 2(2))
3. The information sought (feasibility study on a legislative proposal) fell within the definition of environmental information under Article 2(3)(b).

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4. That the party concerned had failed to provide an expeditious procedure for challenging the refusal in breach of Art 9(1).
 5. That the party concerned had failed to transpose into national legislation 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.
 6. No guidance had been issued to the judiciary with regard to the direct applicability of the Convention's provisions.

Communication ACCC/C/2004/02, Green Salvation (Kazakhstan)



- January 2001 the Mayor of Almaty adopted a decision to proceed with a project to construct a 110kv overhead power line to replace a faulty underground power line. The proposed route was to go through a heavily built up residential area, in breach of existing rules requiring 50 meter exclusion zones.
- EIA was carried out but without public consultation with the residents.
- This EIA was rejected by Minister for Environment. A new EIA was carried out, and this was approved by the same Minister despite the fact that this second assessment also did not take into account the views of the public (consultation was done only with interested bodies but not residents).
- Court proceedings challenging the project were unsuccessful (in spite of the fact it was manifestly in breach of a number of environmental and building laws, and that construction work began on the project before all necessary permits were obtained).
- There were allegations of physical attack on the initiator of the case, and of penalisation by the Courts.

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- The Committee found that the activities concerned did not fall within the thresholds of those requiring public participation under Art 6 but found nonetheless that public participation was required as Annex I para 20 requires public participation under Art 6 occur where the act is subject to public participation under a National Law measure, which this was.
 - However the Committee indicated that because this breach of Art 6 hinged on their being a requirement in national law, it was a breach of lesser gravity than a breach of Art 6 that hinged on breach of the Convention.
 - For example a country that had no requirement under national law to have public participation in an EIA would not be considered to be in breach of this provision, even in circumstances where its legal system was not as compliant with the spirit of the Convention as Kazakhstan's was.

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- The Committee found a breach of Art 6(2) as the residents of the area affected fell within the definition of the “public concerned” and they were not notified of the hearings that were held to purportedly satisfy the requirement of “public participation”. This resulted in breaches of Art 6(3), (4), (“reasonable time frames” and “early public participation, when all options are open) and (7) (allowing the public to submit input), (8) (taking into account that input).
 - The Committee did not find that Art 9 was breached, even though adverse court decisions were obtained, and the process was lengthy. This was not enough in itself to find there was no access to fair equitable and timely review. It was found to be outside the scope of the Committee’s work to consider the fact that National law had not been applied correctly by the Court and this was not found to be relevant to Art 9 compliance.
 - However the conflicting decisions of the courts and the lack of clarity on the law was found to be a breach of Art 3 (1).

Submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine) (Bystre deep-water navigation canal construction)

- Plan for a deep-water navigation canal (Annex I para 9) in the Danube Delta, which was a Special Area of Conservation, in an area in the Ukraine but close to the Romanian part of the delta.
- The EIA was conducted and approved without public participation, and requests for information such as the EIA were repeatedly denied, on grounds that the EIA was the private information of the developer which could not be disclosed.
- A court action was taken which initially resulted in a victory but the appellate Court overturned this.
- A complaint was made and rejected from Espoo Convention implementation body on technical grounds.



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- The Party concerned maintained that there was no national law obligation to have public participation as part of the EIA process conducted.
 - The Committee found breaches of Art 6 for failure to provide public participation for an Annex 1 project.
 - There was a breach of Art 4(1) for failure to provide the relevant information on request.
 - There was a breach of Art 3(1) for failure to have clear implementation of the provisions of the Convention in National law in the area of public participation in EIA projects.

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- **“Public authorities should possess information relevant to its functions”** – the public authority has an obligation to gather and have to hand the information relevant to the exercise of their functions including that on which they base their decisions.
 - “lack of clarity with regard to public participation requirements in EIA and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, indicates the absence of a clear, transparent and consistent framework for the implementation of the Convention and constitutes non-compliance with article 3, paragraph 1, of the Convention”

ACCC/C/2012/77 – UK Costs case (Greenpeace)

- The Communicant NGO Greenpeace was involved in a judicial review challenge to the UK Nuclear National Policy Statement (NPS), that failed at the very initial stage of the Court process, at the paper-based leave application stage.
- The Court determined that the Communicant should have to bear their own costs, and also that they pay £11, 813. The Communicant appealed this and it was reduced to £8,000. Further stage appeals on both costs and leave were available but not availed of, ostensibly because of a fear of further costs orders.
- The Communicant alleged this costs order rendered the process prohibitively expensive.
- The Compliance Committee agreed having regard to the means of the Communicant



GREENPEACE

ACCC/2013/91 – UK Hinkley Point Case

- Concerned the process of permitting the nuclear facility in the UK known as Hinkley Point C.
- The Committee found that the requirement to identify the public concerned when carrying out ultrahazardous activities was not met, and also that there had not been a transboundary consultation in circumstances that required it, in breach of Art 6.



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- The decision of the Committee was amended by the MoP to remove the word “legal” from a recommendation requiring amendment of the legal framework to ensure that transboundary consultation was carried out in all cases of transboundary impacts, not just in cases requiring a transboundary Environmental Impact Assessment (ie not just when projects physically cross a border).
 - This left a recommendation that they introduce a “framework” but not a “legal framework” providing for transboundary consultation in cases of likely transboundary impacts the found the UK courts had been incorrect in their interpretations of the public concerned and likely effects.
 - Also removed was a section referring to the need to take into account the fear concerns and perceptions of the public as transboundary impacts.

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- **Note:**
 - An Taisce had taken an unsuccessful legal challenge in the UK on grounds that the Irish public should have been consulted under transboundary EIA obligations arising from the Espoo Convention:
 - R v. The Secretary of State for Energy and Climate Change [2013] EWHC 4161 (Admin).
 - R v. Secretary of State for Energy and Climate Change and another [2014] EWCA Civ 1111.
 - In April 2016, the Espoo Compliance Committee later made a finding of non-compliance with the obligation to conduct transboundary EIA.
 - As a result of this and the Aarhus Compliance Committee finding, a public consultation was run by the Irish Government at the request of the UK Government, which closed last week.

ACCC/C/2005/11 (Belgium),

The independence of the judiciary, which is presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures to implement the Convention.

“C32 EU Part 2”

ACCC/C/2008/32 (part II) (European Union)

- Concerned a challenge by Client Earth NGO to the “Plaumann” standing rule in CJEU case law, that the only parties (individual or NGO) who had standing to challenge a legal measure were those who were “individually concerned” with the measure.
- “Individually concerned” was interpreted quite strictly in Plaumann to mean that a large degree of affect had to be suffered by an individual before they would fulfil the criteria.
- This effectively ruled out public interest litigation by NGO’s or Individuals before the CJEU.
- (Interesting in light of LZ and Trianel cases above).
- The Compliance Committee issued findings that the EU’s standing rules were in breach of the rules particularly in regard to NGOs automatic standing provided for by the Convention.

The EU did not accept the findings of the Compliance Committee, arguing that to do so would be to require them to interfere with the independence of the judiciary and the separation of powers.

Client Earth pointed out that Art 27 of the Vienna Convention forbids Parties to international treaties arguing “internal” laws prevent their compliance, if they have not sought a derogation prior to ratification.

This was an unprecedented move, and resulted in negotiations to try to reach a consensus.

However the EU Commission negotiators hands were largely tied by the negotiating mandate issued to them by Council decision that left no room for compromise.

<http://www.consilium.europa.eu/en/press/press-releases/2017/07/17/aarhus-convention/>

The decision was made to postpone the findings to the next MoP.

Draft COUNCIL DECISION on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32

<http://data.consilium.europa.eu/doc/document/ST-11150-2017-INIT/en/pdf>

“In view of the separation of powers in the Union, the Council cannot give instructions or make recommendations to the Court of Justice of the European Union ('the Court of Justice') concerning its judicial activities. Therefore, the recommendations in draft Decision VI/8f related to the Court of Justice and its jurisprudence cannot be accepted.”

What has the CJEU said about the status of the Aarhus Convention?

- “LZ No.1” p.30
- “The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, **according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union** (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).”

“ In those circumstances, the answer to the first and second questions referred is that Article 9(3) of **the Aarhus Convention does not have direct effect in EU law**. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.”

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- **“Trianel” .p41:**
 - Discussing Art 10a access to justice provisions of the EIA Directive 2011:
 - “Those various provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which – as is stated in recital 5 to Directive 2003/35 – **EU law should be ‘properly aligned’.**”

Some EU Decisions on Aarhus

1. C 279/12 – “Fish Legal” Fish Legal and Emily Shirley v Information Commissioner and Others.
2. C-240/09 - “LZ” (Slovak Brown Bears) Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.
3. C-115/09 - “Trianel” Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG
4. C-263/08 - “Djurgården” Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd
5. C-427/07 - Commission v Ireland
6. C-470/16 - North East Pylon Pressure Campaign Ltd v An Bord Pleanála (15th March 2018)

C 279/12 – “Fish Legal”

Fish Legal and Emily Shirley v Information Commissioner and Others.

- **Generally the judgements of the CJEU show an intention to strive for what Ryall has called the “Doctrine of Consistency”:**
- **Para 35:** “First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by or for public authorities (see, to this effect, Case C-524/09 Ville de Lyon [2010] ECR I-14115, paragraph 36, and Case C-204/09 Flachglas Torgau [2012] ECR, paragraph 30).”

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- **Para 36:** “As recital 5 in the preamble to Directive 2003/4 confirms, in adopting that directive the **European Union legislature intended to ensure the consistency of European Union law with the Aarhus Convention** with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest (Flachglas Torgau, paragraph 31).”

C-240/09 - “LZ No.1” (Slovak Brown Bears)

Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.

- A Slovakian NGO wished to be party to the decision making process for granting licences to hunters for killing of protected Brown Bears in protected Habitats in Slovakia.
- The administrative authority refused them this and they lost their appeal also.
- They took court proceedings and the Slovak Courts referred the question to the CJEU.
- The CJEU held that Art.9(3) does not have direct effect in EU law.
- However the National Court had an obligation to interpret National law in accordance with the Objectives of Art 9(3), in a manner that would allow NGOs to challenge a decision, if it would breach the provisions of EU law affected by Art 9.
- The CJEU went on to emphasise, however, that art.9(3), although drafted in broad terms, is intended to ensure effective environmental protection.

C-115/09 - “Trianel”

Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v
Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen GmbH & Co KG

- Challenge by German FoE to permit of a coal fired power plant on grounds that it had not been shown that there would be no significant effect on a Habitat in breach of Art 6(3) of the Habitats Directive.
- The Court sought to block the challenge on grounds that the Applicant NGO did not fulfil the administrative law requirement for review of maintain an impairment of a right, and that they sought to rely on public law measures that did not confer rights on individuals.
- The CJEU found that this law was incompatible with the Directive and the Aarhus Convention requirement of broad access to justice.
- Art.10a of the EIA Directive contains a specific rule that any NGO meeting the requirements referred to in art.1(2) of the EIA Directive automatically has standing to invoke the review procedure

C-263/08- “Djurgården”

Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd (C-263/08)

- The CJEU determined that Swedish legislation requiring NGOs to have a minimum of 2,000 members to acquire standing to bring an appeal against an environmental decision was not compatible with the access to justice obligation in the EIA Directive.
- The EIA Directive does allow MSs discretion to set down conditions for NGO standing.
- But these rules must be consistent with “wide access to justice” .
- Requiring minimum numbers was fine as long as it wasn’t a prohibitive threshold.
- Requiring environmental objectives was also fine.

Commission v Ireland (C-427/07).

- The CJEU ruled that Ireland's costs regime was align with the requirement of “not prohibitively expensive” and as the Courts discretion not to award costs against an unsuccessful litigant lay in the realm of discretion, it failed to provide sufficient legal certainty.
- This was in breach of Article 10(a) of the EIA Directive 85/337 as amended which implements Art 9 of the Convention.

North East Pylon Pressure Campaign Ltd v An Bord Pleanála (C-470/16)

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=195752&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1>

The Applicants challenged planning permission granted for Eirgrid's North-South Interconnector.

They were unsuccessful due to prematurity after a five day leave application.

The question of costs and the “not prohibitively expensive rule” (NPE rule) was referred to the CJEU.

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1. The NPE rules in Art 9(3) and (4) do not prohibit awarding reasonable costs against the unsuccessful applicant. Only unreasonable costs are prohibited.
 2. Therefore costs can be awarded against an applicant for bringing a vexatious claim but these costs must be reasonable if the proceedings are covered by the Directive.
 3. In a case involving some arguments grounded on Environmental Rules and some grounded on non-environmental rules, NPE Rules only to the arguments grounded in Environmental Rules and in ascertaining costs the National Courts should endeavour to distinguish between the costs of each. BUT this cannot be done in a way that violates the principles of Article 9. Article 9(3) and (4) do not have direct effect. However the National Court must interpret National Law in a manner that is consistent with them.
 4. There can be no requirement to demonstrate environmental damage to avail of the costs protections.

Irish Courts treatment of Aarhus:

Status of the Convention:

1. Kimpton Vale Developments Ltd v An BP [2013] IEHC 442, Hogan J..

Refer to the Compliance Committee Decisions:

3. Conway v AG & NRA 24th Feb 2017 HC Clarke J.

1. Kimpton Vale Developments Ltd v An BP

[2013] IEHC 442, Hogan J.

- This decision concerned Kimpton Vales' challenge to refusal of An BP to allow a proposed development to be considered to be exempted development.
- The Company took a JR in the High Court and An BP sought a PCO under the Companies Acts as the Company was in NAMA.
- It was argued that the special Aarhus Costs rules under s.50B/S.3 of the 2011 Act should apply, excluding the possibility of AN BP obtaining their costs, and therefore a PCO was inappropriate.
- The HC found that the matter was not one falling within the categories of EU case that were described by the legislation and therefore the ordinary costs rules applied and the PCO was granted.
- The Oireachtas had not made the Aarhus Convention a part of the law of the State, outside of the specific instances covered by these individual pieces of legislation.
- The Convention only had binding force as part of EU Law.

3. Conway v AG & NRA

24th Feb 2017 HC Clarke J.

“While not providing a definitive legal interpretation of the scope of the **Aarhus Convention** it is, in my view, appropriate to have regard to decisions and commentaries of the **compliance committee** established under the **Aarhus Convention** for the purposes of facilitating the compliance by subscribing states with the terms of the Convention itself. That committee has taken the view that “national law” relating to the environment includes EU law applicable within EU member states.”

“It seems to follow, therefore, that it is at least possible in principle that provisions of the Aarhus Convention may be directly effective in member states or be required to be implemented as far as practicable by a conforming interpretation of national procedural rules but it is also clear that not every provision of the Convention is directly effective or capable of such implementation. Thus, in respect of any particular provision sought to be relied on, it will be necessary to determine whether it met the relevant criteria. That could well raise important questions not least in the context of the “not prohibitively expensive” requirements to be found in Article. 9.4 of the Convention.”

Comments on Irish Compliance with Aarhus

1. Access to Information
2. Public Participation
3. Access to Justice

1. Access to Information

- Implementation of provisions by way of EU Directive Implementation
- Legal regime could be tighter to give certainty
- However mainly issues in application - need for greater Capacity Building among public bodies as to their obligations.
- No active efforts by many public authorities to actively gather and disseminate environmental information on a regular basis.
- Delays in both responses to requests and processing of complaints by the CIE (backlogs).
Knock on consequences – denial of participatory and access to justice rights if timeframes elapse for JR/other challenges.

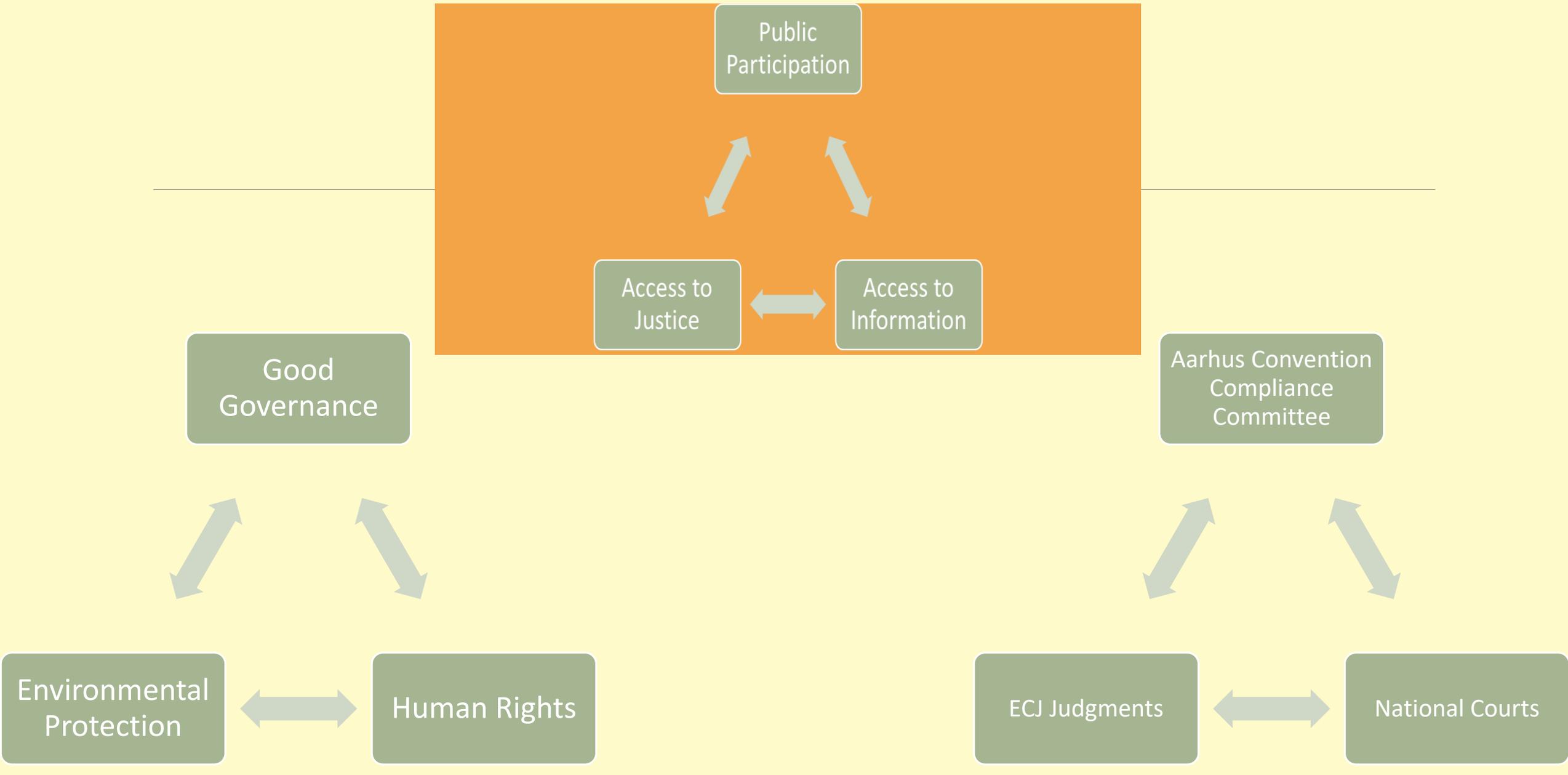
2. Public Participation

- Inconsistent application of the rules across different sectors.
- Quite good in Planning/EIA Developments.
- Abysmal in Forestry and Aquaculture – lack of clear processes & online information.
- Concerns regarding the use of really high thresholds to exclude almost all projects in a given sector from the EIA process – not consistent with the principle of broad and open public participation.

3. Access to Justice

- Only formal attempt to implement in this area have been the costs rules for Judicial Reviews under S.50B of P&D Act 2000 as amended and s.3 of the Environment Miscellaneous provisions Act 2011 create a new costs regime for specific matters falling within the scope of the EIA, IPPC and the Strategic Environmental Assessment Directives
- Otherwise there would appear to be a lack of implementation of Article 9 and definitive statements by the Courts it is not part of Irish Law in a general sense (Kimpton Vale, JC Savage, Conway)
- Issue with uncertainty – Numerous litigations about whether the costs provisions apply to particular cases or not would indicate the matter is unclear.
- Issues with the idea of bearing your own cost = not prohibitively expensive.
- Issues with capacity building – to what extent could it be said the general public know how to use the Courts and are assisted in doing so?

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- **Matters not the subject of EU Law are not covered by this costs regime.**
 - **Requirement to show likelihood/risk of environmental damage not compatible.**
 - **The Oireachtas has not declared Art 9 to be part of Irish Law yet outside of these instances.**
 - **Plans to do so since 2016 by an “Aarhus Bill” so have not progressed.**
 - **Complaint pending before the ACCC regarding compatibility of Ireland’s costs regime with Art 9 of the Convention (ACCC/C/2014/113).**



Conclusions

- Since its inception, the Aarhus Convention Compliance Committee has been having a significant impact on the meaning of the Convention and its interpretation.
- As a consequence it is shaping also the legal systems of all of the Party States.
- In the event of a hard Brexit, it could have an important normative role to play in the Environmental Law of the UK, and the retention of common standards between the jurisdictions.
- Efforts must be made politically to ensure the continued integrity of the process of acceptance of findings of the CC by the Parties, as it is on this political will that the strength of the mechanism rests. Dangerous signs at the last MoP of the potential for a breakdown of this system.

Selected References:

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