**The Aarhus Convention Index**

**INTRODUCTION AND INDICATORS FOR PILOT TESTING**

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[METHODOLOGY AND SCORING SYSTEM 5](#_Toc462667864)

[Legal Indicator Scoring 5](#_Toc462667865)

[Practice Indicator Scoring 7](#_Toc462667866)

[Weighting of the Legal Indicators and Practice Indicators 7](#_Toc462667867)

[Research and Review 8](#_Toc462667868)

[2015 Expert Workshop and 2016 ACI Pilot Testing 9](#_Toc462667869)

[SUMMARY OF COVERAGE BY INDICATORS 10](#_Toc462667870)

[AARHUS CONVENTION INDICATORS 18](#_Toc462667871)

[Guidelines for assessing legal indicators 18](#_Toc462667872)

[Guidelines for assessing practice indicators 21](#_Toc462667873)

[I. General pillar (incl. definitions) 23](#_Toc462667874)

[(a) Definitions - Legal indicators 23](#_Toc462667875)

[Definitions – Practice indicators 27](#_Toc462667876)

[(b) General provisions – Legal indicators 33](#_Toc462667877)

[General provisions – Practice indicators 40](#_Toc462667878)

[II. Access to information pillar 50](#_Toc462667879)

[(a) Information on request – Legal indicators 50](#_Toc462667880)

[Information on request – Practice indicators 63](#_Toc462667881)

[(b) Collection and active dissemination of information – Legal indicators 76](#_Toc462667882)

[Collection and active dissemination of information – Practice indicators 87](#_Toc462667883)

[III. Public participation pillar 103](#_Toc462667884)

[(a) Public participation in decisions on specific activities – Legal indicators 103](#_Toc462667885)

[Public participation in decisions on specific activities – Practice indicators 113](#_Toc462667886)

[(b) Public participation concerning plans, programmes and policies relating to the environment – Legal indicators 131](#_Toc462667887)

[Public participation concerning plans, programmes and policies relating to the environment – Practice indicators 134](#_Toc462667888)

[(c) Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments – Legal indicators 140](#_Toc462667889)

[Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments – Practice indicators 142](#_Toc462667890)

[IV. Access to justice pillar 146](#_Toc462667891)

[Access to justice – Legal indicators 146](#_Toc462667892)

[Access to justice – Practice indicators 155](#_Toc462667893)

[I. General pillar (including definitions)(cont.) 176](#_Toc462667894)

[National reporting and overall framework 176](#_Toc462667895)

**THE AARHUS CONVENTION PILOT INDICATORS**

The Aarhus Convention[[1]](#footnote-2) Indicators (ACI) are being created by the Access Initiative and World Resources Institute, in collaboration with regional experts, to allow civil society, governments, academics, and the private sector to assess how well a country/Party protects the rights enshrined in the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereafter “the Aarhus Convention”). These rights have been recognised by the United Nations as fundamental to sustainable development and help promote fair and equitable decision-making by improving transparency, stakeholder engagement, and accountability.

The ACI will enable researchers to benchmark the quality of a country’s laws and practices against the Aarhus Convention, an internationally recognised and legally binding standard. The information ACI produces can be used to pinpoint gaps in laws and practices, prioritise reforms and provide models, through international comparison, of good laws and practices. Together with complementary resources such as the Aarhus Convention Implementation Guide (2014),[[2]](#footnote-3) it is our intention and hope that ACI will encourage and facilitate the improvement of laws and practices to secure the critical rights enshrined in the Aarhus Convention.

The ACI is composed of two discrete sets of indicators—a legal set consisting of 86 indicators responding to eight articles of the Aarhus Convention (Articles 2 to 9), and a practice set consisting of 69 indicators responding to the same eight articles of the Convention plus the ‘regular reporting’ obligation in Article 10(2). The legal indicators seek to measure how well national laws enact[[3]](#footnote-4) obligations under the Aarhus Convention. These indicators measure enactment of Aarhus Convention obligations by way of ***national*** laws in the case of countries, or ***EU laws*** in the case of the European Union’s enactment, since the EU is a Party to the Aarhus Convention in its own right.Neitherlegal nor practice indicators have been developed in respect of Article 1, or Article 10 onwards (with the exception of the practice indicator for Article 10(2) mentioned above) of the Aarhus Convention, as these provisions do not appear to impose obligations that require enactment.

***Note on legal systems and scoring:*** The legal indicators test if the relevant law measures up to the Aarhus Convention.  A high score indicates that that law conforms to the Aarhus Convention.  That however does not necessarily mean that the law is strong within the context of the legal system of that country.  In some countries, other laws or even policies may trump, or be more authoritative, than the relevant law.  In others, the law may receive a high score but because the rule of law is weak, laws in that country may not be respected. Nevertheless, the ACI assumes that for the public to have enforceable rights to transparency, participation and access to justice, a good starting point is to ensure that those rights are recognised and clearly written down in the legal framework.

Instead of measuring the quality of enacting laws, the practice indicators assess discrete aspects of how the Aarhus Convention is being implemented in practice. Besides that main difference, the authors wish to emphasise that the practice indicators will provide a snapshot of a national level assessment (or regional level in the case of the EU), based on desktop research and the experiences and knowledge of the researcher and reviewer. In other words, scoring the practice indicators does not include extensive surveys, data analysis, or field research, though it may involve a few interviews depending on the experience of the researcher (see p.23). However, the scores given by researchers/reviewers in respect of the practice indicators will be duly explained and the explanations will be subject to multiple reviews.

# METHODOLOGY AND SCORING SYSTEM

## Legal Indicator Scoring

With one exception,[[4]](#footnote-5) each legal indicator is scored on a four-point scale, from 0 to 3, with 3 as the highest score. Each choice is guided by criteria that are required to merit that score, such that subjectivity is limited as much as possible. In developing these criteria we have drawn on “Guidelines for conformity checking (2009),”[[5]](#footnote-6) which guidelines were developed in the context of assessing the conformity of countries’ laws with instruments of EU environmental law. In general, a “0” represents complete absence of the conditions, or legal coverage referred to in the indicator. “1” represents a low level of conditions or coverage. “2” represents a medium level and “3” a high level of presence of conditions or coverage referred to in the indicator. In respect of certain indicators we have provided more than one factual permutation for a given indicator score (e.g. there could be two different factual scenarios which would merit the same score of 1, say). In such cases, researchers are to identify the relevant factual scenario and score accordingly, indicating in their comment which of the scenarios was relevant in the case of the Party in question. The scores of the indicators for each relevant provision of the Aarhus Convention will be averaged to produce a score for each assessed article. The articles for each pillar (i.e. General (incl. definitions); Access to information; Public participation; and Access to justice) will then be averaged to produce pillar scores. Finally, the average of the pillars will be used to produce the overall country/Party score.

Ultimately, if ACI moves beyond the pilot phase into a full roll-out to all Aarhus Convention Parties, the intention would be that these scores will be displayed on an interactive map on a website as well as being made available, along with sources, comments and dialogue between researchers and reviewer(s), on each country/Party page. This would represent the Aarhus Convention Index.

***Note on the scoring averages:*** ACI uses arithmetic averages a) for all articles of the Convention and b) from the values of the articles for the pillars and finally, c) for the whole Convention in all cases both for the legal and practical indicators. We note that the scores of certain indicators (e.g. in respect of definitions) will necessarily impact the range of scores that may be selected in subsequent indicators which test the enactment of provisions which rely on those definitions (e.g. once a definition determines the scope of a term too narrowly, this narrows the scope of all rules that use the same definition).

***Note on scoring ranges:*** The range of four possible scores (0 – 3) is used as a general matter because it provides a standard scoring range and captures most of the nuance in range of different possibilities for that indicator.

In addition to the scores, the researchers are required to provide the legal provisions that support the score. Finally, researchers use the comment box to provide rationales, explanations, or other clarifications which can help justify the score.

**RESPONDENT: In your view, if a Party maintains or introduces measures providing for broader access to information, more extensive public participation, and/or wider access to justice rights than the Convention requires (see Art. 3(5)), should it receive additional points by way of a dedicated indicator (as below) or it is enough to allocate the highest score in respect of each relevant indicator where this is the situation?**

## Practice Indicator Scoring

The practice indicators follow the same scoring system as the legal indicators.[[6]](#footnote-7) These indicators check for evidence of the existence and quality of a practice that is required by law. For most indicators (with a small number of exceptions which are scored on a presence/absence basis (i.e. only two options: 0 or 3)), the researcher/reviewer may choose one of four responses (which vary depending on the provision being tested): e.g. Excellent (scored 3), Good (2), Fair (1), Poor (0). Again, in respect of certain indicators we have provided more than one factual permutation for a given indicator score (e.g. there could be two different factual scenarios which would merit the same score of 1, say). Again, in such cases researchers are to identify the relevant factual scenario and score accordingly, indicating in their comment which of the scenarios was relevant in the case of the Party in question.

In respect of the practice indicators certain scenarios have been provided (see the tables of indicators below) as a ‘prompt’ or catalyst to get the researcher/reviewer thinking about potentially relevant situations (and other scenarios that such considerations might prompt); these scenarios may or may not be relevant, or may or may not have arisen, in the relevant national context – e.g. [situations which have been considered previously by the Aarhus Convention Compliance Committee](http://www.unece.org/env/pp/pubcom.html); in [Parties’ 2014 National Implementation Reports](http://www.unece.org/env/pp/reports_trc_implementation_2014.html); in the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf); or by the [Court of Justice of the European Union](http://curia.europa.eu/juris/recherche.jsf).

Researchers are asked to provide a justification for their score and to explain the factors they considered. Researchers and reviewers are encouraged to draw on as broad a range of sources (such as case studies, other sources of professional literature, interviews etc.) as possible in providing their suggested scores. When using such sources a balance should be carefully maintained between official, governmental sources, peer-reviewed sources, and NGO sources.

## Weighting of the Legal Indicators and Practice Indicators

The authors anticipate the creation of an Aarhus Convention Index in 2017, following the revision of the pilot indicators. Separate average scores will be calculated for each Party in respect of the Legal Indicators and Practice Indicators. These averages will then be amalgamated to give the overall score for that Party for the Aarhus Convention Index.

In doing this, a relative weighting will be given to each of the two parts of the Index (i.e. Legal and Practice) to create the final score. The relative weighting is being discussed and will be determined following the pilots.

**RESPONDENT: In your view, in amalgamating the average scores for the Legal Indicators and Practice Indicators to give an overall score for a Party, what should be the relative weighting of the Legal Indicators vs. the Practice Indicators?**

## Research and Review

There are four stages to the research and review in this pilot phase of the project, to provide adequate checks and balances that ensure accuracy, credibility and verification to the index:

1. **National Researcher:** This role is held by an environmental lawyer who is well-versed in laws and practices relating to environmental democracy in the Party being assessed. The researcher is responsible for scoring the indicators, providing the sources to justify the scores and providing relevant comments to explain the score.
2. **National Reviewer**: This role is held by an environmental lawyer who is well-versed in laws and practices relating to environmental democracy in the Party being assessed. This person critically evaluates the scores of the researcher. S/he may agree, agree and comment, or disagree with the score. Rationale must be provided.
3. **Steering Committee Reviewer**: The Steering Committee reviewer (within EMLA, UCD or WRI) reviews the researcher’s scores and comments as well as the national reviewer’s comments. In the case of a disagreement between the researcher and national reviewer, the Steering Committee reviewer may send a question back to one or both. If the disagreement persists, the Steering Committee reviewer will decide the issue with a clearly reasoned decision. The Steering Committee also provides a second review of the scores, sources, and rationale, and may raise her/his own questions to the researcher.
4. **Final Approval**: The Steering Committee reviewers will also fill this role, although the final reviewer will never be the same person as the Steering Committee reviewer for any given Party. The final reviewer checks scoring and reviews for consistency and sends any final questions back to other parties (researcher, reviewer, etc).

**Respondent: What is your view on this method of research and review? Are there alternatives to consider?**

## 

## 2015 Expert Workshop and 2016 ACI Pilot Testing

In autumn 2016, the pilot legal and practice indicators will be tested in 5 Parties to the Aarhus Convention. Potential parties for the pilot process were discussed at a workshop of experts in Dublin in July 2015, which workshop also helped to develop and refine the draft indicators here. Written comments were kindly provided subsequently by the Aarhus Secretariat and others on an earlier draft of this indicator document, which comments greatly improved the text. Any errors or inaccuracies, and the final choices re indicator design, are the Steering Committee’s (EMLA, UCD, WRI), which takes full responsibility for the text here. The final selection of Parties for pilot testing was carried out by the Steering Committee based on the availability of researchers/reviewers, amongst other factors. Pilot testing is to be carried out in the Czech Republic, Kazakhstan, Serbia, the UK, and Ukraine. As the indicators are currently in pilot form, the scores/results obtained for these countries whilst testing the pilot indicators will not be used as the basis for a published index.

# SUMMARY OF COVERAGE BY INDICATORS

| **Provision of Aarhus Convention** | **Section, Indicator** | **Comment** |
| --- | --- | --- |
| **I. General (incl. definitions):**  **(a) Definitions** | | |
| Article 1 (Objective) | - | Not an independently enactable obligation |
| Article 2(1)  Definition of “Party” | - | Not assessed |
| Article 2(2)  Definition of “Public authority” | I(a), Legal indicator 1, Practice indicator 1 |  |
| Article 2(3)  Definition of “Environmental information” | I(a), Legal indicator 2, Practice indicator 2 |  |
| Article 2(4)  Definition of “The public” | I(a), Legal indicator 3,  Practice indicator 3 |  |
| Article 2(5)  Definition of “The public concerned” | I(a), Legal indicators 4-6, Practice indicator 4 |  |
| **(b) General** | | |
| Article 3(1) | I(b), Practice indicators 8-10 (see very end of this table) | Assessed right at the end of process, as it is an overall assessment |
| Article 3(2) | I(b), Legal indicator 1, Practice indicator 1 |  |
| Article 3(3) | I(b), Legal indicator 2, Practice indicators 1 and 2 |  |
| Article 3(4) | I(b), Legal indicator 3, Practice indicator 3 |  |
| Article 3(5) | I(b), Legal indicator 4,  Practice indicator 4 | Please note the question for respondents above regarding this provision |
| Article 3(6) | - | Not really an enactable obligation |
| Article 3(7) | I(b), Legal indicator 5, Practice indicator 5 |  |
| Article 3(8) | I(b), Legal indicator 6, Practice indicator 6 |  |
| Article 3(9) | I(b), Legal indicator 7, Practice indicator 7 |  |
| **II: Access to information:**  **(a) information on request** | | |
| Article 4(1) | II(a), Legal indicator 1-2, Practice indicator 1 |  |
| Article 4(2) | II(a), Legal indicator 3, Practice indicator 2-3 |  |
| Article 4(3) | II(a), Legal indicators 4-6, Practice indicator 4-5 |  |
| Article 4(4) | II(a), Legal indicators 7-14, Practice indicator 6 |  |
| N/A | II(a), Legal indicator 15, Practice indicator 7 | Tests whether Parties have provided any exemptions from the right to obtain environmental information on request which are not envisaged by the Aarhus Convention |
| Article 4(5) | II(a), Legal indicator 4 (assessed together with Art. 4(3)(a)), Practice indicator 4 (assessed together with Art. 4(3)(a)) |  |
| Article 4(6) | II(a), Legal indicator 16, Practice indicator 8 |  |
| Article 4(7) | II(a), Legal indicators 17-19, Practice indicator 9 |  |
| Article 4(8) | II(a), Legal indicator 20, Practice indicator 10 |  |
| **(b) collection and active dissemination of information** | | |
| Art. 5(1) | II(b), Legal indicators 1-3, Practice indicators 1-2 |  |
| Art. 5(2) | II(b), Legal indicators 4-5, Practice indicator 3 |  |
| Art. 5(3) | II(b), Legal indicator 6, Practice indicator 4 |  |
| Art. 5(4) | II(b), Legal indicator 7, Practice indicator 5-6 |  |
| Art. 5(5) | II(b), Legal indicator 8, Practice indicator 7 |  |
| Art. 5(6) | II(b), Legal indicator 9, Practice indicator 8 |  |
| Art. 5(7) | II(b), Legal indicators 10-12, Practice indicator 9-11 |  |
| Art. 5(8) | II(b), Legal indicator 13, Practice indicator 12 |  |
| Art. 5(9) | II(b), Legal indicator 14, Practice indicator 13 |  |
| Art. 5(10) | - | Not assessed |
| **III. Public participation pillar**  **(a) Public participation in decisions on specific activities** | | |
| Art. 6(1) | III(a), Legal indicators 1-3, Practice indicators 1-2 |  |
| Art. 6(2) | III(a), Legal indicator 4, Practice indicator 3 |  |
| Art. 6(3) | III(a), Legal indicator 5, Practice indicator 4 |  |
| Art. 6(4) | III(a), Legal indicator 6, Practice indicator 5 |  |
| Art. 6(5) | III(a), Legal indicator 7 | No practice indicator |
| Art. 6(6) | III(a), Legal indicator 8, Practice indicator 6 |  |
| Art. 6(7) | III(a), Legal indicator 9, Practice indicator 7 |  |
| Art. 6(8) | III(a), Legal indicator 10, Practice indicator 8 |  |
| Art. 6(9) | III(a), Legal indicator 11, Practice indicator 9 |  |
| Art. 6(10) | III(a), Legal indicator 12, Practice indicator 10 |  |
| Art. 6(11) | III(a), Legal indicator 13, Practice indicator 11 |  |
| **(b) Public participation concerning plans, programmes and policies relating to the environment** | | |
| Art. 7 | III(b), Legal indicators 1-5, Practice indicators 1-4 |  |
| **(c) Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments** | | |
| Art. 8 | III(c), Legal indicators 1-5, Practice indicators 1-2 |  |
| **IV. Access to justice pillar** | | |
| Art. 9(1) | IV, Legal indicators 1-4, Practice indicators 1-3 |  |
| Art. 9(2) | IV, Legal indicators 5-6, Practice indicators 4-6 |  |
| Art. 9(3) | IV, Legal indicator 7-8, Practice indicator 7 |  |
| Art. 9(4) | IV, Legal indicators 9-14, Practice indicators 8-12 |  |
| Art. 9(5) | IV, Legal indicator 15-16, Practice indicators 13-14 |  |
| **I. General (incl. definitions) (cont.): (b) General**  **National reporting and overall framework** | | |
| Art. 3(1) | I(b), Practice indicators 8-10 | No legal indicators (these ‘practice indicators’ are in fact more like a hybrid between legal and practice, but we have classified them as practice for the purpose of calculation) |
| Art. 10(2) | I(b), Practice indicator 11 | No legal indicator |
| **Remainder of convention** | | |
| Art. 10 onwards (with exception of national reporting in Art. 10(2) – see above) | - | These articles do not appear to impose obligations that require enactment into national law, and with the exception of the national reporting requirement in article 10(2) are not tested by practice indicators |

# AARHUS CONVENTION INDICATORS

With a view to ensuring consistency, for the purposes of both the legal indicators and the practice indicators, researchers and reviewers should consider the following in scoring the indicators: environmental protection laws as well as sectoral laws governing air and water quality, forests, biodiversity, extractive industries and environmental impact assessments,[[7]](#footnote-8) as well as the general freedom of information law(s) or the law(s) that provide for access to environmental information at national level as well as the laws concerning administrative and judicial review procedures, including costs, remedies and injunctive relief. Where they have not considered all of these laws in respect of any indicator, the researcher/reviewer should say so and explain the reason.

## Guidelines for assessing legal indicators

In respect of each legal indicator, the researcher should include **in the first line of the comments box** a general assessment of enactment at the Party level, using the following typology:

* Literal enactment

No enactment error(s)

* Effective enactment
* Enactment which goes further than required
* Not enacted at all
* Incomplete enactment
* Incorrect enactment Enactment error(s)
* Incomplete and incorrect enactment
* Ambiguous enactment
* Contradictory enactment

Use **“literal”** where the enacting provision uses exactly the same (or almost exactly the same) language as the relevant provision of the Convention. In cases of “almost exactly the same” (e.g. where the enacting legislation cross-refers to provisions of the enacting legislation rather than to provisions of the Convention, or when the enacting legislation specifies a public authority in a particular context where the Convention refers to “the public authority”), researchers should quote the Convention text and the language from the enacting legislation in the notes column in providing their reasoning for the indicator score. Use **“effective”** where the enacting provision achieves the objective of the relevant provision of the Convention but does not use the same (or almost exactly the same) language. Again, in cases of “effective” enactment researchers should quote the Convention text and the language from the enacting legislation in the notes column in providing their reasoning for the indicator score. Use **“Not enacted at all”** where there is simply a gap in enactment. Use **“incomplete”** where the relevant provision of the Convention has been only partially enacted, even if the enactment is accurate insofar as it goes. In such cases please explain which part(s) of the provision have been enacted and which have not. Use **“incorrect”** where the relevant provision of the Convention has been incorrectly enacted, and please provide an explanation of your conclusion. Use **“incomplete and incorrect”** where the enactment is both incomplete and incorrect, and please provide an explanation of your conclusion in respect of the different parts of the relevant provision of the Convention. Use **“ambiguous”** where the enacting provision is open to interpretation that could comply or not comply with the relevant provision of the Convention. Again, please explain your conclusion in this regard. Use **“contradictory”** where the Party in question has enacted legislation which contradicts the relevant provision of the Convention, i.e. where there may be a possible intention to go directly against Aarhus obligations. “Contradictory” might therefore arise in combination with other descriptions, since a Party might for example have made specific legislation, but erred, in seeking to enact a Convention obligation and *in addition* might have contradictory national legislation (this could be indicated by “Incorrect enactment” **and** “Contradictory enactment”).

In respect of certain indicators, researchers are asked to indicate whether an enactment error is **“minor”** or **“more than minor”**. “Minor” errors are those which are not very serious and would not impede (or would impede only in a very limited way) the effective implementation of the relevant provision of the Convention. The threshold for “minor” errors should be considered to be very low, since any error is likely to impede effective implementation to some extent. Researchers should in each case use their judgment to decide whether an error is minor or more than minor, and should justify their conclusion in the comments box.

Where an enactment error relates to a definition, please note in your comments which other provision(s) of the Convention are affected by this error. In the comments box for the relevant definition, please note “Articles [X, Y, Z, etc.], paragraphs [X, Y, Z, etc.] of the Convention are affected by this error” and in the comments boxes of the affected provisions please record “The enactment of this provision of the Convention is affected by an error in the enactment of definition [X]”. In such cases you should take account of the error in enacting the definition in scoring enactment of the affected provision(s). Wherever it seems obvious, the instructions will contain a reference to this interrelationship between a faulty definition and a substantial provision.

The Aarhus Convention requires Parties, as a general matter (Art. 3(1)), to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Aarhus Convention. Please note that we have included dedicated indicators to test the extent to which legal enactment has served to achieve this. As such, in assessing the *other* legal indicators it is not necessary to ask yourself each time whether the enacting measure in question forms part of a clear, transparent and consistent framework to implement the provisions of the Aarhus Convention, and your scores for such other indicators should not be affected by this question.

Please also provide in the comments boxes:

* Reference to the relevant national provision(s) (i.e. name of law, article, paragraph, sub-paragraph, URL to the law if available, etc.). If there are various enacting measures, the first legal act to be cited should be the most relevant instrument enacting the Convention, but please cite all relevant provisions.
* Complete text of relevant national provision(s), in language of Party.
* Translation into English of relevant national provision(s), if available.
* In addition to referring to enacting legislation, you should where relevant base your analysis and scores on relevant decisions of judicial and administrative bodies. You should draw on these, where relevant, plus decisions of any other national, regional or international judicial or administrative bodies that are relevant to your analysis. Please cite in full in the relevant comment boxes any such decisions which you have relied upon in reaching your scores.
* Other sources to which you should refer in carrying out your research include the Aarhus Convention Implementation Guide (2014),[[8]](#footnote-9) Case Law of the Aarhus Convention Compliance Committee (2004-2011),[[9]](#footnote-10) the latest country report of your country issued to the Aarhus Secretariat before the most recent Meeting of the Parties,[[10]](#footnote-11) relevant peer-reviewed journal articles, governmental sources, and NGO sources.

**RESPONDENT: Are the above guidelines on legal indicators clear? Is terminology well defined?**

The questionnaire is very clear and easy to follow. My overriding comment would be that it takes a very long time to provide the breadth of evidence requested here – one could easily spend upwards of an hour on one question alone. It may be worth prioritising which information sources you prefer so that comparisons between countries can be made more consistently.

## 

## Guidelines for assessing practice indicators

As mentioned above, in respect of each practice indicator certain scenarios have been provided to act as a ‘prompt’ or catalyst to begin the process of considering relevant issues in settling on an appropriate score – such scenarios are taken, for example, from [Aarhus Convention Compliance Committee findings](http://www.unece.org/env/pp/pubcom.html); from [Parties’ 2014 National Implementation Reports](http://www.unece.org/env/pp/reports_trc_implementation_2014.html); from the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf); and from decisions of the [Court of Justice of the European Union](http://curia.europa.eu/juris/recherche.jsf).[[11]](#footnote-12) Whilst these scenarios may or may not be relevant, or may or may not have arisen in the relevant national context, they are intended to get researchers and reviewers thinking, and researchers/reviewers should please consider all the provided examples, amongst other things, as part of their work.

Researchers should check if there is an ACCC communication concerning their country/Party and take account of the outcome before the ACCC, if applicable. Researchers should do the same concerning relevant cases before the European Court of Human Rights, the CJEU and national courts/tribunals, if applicable.

Other ready sources of information which should be taken into account by researchers include decisions and annual reports of any relevant information officials (e.g. freedom of information bodies, access to information on the environment bodies) and those of ombudsmen with (usually amongst several others) an environmental portfolio.

Researchers/reviewers are asked to provide a justification for their score and to explain the factors they considered. Researchers and reviewers are encouraged to draw on as broad a range of sources as possible – as above in respect of the legal indicators - in providing their suggested scores.

Researchers should draw on their own personal experience in scoring; where this experience is insufficient to provide a score to a particular indicator, researchers should seek to interview two others with the requisite experience, and should base their score on these interview data, recording the fact of the interviews, the names/affiliations of interviewees,[[12]](#footnote-13) and the justification for the score.

RESPONDENTS: Are the above guidelines on practice indicators clear? Is terminology well defined?

See above.

## I. General pillar (incl. definitions)

### (a) Definitions - Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 2(2) | 1. How well has the definition of “Public authority” been enacted?   Art. 2(2) provides:  ““Public authority” means:  (a) Government at national, regional and other level;  (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) above;  (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.  This definition does not include bodies or institutions acting in a judicial or legislative capacity;”  **Researcher’s score: 2 – Minor errors (Scotland)**  The EIRs 2004 define public authorities as including: government departments; other public authorities set out in line with section 3(1) of the FOIA 2000 (examples range from police forces to the National Gallery); other bodies or persons carrying out functions of public administration; or a body or person under the control of any of those persons that has public responsibilities relating to the environment, exercises functions of a public nature relating to the environment or provides public services relating to the environment.  The exceptions listed in Schedule 1 to the FOIA 2000 (or designated under the section 5 order-making power) are dis-applied for the purposes of the definition in the EIRs 2004 to ensure that it reflects the Convention and Environmental Information Directive.  Regulation 2(2) of the Environmental Information Regulations 2004 define a public authority as follows: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>  *“public authority” means—*   1. *government departments;* 2. *any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—* 3. *any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or* 4. *any person designated by Order under section 5 of the Act;* 5. *any other body or other person, that carries out functions of public administration; or*   *(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—*  *(i) has public responsibilities relating to the environment;*  *(ii) exercises functions of a public nature relating to the environment; or*  *(iii) provides public services relating to the environment.*  Section 3(1) and Schedule 1 of the Freedom of Information Act 2000 can be found here: <http://www.legislation.gov.uk/ukpga/2000/36/section/3> and  <http://www.legislation.gov.uk/ukpga/2000/36/schedule/1>  The corresponding provisions for Scotland can be found in the Environmental Information (Scotland) Regulations 2004 (<http://www.legislation.gov.uk/ssi/2004/520/contents/made>)  and the Freedom of Information (Scotland) Act 2002 (<http://www.legislation.gov.uk/asp/2002/13/section/3>)  The definition of “Scottish public authority” in the 2004 Regulations does not precisely reflect the Aarhus Convention insofar as it does not include in its definition a requirement that the body or person performs “*public administrative functions”* under national law[[13]](#footnote-14). Instead the definition includes (a) anybody listed in Schedule 1 to the FOISA or designated under section 5(1) of the FOISA; (b) a publically owned company as defined by section 6 of the FOISA; (c) any other Scottish public authority with mixed functions or no reserved functions within the meaning of the Scotland Act 1998 and (d) any other person who is under the control of a person within paragraphs (a) to (c) and has public responsibilities, exercises functions of a public nature or provides public services, relating to the environment[[14]](#footnote-15) . Paragraph (c) is intended to operate so that those bodies which carry out reserved functions are subject to the UK wide Environmental Information Regulations 2004 and not the Scottish 2004 Regulations. The Scottish Information Commissioner’s Guidance[[15]](#footnote-16) suggests that bodies such as public utility companies might fall within the definition of a Scottish public authority and that a private organisation under the control of a Scottish public authority may have responsibilities under the 2004 Regulations which could include private contractors[[16]](#footnote-17).  (information about Scotland taken from Chapter 3 of Banner, C. (2015) *The Aarhus Convention – A Guide for UK Lawyers*. Bloomsbury) | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 2(3) | 1. How well has the definition of “Environmental information” been enacted?   Art. 2(3) provides:  “Environmental information” means any information in written, visual, aural, electronic or any other material form on:  (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 or 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 analyses 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) above;”  **Researcher’s score: 3 – Effective enactment**  Articles 4 and 5 of the Convention require Parties to provide a system for the provision of environmental information by public authorities to the public. This includes both the provision of information in response to a request and more general requirements to disseminate environmental information. The Convention also allows Parties to refuse requests for environmental information in certain circumstances.  The Environmental Information Directive[[17]](#footnote-18) implemented these requirements in EU law. The Directive is transposed in England and Wales by the Environmental Information Regulations 2004, SI 2004/3391 (“EIRs 2004”). The 2004 Regulations sit within a wider framework of freedom of information legislation, namely the Freedom of Information Act 2000 (“FOIA 2000”).  Regulation 2(2)(1) of the EIRs 2004 defines “environmental information” as:  “*environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*   1. *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;* 2. *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);* 3. *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;* 4. *reports on the implementation of environmental legislation;* 5. *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and* 6. *the state of human health and safety, including the contamination of the food chain, where relevant, 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 referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*   The corresponding provisions for Scotland can be found here: <http://www.legislation.gov.uk/ssi/2004/520/regulation/2/made> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 2(4) | 1. How well has the definition of “The public” been enacted?   Art. 2(4) provides:  “”The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;”  **Researcher’s score: 2**  In the context of access to information, there is no definition of “the public” in the EIRs 2004 or the FOIA 2000 in England, Wales and Northern Ireland or in the corresponding Scottish provisions:  <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>  <http://www.legislation.gov.uk/ukpga/2000/36/section/84>  <http://www.legislation.gov.uk/ssi/2004/520/regulation/2/made>  <http://www.legislation.gov.uk/ukpga/2000/36/section/84>  There would also appear to be no such definition of “the public” in other relevant legislation concerning public participation or access to justice. Indeed, UK legislation does not appear to define “the public” at all (possibly because the UK has such a great tradition of consultations with citizens and civil society that it is deemed unnecessary).  As such, the absence of any definition of the public should not be taken to mean that consultation processes are routinely restricted in the UK. Accordingly, I have scored the UK a “2” in recognition of the position, stopping short of the highest score in recognition of the absence of a statutory definition of “the public”. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Please be aware, for example, that some countries refer to “citizen” instead of member of the public, while others do not give rights to unregistered groups or associations.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 2(5)  Indicator 1 | 1. Does the definition of “The public concerned” include the public affected or likely to be affected by the environmental decision-making?   Art. 2(5) provides:  ““The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”  **Researcher’s score: 0—Not enacted at all (changed on final review)**  Requirements under Article 6 of the Convention apply to the “public concerned”. Article 6 also includes provision for encouraging dialogue between applicants and the public concerned and for public authorities to give the public concerned access to information relevant to the decision-making. The public participation procedures should allow the public to submit comments, information, analyses or opinions relevant to the proposed activity. The decision should take due account of the outcome of public participation, (although as the Compliance Committee has confirmed, this does not amount to the right of the public to veto a decision[[18]](#footnote-19)), and be appropriately publicised.  In the context of public participation, there is a reference to “the public concerned” in Part 11 of the Town and Country Planning (Environmental Impact  Assessment) Regulations 2011 (Development with Significant Transboundary Effects (<http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf>).  For example -Regulation 53(4):  “*The Secretary of State shall -*  *arrange for the particulars and information referred to in paragraphs (2) and (3) and any further information and any other information to be made available, within a reasonable time, to the authorities referred to in Article 6(1) of the Directive and the public concerned in the territory of the EEA State likely to be significantly affected …”*  However, there is no definition of the term and no further information to determine how it should be interpreted.  The definition of “the public concerned” is also relevant to Articles 9(2) and (3) of the Convention with regard to access to justice. There is no reference to “the public concerned” in UK legislation on access to justice. Instead, section 31(3) of the Supreme Court Act 1981 provides: “*No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates*” (see: <http://www.legislation.gov.uk/ukpga/1981/54/pdfs/ukpga_19810054_en.pdf>)  However, as above, the absence of a definition of “the public concerned” should not be taken to mean that public participation processes and access to justice is non-existent in the UK. I have stopped short of awarding the UK the maximum score on the basis that there is no statutory definition of “the public concerned” but there are relatively good practices around participation and standing (see later). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 2(5)  Indicator 2 | 1. Does the definition of “The public concerned” include the public having an interest in the environmental decision-making?   Art. 2(5) provides:  ““The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”  **Researcher’s score: 1 – Errors that are more than minor**  This is difficult to score as none of the categories in the Scoring Guide apply. There is no definition of “the public concerned” in Part 11 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (Development with Significant Transboundary Effects) and no context to inform how far it should extend. In practice, environmental NGOs would almost always be granted standing to bring a case to court but as no reference is made to their role or contribution in this respect in statute I have had to award the UK a low score. | **Scoring Guide:**  3 = Literal enactment and/or enactment specifies that any natural or legal person who asks to take part has an interest (i.e. a factual interest)  2 = Minor errors or enactment specifies that only persons with a legal interest (even if not a direct financial interest) have an interest in the environmental decision-making  1 = Errors that are more than minor (e.g. enactment specifies that only those with a direct financial interest in the decision-making have an interest in the environmental decision-making  0 = Definition of “public concerned” does not include those with an interest in the environmental decision-making.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 2(5)  Indicator 3 | Does the definition of “The public concerned” include NGOs promoting environmental protection and if so, are there any additional requirements under national law in order for an NGO to be deemed to have an interest?  Art. 2(5) provides:  ““The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”  **Researcher’s score: 3 – Effective enactment**  There is no appreciable differentiation between the standing criteria for individuals and NGOs. The Supreme Court Act 1981 states that an applicant must have “*a sufficient interest in the matter to which the application relates*”. As such, there is no legislative requirement as to the formal structure or standing of an NGO or community group relevant to the question of standing. There have been no changes to the legislative position since 1981.  Local residents can form a group to challenge a decision and the courts do not require the body to have a distinct legal entity. Such groups may be unincorporated or incorporated. The unincorporated association form is usually chosen when a number of individuals agree or 'contract' to come together for a common purpose. They are relatively straightforward to run, cost nothing to set up and do not need to register with, or be regulated by, either Companies House or the Financial Services Authority. However, they have no separate legal identity so their members carry the risk of personal liability. The limited company is an organisational structure which gives limited liability to its members, and the courts have accepted that a limited company may be formed to bring a case in order to limit exposure to costs.  An association, whether incorporated or not, may therefore be able to bring an action on behalf of its members but amalgamation as such does not provide enhanced interest – “*an aggregate of individuals each of whom has no interest cannot of itself have an interest*”[[19]](#footnote-20), provided that that association represents interests which are relevant to its claim for JR.  There are also no restrictions in the Civil Procedure Rules (England and Wales) regarding geographical scope – the UK treats all members of the public equally, regardless of nationality, citizenship and domicile. Any person has equal access to the courts. Foreign environmental individuals and NGOs are not prohibited from applying for JR, providing they can demonstrate sufficient interest in the matter to which the application relates. Thus, there was no bar to an Irish NGO (An Taisce) applying for a JR of the decision of the Secretary of State to make an order granting development consent for the construction of a European pressurised reactor (EPR) nuclear power station at Hinkley Point in Somerset[[20]](#footnote-21). However, in such cases, a court is more likely to exercise its discretion to require greater provision for security of costs before the action takes place[[21]](#footnote-22). | **Scoring Guide:**  3 = NGOs are included (or deemed included) and there are no additional requirements  2 = NGOs are included (or deemed included) and there are minimal and easily fulfilled requirements  1 = NGOs are included (or deemed included) but there are demanding requirements, e.g. minimum 2000 members  0 = Environmental NGOs are not included or deemed to have an interest  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 2 legal indicators?

The scoring guide for Article 2(5) indicator 2 doesn’t allow for the possibility that there is no statutory definition of the public concerned in relevant legislation, as is the case in the UK

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### Definitions – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 2(2) | 1. Breadth of interpretation of the definition of “public authority”:[[22]](#footnote-23)   Art. 2(2) provides:  ““Public authority” means:  (a) Government at national, regional and other level;  (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) above;  (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.  This definition does not include bodies or institutions acting in a judicial or legislative capacity;”  **Researcher’s Score: 2**  In *Smartsource[[23]](#footnote-24)* the question of whether a privatised water company was a ‘public authority’ under the 2004 Regulations came before the Upper Tribunal. The Information Commissioner was joined by 19 water companies (the bulk which covered England and Wales) as additional parties. The Tribunal examined the definition in the EIRs 2004 against the background of the Convention and the Environmental Information Directive, the wording of the first edition of the Aarhus Implementation Guide (2000), including references to privatised utilities, now reflected in the 2014 edition of the Guide[[24]](#footnote-25). The Tribunal found that the water companies were not public authorities for the purposes of the EIRs 2004. It held that the definition of ‘public authority’ needed to reflect the context and time in which it was being used, concluding that, within the context of the Water Industry Act 1991, the water companies could not be considered as coming within that definition.  However, in *Fish Legal[[25]](#footnote-26)* the Upper Tribunal referred the question of whether water companies were covered by the definition to the CJEU. The Court examined whether the water companies are vested, under the applicable national law, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. The Court also found that the undertakings in question, providing public services relating to the environment, are under the control of a body or person falling within Article 2(2)(a) or (b) of the Environmental Information Directive. This means that they should be classified as ‘public authorities’ under Article 2(2)(c), if they do not determine the way in which they provide those services in a genuinely autonomous manner. Classification as a public authority under Article 2(2)(b) or (c) makes a significant difference to how much environmental information is potentially subject to the disclosure obligations. Article 2(2)(b) must, in the Court’s judgment, be interpreted as meaning that a person falling within that provision constitutes a ‘public authority’ in respect of all the environmental information which it holds. A commercial company capable of being considered a ‘public authority’ under Article 2(2)(c) only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b), would not be required to provide environmental information if the information does not relate to the provision of such services. The question of how these principles should be applied to the circumstances of the water companies in *Fish Legal* was returned to the Upper Tribunal. The Administrative Appeals Chamber of the Upper Tribunal eventually ruled that water and sewage utility companies are “public authorities” for the purposes of the environmental information regulations, and are bound by them accordingly”.  The Upper Tribunal’s findings in *Smartsource* were also the subject of a communication to the Aarhus Convention Compliance Committee[[26]](#footnote-27).  ACC judgment - <http://www.bailii.org/uk/cases/UKUT/AAC/2015/52.html>    CJEU judgment - <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d51c7e93b19da24b7692f7c4a71c9aad5d.e34KaxiLc3eQc40LaxqMbN4Pa3uKe0?text=&docid=145904&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=195485>  See also : Banner, C. (2015) *The Aarhus Convention: A Guide for UK Lawyers*. Bloomsbury. Chapter 2.  Interesting commentary here : <https://ukhumanrightsblog.com/2015/04/16/water-companies-are-public-authorities-and-must-therefore-disclose-environmental-information/>  Also, in *Bruton v IC and The Duchy of Cornwall & The Attorney General to HRH the Prince of Wales[[27]](#footnote-28)*, the First-Tier Tribunal made a brave decision in holding that the Duchy of Cornwall was capable of being a “public authority” within the EIRs 2004. There is interesting commentary and a link to the judgment here: <https://ukhumanrightsblog.com/2011/11/06/prince-charles-oysters-and-environmental-information/> | **Scoring Guide:**  3 = Broad  2 = Medium  1 = Narrow  0 = Very narrow  Breadth of interpretation may be considered to be relatively broader when the following institutions are considered “public authority” in practice in the majority of cases: public utility companies; administrative bodies when preparing or issuing normative acts (see ref. 2 below); legislative bodies when deciding on individual cases (see ref 4 below). Where one or more of these examples is not relevant in the Party, please justify your score in full by reference to the factors you have considered. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * any cases where public utility companies perform quasi administrative functions (e.g. collecting data for public decision-making) (ref.1) * breadth of interpretation of the term “bodies acting in a legislative capacity” in cases where administrative bodies issue or adopt normative acts (ref.2) * the CJEU’s judgment in Case C-279/12 *Fish Legal* on the interpretation of the phrase “public administrative functions under national law” for the purposes of the definition of “public authority” (ref.3) * occurrence and frequency of cases where legislative bodies decide on individual cases in “hybrid bill procedures” in order to approve major developments and exclude public participation (ref.4) * bodies acting in a “judicial/legislative capacity”: e.g. can the public in your jurisdiction obtain access to parties’ written pleadings, submissions, responses, etc, or does your jurisdiction seek to argue that such documents are held by the courts, which hold such documents in a “judicial capacity", even where the proceedings in question have ended; cf. the CJEU’s judgment in Case C-204/09 for the parallel case of “acting in a legislative capacity” where the legislative process in question has ended (ref.5)   Please justify your score and explain the factors you considered, including any not listed above. |
| Art. 2(3) | 1. Breadth of interpretation of the definition of “environmental information”[[28]](#footnote-29)   Art. 2(3) provides:  “Environmental information” means any information in written, visual, aural, electronic or any other material form on:  (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 or 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 analyses and assumptions used in  environmental decision-making;   1. 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) above;”   **Researcher’s score: 2 - Medium**  While the definition of environmental information in the EIRs 2004 reflects Article 2(1) of the Environmental Information Directive, it is for the courts to provide a definitive view on the meaning of environmental information. The Information Commissioner has a duty under the 2000 Act to provide guidance for both the public and public authorities on various matters, including the meaning of environmental information. This highlights that the definition of environmental information in the 2004 Regulations is the same as that in Article 2(1) of the Environmental Information Directive.  There are cases in which public bodies have refused to disclose information under the EIRs 2000 on the basis that data relating to an environmental matter is not, in itself, environmental information (see ongoing cases include the *Department for Energy and Climate Change v The Information Commissioner* (EA/2014/0103[[29]](#footnote-30)) and *The Cabinet Office and High Speed 2 (SH2) Ltd v The Information Commissioner and Joe Rukin* (EA/2015/0207 and 0208)).  My own experience as a legal practitioner is also relevant. Two or three years ago, I requested data from the Ministry of Justice on the number of applications for JR brought following the introduction of special costs rules for environmental cases. The MoJ refused to provide the information on the basis that while the JRs themselves may be environmental (or part environmental) in substance, data about them was not environmental information for the purposes of the EIRs. I requested an internal review and appealed to the ICO. The ICO initially agreed with the MoJ but changed its opinion one week before the Hearing was due to take place in the Information Rights Tribunal. At that point, the MoJ conceded that the information was environmental information and disclosed it in accordance with the EIRs. But this didn’t happen without a fight.  However, the decisions of the Scottish Information Commissioner illustrate the breadth of information caught by the regulation and how widely it is applied in practice. Information which in isolation may not be regarded as environmental can and should be regarded as having the quality of environmental information when read in context[[30]](#footnote-31). The Aarhus Convention Compliance Committee was satisfied that the Scottish authorities had complied with their obligations in a Scottish case where it was claimed that information which had been withheld ought to have disclosed. The Committee considered that even though the exemptions in Aarhus were to be interpreted restrictively, disclosure which would result in adverse effects to protected species could be reasonably denied[[31]](#footnote-32). | **Scoring Guide:**  3 = Broad  2 = Medium  1 = Narrow  0 = Very narrow  The interpretation of “environmental information” may be considered relatively broader when both rough data and processed data in any stage of their development are considered environmental information. A key issue is when non-environmental (e.g. water management, forestry, mining, road construction etc.) authorities handle data which is relevant from the viewpoint of any environmental elements and/or factors as mentioned in Art 2(3) of the Convention. Financial decisions that have consequences for the environment (such as supporting projects with strong environmental effects) shall be also evaluated here.  Where decisions on the interpretation of “environmental information” have been appealed, reviewed, litigated, etc., please consider only the outcome of the highest decision-maker in scoring this indicator (which may be the CJEU in respect of EU Member States).  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  The level of development of information, between rough data and elaborated content frequently causes interpretation problems. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * breadth of interpretation of the term environmental information in the case of feasibility studies and other background materials (ref.1) * information produced or processed by non-environmental bodies, but having environmental relevance (ref.2) * decisions, agreements etc. concerning the financing of environmentally relevant projects (ref.3) * possible differentiation of raw and processed data (ref.4)   Please justify your score and explain the factors you considered, including any not listed above |
| Art. 2(4) | 1. Breadth of interpretation of the definition of “The public”   Art. 2(4) provides:  “”The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;”  **Researcher’s score: 3 - Broad**  There is no definition of “the public” in either the EIRs 2004 or the FOIA 2000. However, there appears to be no restriction on the provision of information by reference to the body requesting it in practice. For example, Guidance published by the Information Commissioner’s Office (ICO) states: “*In most cases, authorities should consider FOI and EIR requests without reference to the identity or motives of the requester. Their focus should be on whether the information is suitable for disclosure into the public domain, rather than the effects of providing the information to the individual requester.*   * *Anyone can make a request for information, regardless of who they are or where they live.* * *There is no requirement for the requester to explain why they need the information or to provide justification for their request.* * *An authority may however take the requester’s identity and motives into account in some limited circumstances.* * *The requester’s identity may be taken into account when; or the authority has reason to believe that the requester hasn’t provided their real name*”   See: <https://ico.org.uk//media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>  In terms of access to justice, In *R (Halebank Parish Council) v Halton Borough Council[[32]](#footnote-33)*, the judge held (in considering an application for a PCO application) that the Parish Council fell within the definition of the “public” for the purposes of the Aarhus Convention.  Similarly, in a lengthily reasoned costs order following an unsuccessful JR claim by the London Borough of Hillingdon (LBH) alleging that the safeguarding directions issued to protect land required for the HS2 railway were adopted in breach of the Strategic Environmental Directive 2004/42/EC[[33]](#footnote-34), the judge held that the LBH was entitled to an Aarhus Convention costs cap under Civil Procedure Rules 45-41-44 and 5.1-5.2 on the basis that the Aarhus costs cap regime in the Rules: “*relates to claims of a particular nature rather than to any particular type or category of claimant*”, and that “*local authorities and other public bodies are not included. Nor is there any qualification in terms of the claimant’s means, or its ability to fund the proceedings, or the likelihood of its being able to meet from its own resources any order for costs which might be made in favour of another party*”.  On appeal (*R (HS2 Action Alliance Ltd & London Borough of Hillingdon) v. Secretary of State for Transport[[34]](#footnote-35))*, the Secretary of State challenged the Order the LBH an Aarhus PCO under the Civil Procedure Rules[[35]](#footnote-36). The LBH submitted: (i) the provisions of the Civil Procedure Rules were clear that whether  a claimant is entitled to an Aarhus PCO falls to be determined by reference to whether the decision challenged is, or is claimed to be within the scope of the Aarhus Convention, (ii) as the Rules were was unambiguous on this point, the Aarhus Convention could not be relied upon to achieve a contrary interpretation that would undermine the clear wording of the Rules, and (iii) in any event, the terms “*public authority*” and “*member of the public concerned*” under Articles 2 and 9 of the Convention were not mutually exclusive for all purposes, and a local authority acting not in its capacity as a decision-maker but instead bringing a JR claim in the interests of its constituents[[36]](#footnote-37) was a “*member of the public concerned*” in that context despite the fact that it would be a “*public authority*” when acting in its capacity as a decision-maker on the receiving end of a JR claim.  The Court unanimously agreed with LBH’s first and second submissions, and held that since this was sufficient to determine the cross-appeal, it was neither necessary nor appropriate to resolve the dispute as to the proper interpretation of the Convention, particularly since that issue was likely to be resolved in LBH’s pending communications to the Aarhus Compliance Committee against the UK and EU in relation to HS2. | **Scoring Guide:**  3 = Broad  2 = Medium  1 = Narrow  0 = Very narrow  Please be aware, for example, that some countries in practice narrow the definition of the public to “citizens”, while others do not give rights to unregistered groups or associations. |
| Art. 2(5) | 1. Breadth of interpretation of the definition of “The public concerned”   Art. 2(5) provides:  ““The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”  **Researcher’s score: 3**  See above and commentary on standing under Article 9 of the Convention (below).  There are few modern examples of individuals or environmental groups being refused standing and perhaps because the courts are exhibiting a broad approach to sufficient interest, the Government has not been prompted to amend the SCA 1981 to specifically reflect the requirements of the Aarhus Convention. | **Scoring Guide:**  3 = Broad  2 = Medium  1 = Narrow  0 = Very narrow  As a general guide for scoring, researchers should consider that, as a rule, the more additional qualifications attached to the “public concerned” in practice, the narrower the breadth of interpretation. For instance, whenever there is differential treatment between participants according to their physical proximity, the type of environmental case, the type of communities or organisations that wish to participate, etc., the lower the score should be.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that this indicator is closely related to other indicators, especially under Article 6. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * interpretation of physical proximity, especially in the case of projects with a linear route (ref.1, ref.4) * the breadth of the circle of people or communities who can be affected or their interests are at stake (ref.2) * broad enough consideration of rights such as *in rem rights*, social rights or other rights (ref.5) * how far the nature and size of the activity is taken into consideration when establishing the circle of affected persons? (ref.5) * the practice concerning foreigners (ref.3) * the practice concerning non-governmental organisations (ref.2) * introducing new, obscure categories, subdivisions of definitions etc. with nebulous meaning might qualify as a restriction in defining the public concerned (ref.6)   Please justify your score and explain the factors you considered, including any not listed above |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 2 practice indicators?

Comparing Article 2(5) (practice indicator) and Article 2(5) (legal indicator), which approach do you think is better? Three separate legal indicators were created for Article 2(5), separating out aspects of the provision; in contrast, all three elements were dealt with in a single practice indicator. Which works better in your view? Are different approaches justified for the legal and practice indicators?

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### (b) General provisions – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 3(2)[[37]](#footnote-38) | 1. To what extent does the law oblige officials and authorities to assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters?   Art. 3(2) provides:  “Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”  **Researcher’s score: 1 - The law obliges officials and authorities to assist and provide guidance to the public in seeking access to information**  The Environmental Information Regulations 2004 require public bodies to assist the public in seeking information (see below).  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states the following in relation to Article 3(2):   1. *Several general measures have been taken in the UK to ensure that officials and authorities behave properly in their relations with the public, including by providing appropriate assistance and guidance. Expected standards of conduct and service delivery have been extensively codified. Examples include the Civil Service Code of Conduct (*[*http://www.civilservice.gov.uk/about/values/cscode/index.aspx*](http://www.civilservice.gov.uk/about/values/cscode/index.aspx)*), the Northern Ireland Civil Service Code of Ethics (http://www.dfpni.gov.uk/nics-code-of-ethics.pdf) and the “Customer Service Excellence” scheme (http://www.customerserviceexcellence.uk.com/). A single, searchable internet website (www.gov.uk) has been created and will eventually provide access to all relevant information and services provided by government departments. A similar website operates in Northern Ireland (*[*www.nidirect.gov.uk*](http://www.nidirect.gov.uk)*).* 2. *Information for people seeking access to information through a Freedom of Information (FOI) request is available at the bottom of the general Defra webpage (https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs). This includes both information about how to make an FOI request and a link to a searchable list of previous FOI releases (https://www.gov.uk/government/publications?departments%5B%5D=department-for-environment-food-rural-affairs&publication\_type=foi-releases). Environmental data is brought together under the data.gov.uk portal (http://data.gov.uk/) and forms the basis for a number of web based services.* 3. ***The Information Commissioner’s Office has a statutory duty to provide guidance on the Freedom of Information Act 2000, the Environmental Information Regulations 2004, the Data Protection Act 1998 (www.ico.org.uk/) and to promote good practice. It also provides a range of guidance notes (http://www.ico.org.uk/for\_organisations/guidance\_index) and training products (http://www.ico.org.uk/for\_organisations/training). The Scottish Information Commissioner (http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp) has similar powers under the Freedom of Information (Scotland) Act 2002, although data protection is not devolved and remains with the UK Information Commissioner.*** 4. *Defra has an Environmental Information Unit, which can be contacted by email or via Defra’s telephone helpline, and from which members of the public and public authorities can obtain guidance on environmental information access rights. The unit also delivers workshops and presentations to public authority staff to promulgate best practice in environmental information access rights.* 5. *Consultation Principles for Government were updated in 2016[[38]](#footnote-39) (https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/492132/20160111\_Consultation\_principles\_final.pdf). The Principles outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation.* 6. *A guide to the procedures involved in environmental impact assessment (EIA) are published by the Department for Communities and Local Government (DCLG): (https://www.gov.uk/government/publications/environmental-impact-assessment-circular-02-1999). DCLG are also preparing a new online suite of National Planning Practice Guidance, which has been recently open to public testing and comment at the beta-testing stage at http://planningguidance.planningportal.gov.uk/* 7. *The Government provides information and links on the provision of effective and accessible justice for all, in particular via the Community Legal Advice website (https://claonlineadvice.justice.gov.uk/), which gives guidance on how to access legal services, guidance on eligibility for publicly-funded advice services and information to help resolve problems in a range of categories of law. Information on the judicial system in Northern Ireland can be found at* [*http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/the-justice-system.htm*](http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/the-justice-system.htm)*.* 8. *The work of officials and public authorities is complemented by the work of several independent voluntary bodies, including Citizens Advice, which provides the gateway to a nationwide network of local Citizens Advice Bureaux (www.adviceguide.org.uk/) providing practical advice on legal system and individuals’ rights.*   Thus, while the ICO is required to provide Guidance on accessing environmental information, there would appear to be no equivalent statutory requirements for public bodies in respect of public participation and access to justice. | **Scoring Guide:**  3 = The law obliges officials and authorities to assist and provide guidance to the public in ALL of the following areas: seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters  2 = The law obliges officials and authorities to assist and provide guidance to the public in only TWO of the following areas: (a) seeking access to information, (b) in facilitating participation in decision-making, (c) in seeking access to justice in environmental matters  1 = The law obliges officials and authorities to assist and provide guidance to the public in only ONE of the following areas: (a) seeking access to information, (b) in facilitating participation in decision-making, (c) in seeking access to justice in environmental matters  0 = The law does not oblige officials and authorities to assist and provide guidance to the public in ANY of the following areas: seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 3(3) | 1. To what extent does the law oblige the Party in question to promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.   Art. 3(3) provides:  “Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.”  **Researcher’s score: 0 = The law does not oblige the government to promote environmental education and environmental awareness among the public.**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states the following:  *12. The Government’s central internet website for public services (www.gov.uk) contains information on the work of Defra (https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs) and DECC (https://www.gov.uk/government/organisations/department-of-energy-climate-change). The Environment Agency (www.environment-agency.gov.uk), which is the executive agency for environmental issues, will move its web presence to the central www.gov.uk website during 2014. The www.gov.uk website includes information and advice relevant to all areas of environmental policy. There are also links to more detailed sources of information on particular subject areas. In Scotland, Scotland's Environment website aims to offer a single source of information on the state of the environment and through this supports increased public participation. This initiative – a partnership steered by the Scottish Government and supported by other public bodies and NGOs – has received EU life+ funding to support parts of the initiative, in particular for activities to enhance the level of public awareness and participation in environmental issues (http://www.environment.scotland.gov.uk/).*  *13. Education about environmental issues features in the National Curriculum in schools within the geography and science curriculums. Information is available from the Department for Education (https://www.gov.uk/government/organisations/department-for-education). In addition, the curriculum includes a citizenship programme, which aims to ensure that all pupils:*  *• acquire a sound knowledge and understanding of how the United Kingdom is governed, its political system, and how citizens participate actively in its democratic systems of government; and*  *• develop a sound knowledge and understanding of the role of law and the justice system in our society and how laws are shaped and enforced.*  *14. Various environmental bodies, enforcement agencies and other organisations run specific environmental awareness programmes, sometimes in conjunction with schools, for example:*  *• Local authority initiatives such as the campaigns run by Southwark Council on sustainability and energy saving for schools; (http://www.southwark.gov.uk/environmentaleducation).*  *• DCLG supports a range of initiatives to promote strong, active and empowered communities, capable of defining problems and tackling them together or influencing public investment to address their priorities. These include the community rights provided through the Localism Act 2011. The Community Right to Bid helps to protect locally important community assets – anything from shops to community centres to pubs to amenity land. The Right to Challenge enables communities to challenge to take over local services they think they can run differently and better. Neighbourhood Planning enables local people to choose where they want new homes, shops and offices to go, to have their say on how new buildings look and what amenities should be provided and to grant planning permission for the new buildings which they want to see built. This is supported further through programmes such as Our Place! which gives communities and neighbourhoods the opportunity to take control and tackle local issues. Using the Our Place! approach means putting the community at the heart of decision making and bringing together the right people – councillors, public servants, businesses, voluntary and community organisations, and the community themselves, to revolutionise the way a neighbourhood works (http://mycommunityrights.org.uk/).*  *15. Environmental education and awareness are integrated across UK public policy. Examples include:*  *a) Sustainable Development: The Government launched its new vision for Sustainable Development in 2011 and is mainstreaming Sustainable Development so that it is central to the way that policy is made, its buildings are run, and goods and services are purchased. Ministers have agreed an approach for mainstreaming Sustainable Development, which in broad terms consists of:*  *• providing Ministerial leadership and oversight;*  *• leading by example;*  *• embedding Sustainable Development into policy; and*  *• transparent and independent scrutiny.*  *Our long term economic growth relies on protecting and enhancing the environmental resources that underpin it, and paying due regard to social needs. As part of our commitment to enhance wellbeing, we are measuring our progress as a country, not just by how our economy is growing, but by how our lives are improving; not just by our standard of living, but by our quality of life.*  *b) The Natural Environment: the Natural Environment White Paper (2011) includes ambitions to:*  *• see every child in England given the opportunity to learn about the natural environment;*  *• help people take more responsibility for their environment, putting local communities in control and making it easier for people to take positive action.*  *c) Biodiversity: Biodiversity 2020 has an outcome that by 2020, significantly more people will be engaged in biodiversity issues, aware of its value and taking positive action.*  Thus, while there is good practice (see the discussion on practice indicators, below), the law does not oblige the government to promote environmental education and environmental awareness among the public. | **Scoring Guide:**  3 = The law obliges the government to promote environmental education and environmental awareness generally among the public as well as on specifically how to obtain all three of the following: (a) access to information, (b) to participate in decision-making and (c) to obtain access to justice in environmental matters.  2 = The law obliges the government to promote environmental education and environmental awareness generally among the public as well as on one or two of the following: how to (a) obtain access to information, (b) participate in decision-making and (c) obtain access to justice in environmental matters.  1 = The law obliges the government to promote environmental education and environmental awareness generally among the public, but not specifically in any of the following areas: (a) how to obtain access to information, (b) to participate in decision-making and (c) to obtain access to justice in environmental matters.  1 = The law obliges the government to promote education and awareness among the public on all three of the following: how to (a) obtain access to information, (b) participate in decision-making and (c) obtain access to justice in environmental matters, but does not oblige the government to promote environmental education and environmental awareness generally among the public.  0 = The law does not oblige the government to promote environmental education and environmental awareness among the public.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 3(4) | 1. To what extent does the law provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection, and is the national legal system consistent with this obligation?   Art. 3(4) provides:  “Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.”  **Researcher’s score: 2 – The law provides for appropriate recognition or support (but not both)**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states:  *16. There are no general requirements for the recognition of associations, organisations or groups promoting environmental protection in the UK. A broadly liberal and inclusive approach is taken to their participation in public life, including in relation to environmental policy issues.*  *17. Representatives of consumer groups and women’s groups, as well as individuals acting in an individual capacity, are included in the current membership of environmental stakeholder groups (such as the Chemicals Stakeholder Forum), policy advisory bodies, or as lay or expert members, as appropriate, on specialist advisory committees (such as the Hazardous Substances Advisory Committee or the Pesticides Residue Committee).*  *18. The Civil Service Reform Plan commits the government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process. As a result the government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focusing on real engagement with key groups rather than following a set process. Further information on the Government’s principles for engagement can be found at (https://www.gov.uk/government/publications/consultation-principles-guidance).*  *19. Direct financial support to environmental associations or groups takes a variety of forms. Indirect support includes exemption from direct and indirect taxes for qualifying fund-raising activities by registered charities, as well as tax relief on charitable donations from individuals. The National Charities Database (http://www.charityfinancials.com) currently records more than 1,000 registered charities that include the pursuit of environmental aims within their objectives.* | **Scoring Guide:**  3 = The law provides for appropriate recognition and support, and the national legal system is consistent with this obligation.  2 = The law provides for appropriate recognition or support (not both).  1 = The law provides for appropriate recognition or support (not both), but the national legal system is inconsistent with this obligation.  0 = The law does not provide for appropriate recognition or support  **In assessing “appropriate” recognition and support, please refer (amongst other things) to pp.66-67 of the** [**Aarhus Implementation Guide (2014)**](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf). Please consider especially the following parameters in the legal framework: simple/onerous registration requirements, tax advantages, fee waiver provisions, court cost exemptions, access to legal aid. A further important aspect that should be evaluated here is whether the above types of recognition/support are given to all associations, organizations and groups promoting environmental protection, or only registered ones?  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 3(5) | 1. Has the Party maintained or introduced measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention?   Article 3(5) provides:  “5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.”  **Researcher’s score: 0**  No measures that I can find. | **Scoring Guide:**  3 = Three or more such measures have been maintained or introduced  2 = Two such measures have been maintained or introduced  1 = One such measure has been maintained or introduced  0 = No such measures have been maintained or introduced  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 3(7) | 1. To what extent does the law oblige the government to promote the application of the principles of the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment?   Art. 3(7) provides:  “Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”  **Researcher’s score: 0**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states:  *20. As a member of the European Union, the UK supports the appropriate application of the Convention to European Union legislation and bodies. It also continues to support the development of the participatory principles of the Convention, of Principle 10 of the 1992 Rio Declaration and of Paragraph 99 of the Rio+20 outcome document in international forums, including for example: the United Nations Conference on Sustainable Development (Rio+20);, the eleventh meeting of the Conference of the Parties to the Convention on Biological Diversity; the eighteenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in 2012; and the Environment for Europe process, as well as in specific environment agreements, such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, the Rotterdam Convention and the Basel Convention.*  *21. Examples of the active promotion by the UK at the international level of the practical application of the Convention’s underlying principles include:*  *a) Membership of the Partnership for Principle 10 (www.pp10.org), a group funding various projects throughout the world which aim to improve access to information, public participation and access to justice in environmental matters.*  *a) Sponsorship by Defra of a collaborative project between the United Nations Environment Programme (UNEP) and the UK Environment Agency, to utilise the Agency’s experience and expertise in Geographic Information System (GIS) based electronic information services to help build capacity in the EECCA region for efficient and effective provision of environmental information.*  *b) The contribution of funding by the UK Department for International Development (DfID) to an independent study and the development of a practical guide on public participation and the Cartagena Protocol on Biosafety*  *(www.unep.ch/biosafety/old\_site/development/devdocuments/PublicParticipationIDS.pdf and bch.cbd.int/database/record-v4.shtml?documentid=41530).*  *c) The UK Department for Communities and Local Government part funded www.communityplanning.net. This website, originally funded by DfID, provides detailed information and case studies on how people can effectively influence the planning and management of their environment.*  *d) In June 2010, the United Kingdom became a signatory of the Charter of the Regional Environmental Center for Central and Eastern Europe (REC), an international organisation which supports the exchange of environmental information, encourages public participation in environmental decision-making and promotes cooperation between government, NGOs and other stakeholders (http://www.rec.org/about.php?section=mission). Defra has previously donated to REC initiatives, and the Foreign and Commonwealth Office has funded various regional initiatives through embassies in REC beneficiary countries. REC already works with UK partners via the British Embassy in Budapest and the Prince of Wales’ Corporate Leaders Group.*  *e) The Government worked closely with civil society and businesses in preparing for the UN Conference on Sustainable Development (Rio+20) in 2012 and senior representatives from both sectors were part of the UK official delegation. Meetings with stakeholders to share information and ideas took place before and during Rio+20 and at various levels of government – from the Deputy Prime Minister to official level. Since Rio+20, this regular engagement and information sharing has continued, including through the UK branch of the international coalition of NGOs on the post-2015 development agenda and a number of outreach events following the publication in May 2012 of the UN Secretary-General’s High-Level Panel’s report on the post-2015 development agenda. The UK Prime Minister co-Chaired the High-Level Panel and was instrumental in ensuring that its preparation involved extensive engagement with a wide range of stakeholders.*  *f) NGOs and stakeholder groups contributed to the development of UK positions for the implementation of the EU Timber Regulation, culminating in regular meetings between key stakeholders and officials in the Department for Environment, Food and Rural Affairs to discuss the UK implementation of the Regulation and the UK’s position for the development of supplementary EU legislation (the EU Implementing Regulation and EU Delegated Regulation) and in the development of EU Guidance to assist operators and ensure consistent interpretation of the Regulation across the EU. This was complemented by other meetings with representatives of small and medium-sized enterprises (SMEs) and specialist trade groups.*  *g) Defra officials convene an expert group for NGOs with an interest in the International Whaling Commission (IWC). The meetings are used to shape the UK’s official position and two NGO representatives are nominated by the group to join the UK delegation for the IWC’s bi-annual meeting.*  *h) DECC conducts regular meetings with stakeholder organisations in order to take their views ahead of international meetings at all levels of the Department. DECC holds meetings on topics including Fast Start finance, long-term climate finance, Monitoring Reporting and Verification, REDD and forests, governance and architecture, carbon markets, adaptation, technology and Intellectual Property Rights at appropriate junctures and according to international milestones. There was a contact point in the UK delegation to the 2012 UNFCCC negotiations with whom stakeholders could raise any concerns about public participation in the meeting.*  *i) Defra is an active member of the UN Task Force on Access to Information which aims to continue strengthening implementation of the Convention's provisions on access to information, including through promoting exchange of information, experiences, challenges and good practices concerning public access to environmental information.*  *j) The UK is a Party to the Convention on International Trade in Endangered Species (Fauna and Flora) - ‘CITES’ - which aims to ensure that trade in endangered species is sustainable. Species are listed on three appendices which afford different level of protection and trade is banned for the most endangered species apart from in certain exceptional circumstances. CITES is implemented in the EU by the EU Wildlife Trade Regulations 338/97 and 865/2006. A CITES Joint Liaison Group (JLG) made up of NGOs, traders in CITES specimens and other Government Departments and Agencies meets at least three times a year to discuss policy and implementation issues with Defra officials. JLG members have the opportunity to feed into international meetings such as the CITES Conference of Parties and the various EU CITES meetings through the JLG.*  *k) Defra is keen to share knowledge on the Aarhus Convention, including recent participation at a seminar in Dublin organised by the Environmental Pillar. At this event, Defra presented its experiences of the Aarhus Convention to an audience of Irish officials and representatives of environmental NGOs.*  These are all beneficial examples of good practice but it would seem that there are no relevant legislative provisions. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Note that there are two key aspects to be considered here: the first aspect is whether the Party is legally required itself to promote the Convention in international forums relating to the environment. The second aspect is whether the law requires the Party to involve its own public in the preparation of its input prior to meetings of the international forum; to include members of the public (e.g. relevant NGOs) in its delegation at the international forum; to report back to its public during and after the event; and to involve the public in the implementation of the outcomes of the international forum.  Both aspects will need to have been enacted in order for a score of 3 to be awarded. If one of the aspects has not been enacted, the maximum possible score is 1.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing). |
| Art. 3(8) | 1. To what extent does the law ensure that persons exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed in any way for their involvement   Art. 3(8) provides:  “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial  proceedings.”  **Researcher’s score: 1 - The law contains general provision(s) aimed at ensuring that persons are not unlawfully penalized, persecuted or harassed, and these provisions would likely cover most situations of a person involved in exercising their rights under [articles 4, 6, 7, 8 and 9] of the Convention**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states:  *22. The UK has strengthened the access rights to information through powers of enforcement given to the office of the Information Commissioner (ICO) and the Tribunals Service. The ICO examines complaints from members of the public who feel that their request for information has not been dealt with properly by the public authority. The First-tier Tribunal (Information Rights), Upper Tribunal and, ultimately, the Supreme Court give further and higher levels of appeal. The ICO, Tribunals and the Supreme Court have powers to order public authorities to release information, and both the ICO and Tribunals are free of charge. The Scottish Information Commissioner has broadly similar powers, although the appeal procedure operates without a tribunal.*  *23. We treat all members of the public equally, regardless of nationality, citizenship and domicile. Any person has equal access to the courts.*  *24. Several legal and administrative measures are available in the UK to protect people from penalization, persecution or harassment in pursuing matters covered by the Convention. Some of these measures relate to the avoidance of discrimination against particular members of the public, such as at work or in the provisions of services (e.g., the Equality Act 2010). Others have more general application, or are based on fundamental human rights. Examples include the Protection from Harassment Act 1997, which makes it a criminal offence to behave in a way amounting to the harassment of another person, or the Human Rights Act 1998, which makes rights from the European Convention of Human Rights enforceable in UK courts (https://www.gov.uk/government/topics/equality-rights-and-citizenship). Or, in relation to Northern Ireland, http://www.nidirect.gov.uk/index/information-and-services/government-citizens-and-rights/your-rights-and-responsibilities.htm.* | **Scoring Guide:**  3 = The law contains provisions aimed at ensuring that persons exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed in any way for their involvement and those provisions would likely provide effective protection to persons exercising any right set out in the Convention, those rights being interpreted broadly.  2 = The law contains provisions aimed at ensuring that persons exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed in any way for their involvement and those provisions would likely provide effective protection to persons exercising the specific rights set out in article 4, 6, 7, 8 and 9 of the Convention  1 = The law contains general provision(s) aimed at ensuring that persons are not unlawfully penalized, persecuted or harassed, and these provisions would likely cover most situations of a person involved in exercising their rights under [articles 4, 6, 7, 8 and 9] of the Convention  0 = The law does not contain any provision(s) which could operate to ensure that persons exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed for their involvement  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing). |
| Art. 3(9) | 1. To what extent does the law provide for the public to have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.   Art. 3(9) provides:  “Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.”  **Researcher’s score: 1**  While practice in the UK is good (see below), there is nothing in the law to prohibit discrimination as to citizenship, nationality and domicile and, for a legal person, registered seat or effective centre of its activities with respect to access to information, public participation or access to justice.  There are no restrictions in the Civil Procedure Rules (England and Wales) regarding geographical scope – the UK treats all members of the public equally, regardless of nationality, citizenship and domicile. Any person has equal access to the courts. Foreign environmental individuals and NGOs are not prohibited from applying for JR, providing they can demonstrate sufficient interest in the matter to which the application relates. Thus, there was no bar to an Irish NGO (An Taisce) applying for a JR of the decision of the Secretary of State to make an order granting development consent for the construction of a European pressurised reactor (EPR) nuclear power station at Hinkley Point in Somerset . However, in such cases, a court is more likely to exercise its discretion to require greater provision for security of costs before the action takes place . | **Scoring Guide:**  3= The law prohibits discrimination as to citizenship, nationality and domicile and, for a legal person, registered seat or effective centre of its activities with respect to each of (a) access to information, (b) public participation and (c) access to justice  2= The law prohibits discrimination as to citizenship, nationality and domicile and, for a legal person, registered seat or effective centre of its activities with respect to two of (a) access to information, (b) public participation and (c) access to justice  1= The law prohibits discrimination as to citizenship, nationality and domicile and, for a legal person, registered seat or effective centre of its activities with respect to one of (a) access to information, (b) public participation and (c) access to justice  0= The law does not prohibit discrimination as to citizenship, nationality and domicile and, for a legal person, registered seat or effective centre of its activities with respect to access to information, public participation or access to justice  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 3 legal indicators?

What do you think of the approach to the legal indicator for Article 3(5), which asks you to consider the *number* of measures which have been introduced which go beyond the requirements of the Convention? Can you think of a way that an indicator could capture the fact that not every measure that goes beyond the requirements of the Convention will be of the same significance (i.e. some will have more impact than others)?

### General provisions – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 3(2)[[39]](#footnote-40)  Art 3(3), second clause | 1. Level of assistance by officials and authorities to members and organisations of the public in exercising their rights under the Aarhus Convention. Governmental efforts promoting education and awareness-raising among the public specifically on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.   Art. 3(2) provides:  “Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.”  Art. 3(3), second clause, provides (underlined):  “Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.”  **Researcher’s score: 1**  *4. Several general measures have been taken in the UK to ensure that officials and authorities behave properly in their relations with the public, including by providing appropriate assistance and guidance. Expected standards of conduct and service delivery have been extensively codified. Examples include the Civil Service Code of Conduct (http://www.civilservice.gov.uk/about/values/cscode/index.aspx), the Northern Ireland Civil Service Code of Ethics (http://www.dfpni.gov.uk/nics-code-of-ethics.pdf) and the “Customer Service Excellence” scheme (http://www.customerserviceexcellence.uk.com/). A single, searchable internet website (www.gov.uk) has been created and will eventually provide access to all relevant information and services provided by government departments. A similar website operates in Northern Ireland (www.nidirect.gov.uk).*    *5. Information for people seeking access to information through a Freedom of Information (FOI) request is available at the bottom of the general Defra webpage (https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs). This includes both information about how to make an FOI request and a link to a searchable list of previous FOI releases (https://www.gov.uk/government/publications?departments%5B%5D=department-for-environment-food-rural-affairs&publication\_type=foi-releases). Environmental data is brought together under the data.gov.uk portal (http://data.gov.uk/) and forms the basis for a number of web based services.*  *6. The Information Commissioner’s Office has a statutory duty to provide guidance on the Freedom of Information Act 2000, the Environmental Information Regulations 2004, the Data Protection Act 1998 (www.ico.org.uk/) and to promote good practice. It also provides a range of guidance notes (http://www.ico.org.uk/for\_organisations/guidance\_index) and training products (http://www.ico.org.uk/for\_organisations/training). The Scottish Information Commissioner (http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp) has similar powers under the Freedom of Information (Scotland) Act 2002, although data protection is not devolved and remains with the UK Information Commissioner.*  *7. Defra has an Environmental Information Unit, which can be contacted by email or via Defra’s telephone helpline, and from which members of the public and public authorities can obtain guidance on environmental information access rights. The unit also delivers workshops and presentations to public authority staff to promulgate best practice in environmental information access rights.*  *8. The new Consultation Principles for Government were introduced in July 2012[[40]](#footnote-41) (https://www.gov.uk/government/publications/consultation-principles-guidance). The Principles outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation. Key areas of the new Principles are early and sustained stakeholder engagement, consultation periods which can range from 2 to 12 weeks, and a digital by default consultation process. Concerns were expressed by some elements of civil society in relation to the new Principles, including the pace and scope of change. However it is important to understand that these flexible consultation procedures are aimed at providing a more targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal.*  *9. A guide to the procedures involved in environmental impact assessment (EIA) are published by the Department for Communities and Local Government (DCLG): (https://www.gov.uk/government/publications/environmental-impact-assessment-circular-02-1999). DCLG are also preparing a new online suite of National Planning Practice Guidance, which has been recently open to public testing and comment at the beta-testing stage at http://planningguidance.planningportal.gov.uk/*  *10. The Government provides information and links on the provision of effective and accessible justice for all, in particular via the Community Legal Advice website (https://claonlineadvice.justice.gov.uk/), which gives guidance on how to access legal services, guidance on eligibility for publicly-funded advice services and information to help resolve problems in a range of categories of law. Information on the judicial system in Northern Ireland can be found at http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/the-justice-system.htm.*  *11. The work of officials and public authorities is complemented by the work of several independent voluntary bodies, including Citizens Advice, which provides the gateway to a nationwide network of local Citizens Advice Bureaux (www.adviceguide.org.uk/) providing practical advice on legal system and individuals’ rights.”*  In addition to these generalised measures, the revised (2016) consultation principles are a backwards step. For example, the Principles advocate “*Do not consult for the sake of it. Ask departmental lawyers whether you have a legal duty to consult*”. Secondly, there are no timeframes given for consultation. Prior to 2012, a 12 week consultation period was the norm; in 2012 that was reduced to 2-12 weeks (recognising that, at times, no consultation was required). The 2016 Principles appear to encourage public bodies to consult primarily only where there is a legal duty to do so and take away safeguards with regard to the duration of consultation.  In summary, awareness around access to information is good, but it cannot be said that officials are being encouraged to ensure civil society are given ample opportunities to participate or to seek justice in environmental matters. | **Scoring Guide:**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please note that capacity building[[41]](#footnote-42) (CB) is a key indicator. Without communities and individuals who are able and willing to use them, the three pillars of environmental democracy will not work.  When deciding the score for this indicator please consider especially the CB quality of selected relevant homepages, leaflets/flyers and other materials aimed at supporting Aarhus Convention rights. Also the existence and effectiveness of officials dealing partly or wholly with CB should be evaluated here. Take into consideration *inter alia*:   * as a minimum requirement the homepage of the environmental authorities should be of an acceptable quality (well structured, regularly updated etc.)(ref.1, ref.2) * information officers available (an equally good solution could be proper information training for, and availability of, ‘regular’ environmental officials) (ref.1, ref.5, ref.6, ref.9) * proper training, guidance documents, circulars etc. for officials about public participation (ref.3, ref.4) * general use of electronic mailing, phone, Facebook etc. by environmental authorities for enhancing public participation (ref.6, ref.8, ref.11) * guides, manuals, easy to understand descriptions of public participation available to members and organisations of the public * all kinds of assistance and information within the circle of capacity building are for free (ref.12)   Please justify your score and explain the factors you considered |
| Art. 3(3), first clause | 1. Governmental efforts concerning, as a general matter, promoting environmental education and awareness raising among the public[[42]](#footnote-43)   Art. 3(3), first clause, provides (underlined):  “Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice inenvironmental matters.”  **Researcher’s score: 2**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states the following in relation to Article 3(2):   1. *Several general measures have been taken in the UK to ensure that officials and authorities behave properly in their relations with the public, including by providing appropriate assistance and guidance. Expected standards of conduct and service delivery have been extensively codified. Examples include the Civil Service Code of Conduct (*[*http://www.civilservice.gov.uk/about/values/cscode/index.aspx*](http://www.civilservice.gov.uk/about/values/cscode/index.aspx)*), the Northern Ireland Civil Service Code of Ethics (http://www.dfpni.gov.uk/nics-code-of-ethics.pdf) and the “Customer Service Excellence” scheme (http://www.customerserviceexcellence.uk.com/). A single, searchable internet website (www.gov.uk) has been created and will eventually provide access to all relevant information and services provided by government departments. A similar website operates in Northern Ireland (*[*www.nidirect.gov.uk*](http://www.nidirect.gov.uk)*).* 2. *Information for people seeking access to information through a Freedom of Information (FOI) request is available at the bottom of the general Defra webpage (https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs). This includes both information about how to make an FOI request and a link to a searchable list of previous FOI releases (https://www.gov.uk/government/publications?departments%5B%5D=department-for-environment-food-rural-affairs&publication\_type=foi-releases). Environmental data is brought together under the data.gov.uk portal (http://data.gov.uk/) and forms the basis for a number of web based services.* 3. *The Information Commissioner’s Office has a statutory duty to provide guidance on the Freedom of Information Act 2000, the Environmental Information Regulations 2004, the Data Protection Act 1998 (www.ico.org.uk/) and to promote good practice. It also provides a range of guidance notes (http://www.ico.org.uk/for\_organisations/guidance\_index) and training products (http://www.ico.org.uk/for\_organisations/training). The Scottish Information Commissioner (http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp) has similar powers under the Freedom of Information (Scotland) Act 2002, although data protection is not devolved and remains with the UK Information Commissioner.* 4. *Defra has an Environmental Information Unit, which can be contacted by email or via Defra’s telephone helpline, and from which members of the public and public authorities can obtain guidance on environmental information access rights. The unit also delivers workshops and presentations to public authority staff to promulgate best practice in environmental information access rights.* 5. *Consultation Principles for Government were updated in 2016[[43]](#footnote-44) (https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/492132/20160111\_Consultation\_principles\_final.pdf). The Principles outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation.* 6. *A guide to the procedures involved in environmental impact assessment (EIA) are published by the Department for Communities and Local Government (DCLG): (https://www.gov.uk/government/publications/environmental-impact-assessment-circular-02-1999). DCLG are also preparing a new online suite of National Planning Practice Guidance, which has been recently open to public testing and comment at the beta-testing stage at http://planningguidance.planningportal.gov.uk/* 7. *The Government provides information and links on the provision of effective and accessible justice for all, in particular via the Community Legal Advice website (https://claonlineadvice.justice.gov.uk/), which gives guidance on how to access legal services, guidance on eligibility for publicly-funded advice services and information to help resolve problems in a range of categories of law. Information on the judicial system in Northern Ireland can be found at* [*http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/the-justice-system.htm*](http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/the-justice-system.htm)*.* 8. *The work of officials and public authorities is complemented by the work of several independent voluntary bodies, including Citizens Advice, which provides the gateway to a nationwide network of local Citizens Advice Bureaux (www.adviceguide.org.uk/) providing practical advice on legal system and individuals’ rights.* | **Scoring guide**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please consider, where relevant, inter alia:   * what kind of specialised environmental administrative organisations, departments etc. deal with the research, development, support, management etc. of environmental education and awareness raising? (ref.1, ref.2, ref.9, ref.11) * how far environmental education is integrated into the regular curricula at several levels of the education system (ref.2, ref.5) * are there green school projects (such as forest school, clean up campaigns, ‘open school’ curricula, etc.) with proper organisational, financial and methodological support? (ref.2, ref.13) * is there proper cooperation between the relevant ministries and other governmental bodies in the field of environmental education and awareness raising (with the participation of departments responsible for education, culture, agriculture etc.)? (ref.2, ref.3) * frequency and success (coverage in the media, number of visitors, positive professional feedback etc.) of environmental awareness raising projects (ref.4, ref.6, ref.7, ref.8, ref.13) * how far civil society organisations are involved in environmental education and awareness raising? (ref.7, ref.10, ref.11)   Please justify your score and explain the factors you considered |
| Art. 3(4) | 1. Governmental efforts to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection   Art. 3(4) provides:  “Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.”  **Researcher’s score: 2**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states the following:  *12. The Government’s central internet website for public services (www.gov.uk) contains information on the work of Defra (https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs) and DECC (https://www.gov.uk/government/organisations/department-of-energy-climate-change). The Environment Agency (www.environment-agency.gov.uk), which is the executive agency for environmental issues, will move its web presence to the central www.gov.uk website during 2014. The www.gov.uk website includes information and advice relevant to all areas of environmental policy. There are also links to more detailed sources of information on particular subject areas. In Scotland, Scotland's Environment website aims to offer a single source of information on the state of the environment and through this supports increased public participation. This initiative – a partnership steered by the Scottish Government and supported by other public bodies and NGOs – has received EU life+ funding to support parts of the initiative, in particular for activities to enhance the level of public awareness and participation in environmental issues (http://www.environment.scotland.gov.uk/).*  *13. Education about environmental issues features in the National Curriculum in schools within the geography and science curriculums. Information is available from the Department for Education (https://www.gov.uk/government/organisations/department-for-education). In addition, the curriculum includes a citizenship programme, which aims to ensure that all pupils:*  *• acquire a sound knowledge and understanding of how the United Kingdom is governed, its political system, and how citizens participate actively in its democratic systems of government; and*  *• develop a sound knowledge and understanding of the role of law and the justice system in our society and how laws are shaped and enforced.*  *14. Various environmental bodies, enforcement agencies and other organisations run specific environmental awareness programmes, sometimes in conjunction with schools, for example:*  *• Local authority initiatives such as the campaigns run by Southwark Council on sustainability and energy saving for schools; (http://www.southwark.gov.uk/environmentaleducation).*  *• DCLG supports a range of initiatives to promote strong, active and empowered communities, capable of defining problems and tackling them together or influencing public investment to address their priorities. These include the community rights provided through the Localism Act 2011. The Community Right to Bid helps to protect locally important community assets – anything from shops to community centres to pubs to amenity land. The Right to Challenge enables communities to challenge to take over local services they think they can run differently and better. Neighbourhood Planning enables local people to choose where they want new homes, shops and offices to go, to have their say on how new buildings look and what amenities should be provided and to grant planning permission for the new buildings which they want to see built. This is supported further through programmes such as Our Place! which gives communities and neighbourhoods the opportunity to take control and tackle local issues. Using the Our Place! approach means putting the community at the heart of decision making and bringing together the right people – councillors, public servants, businesses, voluntary and community organisations, and the community themselves, to revolutionise the way a neighbourhood works (http://mycommunityrights.org.uk/).*  *15. Environmental education and awareness are integrated across UK public policy. Examples include:*  *a) Sustainable Development: The Government launched its new vision for Sustainable Development in 2011 and is mainstreaming Sustainable Development so that it is central to the way that policy is made, its buildings are run, and goods and services are purchased. Ministers have agreed an approach for mainstreaming Sustainable Development, which in broad terms consists of:*  *• providing Ministerial leadership and oversight;*  *• leading by example;*  *• embedding Sustainable Development into policy; and*  *• transparent and independent scrutiny.*  *Our long term economic growth relies on protecting and enhancing the environmental resources that underpin it, and paying due regard to social needs. As part of our commitment to enhance wellbeing, we are measuring our progress as a country, not just by how our economy is growing, but by how our lives are improving; not just by our standard of living, but by our quality of life.*  *b) The Natural Environment: the Natural Environment White Paper (2011) includes ambitions to:*  *• see every child in England given the opportunity to learn about the natural environment;*  *• help people take more responsibility for their environment, putting local communities in control and making it easier for people to take positive action.*  *c) Biodiversity: Biodiversity 2020 has an outcome that by 2020, significantly more people will be engaged in biodiversity issues, aware of its value and taking positive action.* | **Scoring guide**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  Conditions for achieving legal status in practice, bureaucratic or restrictive registration processes and other forms of state control over NGOs are important considerations for scoring here. A high level of state financing of NGOs is not always a sign of excellent performance, especially when the financing depends on political, economic or other extraneous interests, rather than the environmental performance of the NGOs. Any country whose legal practice contains occurrences of penalization, persecution or harassment of persons exercising their rights in conformity with the provisions of the Convention should score a 0 for this indicator.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the level of active and passive (upon their request only) involvement of NGOs in dialogue with governmental bodies and into relevant governmental programs, activities (ref.1, ref.5, ref.12, ref.14), including government delegations for international processes. * the level of institutionalisation and financing of the involvement of NGOs (such as framework agreements, standing participation in relevant committees) (ref.2, ref.3, ref.4, ref.9, ref.15) * direct financing of environmental NGOs through project based or operational support (ref.3, ref.4, ref.10, ref.13) * differentiation of participating NGOs (is it objective or arbitrary, based on professional or rather political considerations, is transparency of financial support ensured? etc.) (ref.6) * legal status of environmental NGOs in the practice of registration courts and other relevant bodies (freedom of forming, possible administrative burdens, complication of registration, possible re-registration campaigns, tax status, foreign relations etc.) (ref.7, ref.8, ref.11)   Please justify your score and explain the factors you considered |
| Art. 3(5) | 1. In practice, does the Party provide for broader access to information, more extensive public participation in decision-making or wider access to justice in environmental matters than is required by the Convention?   Article 3(5) provides:  “5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.”  **Researcher’s score: 0**  The definition of environmental information is broader in statute than required (although not always in practice) and much information is readily available on the internet, especially if one knows what one is looking for and is computer literate. However, I cannot find any examples of practice in which the Government has gone further than what is explicitly required. | **Scoring Guide:**  3 = Always or almost always  2 = Frequently  1 = Rarely  0 = Never |
| Art. 3(7) | 1. In practice, how is the government’s performance in terms of promoting the application of the principles of the Aarhus Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment?   Art. 3(7) provides:  “Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”  **Researcher’s score: 2**  The text of UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) on the implementation of Article 3(7) can be found below. However, my experience as a practitioner visiting the last three Meetings of the Parties to the Convention and the meetings of the Task Force on Access to Justice for the last ten years is that the UK does not play a positive role in Aarhus Meetings. They generally say very little and even, occasionally, attempt to block more progressive incentives. For the first time in my experience, the UK did not send any officials to the Access to Justice Task Force in June 2016. This was a great pity. Colleagues from Friends of the Earth report similarly from proceedings of the UNFCCC.  *20. As a member of the European Union, the UK supports the appropriate application of the Convention to European Union legislation and bodies. It also continues to support the development of the participatory principles of the Convention, of Principle 10 of the 1992 Rio Declaration and of Paragraph 99 of the Rio+20 outcome document in international forums, including for example: the United Nations Conference on Sustainable Development (Rio+20);, the eleventh meeting of the Conference of the Parties to the Convention on Biological Diversity; the eighteenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in 2012; and the Environment for Europe process, as well as in specific environment agreements, such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, the Rotterdam Convention and the Basel Convention.*  *21. Examples of the active promotion by the UK at the international level of the practical application of the Convention’s underlying principles include:*  *a) Membership of the Partnership for Principle 10 (www.pp10.org), a group funding various projects throughout the world which aim to improve access to information, public participation and access to justice in environmental matters.*  *a) Sponsorship by Defra of a collaborative project between the United Nations Environment Programme (UNEP) and the UK Environment Agency, to utilise the Agency’s experience and expertise in Geographic Information System (GIS) based electronic information services to help build capacity in the EECCA region for efficient and effective provision of environmental information.*  *b) The contribution of funding by the UK Department for International Development (DfID) to an independent study and the development of a practical guide on public participation and the Cartagena Protocol on Biosafety*  *(www.unep.ch/biosafety/old\_site/development/devdocuments/PublicParticipationIDS.pdf and bch.cbd.int/database/record-v4.shtml?documentid=41530).*  *c) The UK Department for Communities and Local Government part funded www.communityplanning.net. This website, originally funded by DfID, provides detailed information and case studies on how people can effectively influence the planning and management of their environment.*  *d) In June 2010, the United Kingdom became a signatory of the Charter of the Regional Environmental Center for Central and Eastern Europe (REC), an international organisation which supports the exchange of environmental information, encourages public participation in environmental decision-making and promotes cooperation between government, NGOs and other stakeholders (http://www.rec.org/about.php?section=mission). Defra has previously donated to REC initiatives, and the Foreign and Commonwealth Office has funded various regional initiatives through embassies in REC beneficiary countries. REC already works with UK partners via the British Embassy in Budapest and the Prince of Wales’ Corporate Leaders Group.*  *e) The Government worked closely with civil society and businesses in preparing for the UN Conference on Sustainable Development (Rio+20) in 2012 and senior representatives from both sectors were part of the UK official delegation. Meetings with stakeholders to share information and ideas took place before and during Rio+20 and at various levels of government – from the Deputy Prime Minister to official level. Since Rio+20, this regular engagement and information sharing has continued, including through the UK branch of the international coalition of NGOs on the post-2015 development agenda and a number of outreach events following the publication in May 2012 of the UN Secretary-General’s High-Level Panel’s report on the post-2015 development agenda. The UK Prime Minister co-Chaired the High-Level Panel and was instrumental in ensuring that its preparation involved extensive engagement with a wide range of stakeholders.*  *f) NGOs and stakeholder groups contributed to the development of UK positions for the implementation of the EU Timber Regulation, culminating in regular meetings between key stakeholders and officials in the Department for Environment, Food and Rural Affairs to discuss the UK implementation of the Regulation and the UK’s position for the development of supplementary EU legislation (the EU Implementing Regulation and EU Delegated Regulation) and in the development of EU Guidance to assist operators and ensure consistent interpretation of the Regulation across the EU. This was complemented by other meetings with representatives of small and medium-sized enterprises (SMEs) and specialist trade groups.*  *g) Defra officials convene an expert group for NGOs with an interest in the International Whaling Commission (IWC). The meetings are used to shape the UK’s official position and two NGO representatives are nominated by the group to join the UK delegation for the IWC’s bi-annual meeting.*  *h) DECC conducts regular meetings with stakeholder organisations in order to take their views ahead of international meetings at all levels of the Department. DECC holds meetings on topics including Fast Start finance, long-term climate finance, Monitoring Reporting and Verification, REDD and forests, governance and architecture, carbon markets, adaptation, technology and Intellectual Property Rights at appropriate junctures and according to international milestones. There was a contact point in the UK delegation to the 2012 UNFCCC negotiations with whom stakeholders could raise any concerns about public participation in the meeting.*  *i) Defra is an active member of the UN Task Force on Access to Information which aims to continue strengthening implementation of the Convention's provisions on access to information, including through promoting exchange of information, experiences, challenges and good practices concerning public access to environmental information.*  *j) The UK is a Party to the Convention on International Trade in Endangered Species (Fauna and Flora) - ‘CITES’ - which aims to ensure that trade in endangered species is sustainable. Species are listed on three appendices which afford different level of protection and trade is banned for the most endangered species apart from in certain exceptional circumstances. CITES is implemented in the EU by the EU Wildlife Trade Regulations 338/97 and 865/2006. A CITES Joint Liaison Group (JLG) made up of NGOs, traders in CITES specimens and other Government Departments and Agencies meets at least three times a year to discuss policy and implementation issues with Defra officials. JLG members have the opportunity to feed into international meetings such as the CITES Conference of Parties and the various EU CITES meetings through the JLG.*  *k) Defra is keen to share knowledge on the Aarhus Convention, including recent participation at a seminar in Dublin organised by the Environmental Pillar. At this event, Defra presented its experiences of the Aarhus Convention to an audience of Irish officials and representatives of environmental NGOs.* | **Scoring guide**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  While they by no means reflect the wide range of international processes and organizations within the scope of article 3(7), as a proxy to evaluate this indicator, please assess the extent to which the Party:   1. Promoted the application of the principles of the Aarhus Convention in the UNFCCC process, including at both the national and international levels before, during and after UNFCCC meetings. 2. Promoted the application of the principles of the Aarhus Convention in UNEA, including UNEP’s recent consultation exercise regarding its new access to information policy and stakeholder engagement policy.   Please refer to the Almaty Guidelines for guidance on some ways that Parties may promote the principles of the Convention in international processes.  Please justify your score and explain the factors you considered. |
| Art. 3(8) | 1. The performance of the Party in terms of ensuring that persons exercising their rights in conformity with the provisions of the Aarhus Convention are not penalized, persecuted or harassed by State organisations or by third persons in any way for their involvement   Art. 3(8) provides:  “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial  proceedings.”  **Researcher’s score: 2**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states:  *22. The UK has strengthened the access rights to information through powers of enforcement given to the office of the Information Commissioner (ICO) and the Tribunals Service. The ICO examines complaints from members of the public who feel that their request for information has not been dealt with properly by the public authority. The First-tier Tribunal (Information Rights), Upper Tribunal and, ultimately, the Supreme Court give further and higher levels of appeal. The ICO, Tribunals and the Supreme Court have powers to order public authorities to release information, and both the ICO and Tribunals are free of charge. The Scottish Information Commissioner has broadly similar powers, although the appeal procedure operates without a tribunal.*  *23. We treat all members of the public equally, regardless of nationality, citizenship and domicile. Any person has equal access to the courts.*  *24. Several legal and administrative measures are available in the UK to protect people from penalization, persecution or harassment in pursuing matters covered by the Convention. Some of these measures relate to the avoidance of discrimination against particular members of the public, such as at work or in the provisions of services (e.g., the Equality Act 2010). Others have more general application, or are based on fundamental human rights. Examples include the Protection from Harassment Act 1997, which makes it a criminal offence to behave in a way amounting to the harassment of another person, or the Human Rights Act 1998, which makes rights from the European Convention of Human Rights enforceable in UK courts (https://www.gov.uk/government/topics/equality-rights-and-citizenship). Or, in relation to Northern Ireland, http://www.nidirect.gov.uk/index/information-and-services/government-citizens-and-rights/your-rights-and-responsibilities.htm.* | **Scoring guide**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  The score should, inter alia, reflect how effectively the state system prevents (or rather encourages) SLAPP cases or costly media campaigns against public participation in environmental matters. The efforts of such institutions as the ombudsman or public attorneys might play important roles in this protective work. In addition to these factors, all kinds of misuse of State powers (e.g. handpicked tax and revenue office investigations, arbitrary arrest, imposition of fines, incarceration and deportation of environmental activists etc.) belong within the scope of this indicator. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the occurrence of strategic lawsuits against public participation (SLAPP cases) or other similar legal manoeuvres initiated against NGOS, local communities or individuals, where legal tools are misused/abused in order to retaliate in respect of public participation, or intimidate the public from participating (ref.1, ref.5) * the practice of the ombudsman or other similar bodies (prosecutors, auditing offices etc.), if any, in such cases (ref.2) * the typical reaction of the government to civil disobedience actions? (ref.3) * are any whistleblower protection rules applied effectively? are there in practice instances of conflicts of interest when environmental complaints are handled? (ref.4, ref.6) * is the pursuit of legal costs applied in such a way as to penalise or harass those who used their participation rights? (ref.7) * use of the media to harass or insult those who exercise their participation rights (ref.8)   Please justify your score and explain the factors you considered. |
| Art. 3(9) | 1. Are there occurrences of discrimination against participants on the basis of citizenship, nationality or domicile or, in the case of a legal person, on the basis of where it has its registered seat or an effective centre of its activities?   Art. 3(9) provides:  “Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.”  **Researcher’s score: 3 – Never (insofar as aware)**  The UK’s National Implementation Report to the Fifth Meeting of the Parties to the Convention (2014) states:  *22. The UK has strengthened the access rights to information through powers of enforcement given to the office of the Information Commissioner (ICO) and the Tribunals Service. The ICO examines complaints from members of the public who feel that their request for information has not been dealt with properly by the public authority. The First-tier Tribunal (Information Rights), Upper Tribunal and, ultimately, the Supreme Court give further and higher levels of appeal. The ICO, Tribunals and the Supreme Court have powers to order public authorities to release information, and both the ICO and Tribunals are free of charge. The Scottish Information Commissioner has broadly similar powers, although the appeal procedure operates without a tribunal.*  ***23. We treat all members of the public equally, regardless of nationality, citizenship and domicile. Any person has equal access to the courts.***  *24. Several legal and administrative measures are available in the UK to protect people from penalization, persecution or harassment in pursuing matters covered by the Convention. Some of these measures relate to the avoidance of discrimination against particular members of the public, such as at work or in the provisions of services (e.g., the Equality Act 2010). Others have more general application, or are based on fundamental human rights. Examples include the Protection from Harassment Act 1997, which makes it a criminal offence to behave in a way amounting to the harassment of another person, or the Human Rights Act 1998, which makes rights from the European Convention of Human Rights enforceable in UK courts (https://www.gov.uk/government/topics/equality-rights-and-citizenship). Or, in relation to Northern Ireland, http://www.nidirect.gov.uk/index/information-and-services/government-citizens-and-rights/your-rights-and-responsibilities.htm.* | **Scoring guide**  3 = Never (insofar as aware)  2 = Very rarely (no more than 1 example in past 5 years)  1 = Sometimes (between 2 and 4 examples in past 5 years)  0 = Often (5 or more examples in past 5 years)  We suppose that the scandalous events of discrimination leave their traces in the media, community media and the collective memory of the green NGO community. However, discrimination can be more nuanced than this. It may not be intentional and may not be always reported in the media. For example, authorities may refuse to respond to a request for access to information sent from overseas by a foreign citizen, because they are not aware that art 3(9) means that this rights must be provided to everyone, no matter where in the world they are.  As an example of discrimination in public participation, persons across borders may not be notified of a project that may have transboundary impacts, and thus may miss out on their chance to participate in the decision-making, or the main documents may not be translated into their language, so they cannot effectively participate. Furthermore, the hearing in respect of such a project may be held in the main capital, such that persons across the border have difficulty travelling there.  These may not be “deliberate” discrimination occurrences, but they still effectively prevent those members of the public concerned from participating.  The reference cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Take into consideration, for example:   * occurrences of discrimination based on nationality, language etc. (ref.1)   Please justify your score and explain the factors you considered. |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 3 practice indicators? Do you think that the “sample” approach (UNFCCC, UNEA) works well for the practice indicator for Article 3(7) or do you think that the areas of research should not be delimited in this way?

## 

## II. Access to information pillar

### (a) Information on request – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 4(1)(a) | 1. How well has Art. 4(1)(a) been enacted?   Art. 4(1)(a) provides:  “1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:  **(a) Without an interest having to be stated;**  (b) In the form requested unless:  (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; or  (ii) The information is already publicly available in another form.”  **Researcher’s score: 0 – Not enacted at all**  Regulation 5 of the EIRs 2004 states:  *“5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*  However, the EIRs do not specify that the applicant does not have to say why the information is sought. The ICO website confirms that an applicant does not need to say why they want the information (see practice indicator, below) but there would appear to be no statutory provision covering this: <https://ico.org.uk/for-the-public/official-information/> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(1)(b) | 1. How well has Art. 4(1)(b) been enacted?   Art. 4(1)(b) provides:  “1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:  (a) Without an interest having to be stated;  **(b) In the form requested unless:**  **(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; or**  **(ii) The information is already publicly available in another form.”**  **Researcher’s score: 3 - Effective enactment**  Regulation 6 EIRs 2004 states:  *“Form and format of information*  *6.—(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—*  *(a) it is reasonable for it to make the information available in another form or format; or*  *(b) the information is already publicly available and easily accessible to the applicant in another form or format.*  *(2) If the information is not made available in the form or format requested, the public authority shall—*  *(a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;*  *(b) provide the explanation in writing if the applicant so requests; and*  *(c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18.”*  <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(2) | 1. How well has Art. 4(2) been enacted?     “The environmental information referred to in paragraph 1 above [i.e. Art. 4(1)] shall be made available 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. The applicant shall be informed of any extension and of the reasons justifying it.”  **Researcher’s score: 3 Effective enactment**  **Introduction to the provisions covering Article 4 of the Convention**  On 28 January 2003, ‘Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC was adopted  (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:NOT>). Directive 90/313/EEC had previously established measures for the exercise of the right of the public to access environmental information.  The preamble of Directive 2003/4/EC states that “*Provisions of Community law must be consistent with that [Aarhus] Convention with a view to its conclusion by the European Community*” (paragraph 5) and that “*Since the objectives of the proposed Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.”* (paragraph 23)  The EU has therefore implemented Article 4 and 5 of the Convention through this Directive. The UK was required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 February 2005. To do this, Defra introduced the Environmental Information Regulations 2004 (SI 2004/3391) relating to public access to environmental information in England, Wales and Northern Ireland (<http://www.legislation.gov.uk/uksi/2004/3391/made>). See also the accompanying Code of Practice: <https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf>  Scotland transposed the provisions of the 2003 Directive into domestic law by enactment of the Environmental Information (Scotland) Regulations 2004 (“the 2004 Regulations”) , which came into force on 1 January 2005, the same day that the Freedom of Information (Scotland) Act 2002 (the FOISA) came into force. The 2004 Regulations to a large extent mirror the provisions in the 2003 Directive (and Articles 4 and 5 of Aarhus) adopting the same definition of environmental information under Article 2(1).  The Freedom of Information Act 2000 (and the 2002 Scottish Act) took effect on 1 January 2005, and has brought about significant changes to access to information held by public authorities (<http://www.ico.org.uk/for_organisations/freedom_of_information/guide>).  **Article 4(2) Aarhus Convention**  See Regulation 5 and 7 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  “*Duty to make available environmental information on request*  *5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*  *(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”*  “*Extension of time*  *7.—(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.*  *(2) The provisions referred to in paragraph (1) are—*  *(a) regulation 5(2);*  *(b) regulation 6(2)(a); and*  *(c) regulation 14(2).*  *(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(3)(a) and 4(5) | 1. How well have Art. 4(3)(a) and 4(5) been enacted?   Art. 4(3)(a) provides:  “A request for environmental information may be refused if:   1. The public authority to which the request is addressed does not hold the environmental information requested;”   Art. 4(5) provides:  “Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.”  **Researcher’s score: 3 Effective enactment**  See Regulations 10 and 12(4)(a) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  “*Transfer of a request*  *10.—(1) Where a public authority that receives a request for environmental information does not hold the information requested but believes that another public authority or a Scottish public authority holds the information, the public authority shall either—*  *(a) transfer the request to the other public authority or Scottish public authority; or*  *(b) supply the applicant with the name and address of that authority,*  *and inform the applicant accordingly with the refusal sent under regulation 14(1).*  *(2) Where a request is transferred to a public authority, for the purposes of the provisions referred to in paragraph (3) the request is received by that public authority on the date on which it receives the transferred request.*  *(3) The provisions referred to in paragraph (2) are—*  *(a) regulation 5(2);*  *(b) regulation 6(2)(a); and*  *(c) regulation 14(2).*  *12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*  *(a) it does not hold that information when an applicant’s request is received;”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  These two provisions are assessed together here given their interrelationship.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(3)(b) | 1. How well has Art. 4(3)(b) been enacted?   Art. 4(3)(b) provides:  “A request for environmental information may be refused if:  (b) The request is manifestly unreasonable or formulated in too general a manner;”  **Researcher’s score: 3 – Enactment provides a narrower exception than the Convention provision**  See Regulation 12(1), (2) and (4)(b) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  “*Exceptions to the duty to disclose environmental information*  ***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*  *(a) it does not hold that information when an applicant’s request is received;*  ***(b) the request for information is manifestly unreasonable;***  ***(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;***  *Regulation 9*  *(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).* | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(3)(c) | 1. How well has Art. 4(3)(c) been enacted?   Art. 4(3)(c) provides:  “A request for environmental information may be refused if:  (c) 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.”  **Researcher’s score: 3 – Enactment provides a narrower exception than the Convention provision**  See Regulation 12(1), (2) and (4)(d) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  “*Exceptions to the duty to disclose environmental information*  ***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*  *(a) it does not hold that information when an applicant’s request is received;*  *(b) the request for information is manifestly unreasonable;*  *(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;*  ***(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or***  ***(e) the request involves the disclosure of internal communications.”***  ***(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”*** | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(a) | 1. How well has Art. 4(4)(a) been enacted?   Art. 4(4)(a) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 2 - Effective enactment**  See Regulation 12 (1) and (2), 5(d) and 9 of the EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *“****12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  *(a) international relations, defence, national security or public safety;*  *(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;*  *(c) intellectual property rights;*  ***(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;***  ***(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”*** | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.    Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(b) | 1. How well has Art. 4(4)(b) been enacted?   Art. 4(4)(b) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (b) International relations, national defence or public security;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 0 - Incomplete enactment**  See Regulation 12(1) and (2) and 5(a) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  “***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  ***(a) international relations, defence, national security or public safety;”***  Public bodies would appear to be entitled to refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety even when that information concerns emissions (contrast the reasons given in Regulation 5(d) to (g) EIRs 2004)).  As stated in the Guidance note, if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error. | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(c) | 1. How well has Art. 4(4)(c) been enacted?   Art. 4(4)(c) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (c) 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 aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking  into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 0 – Incomplete enactment**  See Regulation 12(1) and (2) and 5(b) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *“****12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  *(a) international relations, defence, national security or public safety;*  ***(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;”***  Public bodies would appear to be entitled to refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature even when that information concerns emissions (contrast the reasons given in Regulation 5(d) to (g) EIRs 2004)).  As stated in the Guidance note, if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  Please note that For the purposes of paragraph (5)(b), references to a public authority include references to a Scottish public authority. | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(d) | 1. How well has Art. 4(4)(d) been enacted?   Art. 4(4)(d) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (d) 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;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: - 2 – Effective enactment**  See Regulation 12(1) and (2), 5(d) and 9 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  ***“12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  *(a) international relations, defence, national security or public safety;*  *(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;*  *(c) intellectual property rights;*  *(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*  ***(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;***  ***(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”*** | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(e) | 1. How well has Art. 4(4)(e) been enacted?   Art. 4(4)(e) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (e) Intellectual property rights;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 0 – Incomplete enactment**  See Regulation 12(1) and (2) and 5(c) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  ***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  *(a) international relations, defence, national security or public safety;*  *(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;*  ***(c) intellectual property rights;***  Public bodies would appear to be entitled to refuse to disclose information to the extent that its disclosure would adversely affect intellectual property rights even when that information concerns emissions (contrast the reasons given in Regulation 5(d) to (g) EIRs 2004)).  As stated in the Guidance note, if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error. | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(f) | 1. How well has Art. 4(4)(f) been enacted?   Art. 4(4)(f) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (f) 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;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 2 – effective enactment**  See Regulation 12(3) and 13 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *“(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.*  *Personal data*  *13.—(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*  *(2) The first condition is—*  *(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—*  *(i) any of the data protection principles; or*  *(ii) section 10 of that Act (right to prevent processing likely to cause damage or*  *distress) and in all the circumstances of the case, the public interest in not*  *disclosing the information outweighs the public interest in disclosing it; and*  *(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relate to manual data held by public authorities) were disregarded.*  *(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.*  *(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.*  *(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that—*  *(a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or*  *(b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act.”* | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(g) | 1. How well has Art. 4(4)(g) been enacted?   Art. 4(4)(g) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (g) 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;  [...]  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 2 – Effective enactment**  See Regulation 12 (1) and (2), 5(f) and 9 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  ***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  ***(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—***  ***(f) the interests of the person who provided the information where that person—***  ***(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;***  ***(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and***  ***(iii) has not consented to its disclosure; or***  ***(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).”***  Please note that for the purposes of paragraph 5(f), references to a public authority include references to a Scottish public authority. | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(4)(h) | 1. How well has Art. 4(4)(h) been enacted?   Art. 4(4)(h) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (h) The environment to which the information relates, such as the breeding sites of rare species.  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 2 – Enactment is fully in accord**  See Regulation 12(1) and (2) and 5(g) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  ***12.—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—***  ***(a) an exception to disclosure applies under paragraphs (4) or (5); and***  ***(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.***  ***(2) A public authority shall apply a presumption in favour of disclosure.***  *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*  ***(g) the protection of the environment to which the information relates.***  The failure to specify “breeding sites of rare species” in the EIRs 2004 is considered too minor an error to affect the scoring. | **Scoring Guide:**  3 = Enactment provides a narrower exception than the Convention provision  2 = Enactment is fully in accord  1= Minor errors  0 = Errors that are more than minor  For present purposes, and in light of the text associated with a score of 3, enacting a provision that is narrower than the exception contained in the Convention should not be regarded as an error.  Please note that if the national legal framework does not require the grounds for refusal to be “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment,” this will be a “more than minor” error.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| N/A | 1. Does the law provide for any situations in which a request for environmental information may be refused which are not contemplated by Art. 4(3) or 4(4) of the Aarhus Convention?   **Researcher’s score: 3** | **Scoring Guide:**  3 = No  0 = Yes  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(6) | 1. How well has Art. 4(6) been enacted?   Art. 4(6) provides:  “Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above [i.e. Art. 4(3)(c) and 4(4)] can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 12(11) EIRs 2004:  *“(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(7), first sentence | 1. How well has the first sentence of Art. 4(7) been enacted?   The first sentence of Art. 4(7) provides:  “A refusal of a request shall be in writing if the request was in writing or the applicant so requests.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 14(1) EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *Refusal to disclose information*  *14.—(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(7), second sentence | 1. How well has the second sentence of Art. 4(7) been enacted?   The second sentence of Art. 4(7) provides:  “A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 14 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *14.—(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*  *(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*  *(3) The refusal shall specify the reasons not to disclose the information requested, including—*  *(a) any exception relied on under regulations 12(4), 12(5) or 13; and*  *(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii)*  *or 13(3).*  *(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.*  *(5) The refusal shall inform the applicant—*  *(a) that he may make representations to the public authority under regulation 11; and*  *(b) of the enforcement and appeal provisions of the Act applied by regulation 18.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(7), third and fourth sentences | 1. How well have the third and fourth sentences of Art. 4(7) been enacted?   The third and fourth sentences of Art. 4(7) provide:  “The refusal shall 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. The applicant shall be informed of any extension and of the reasons justifying it.  **Researcher’s score: 3 – Effective enactment**  See Regulation 7 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  *Extension of time*  *7.—(1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.*  *(2) The provisions referred to in paragraph (1) are—*  *(a) regulation 5(2);*  *(b) regulation 6(2)(a); and*  *(c) regulation 14(2).*  *(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 4(8) | 1. How well has Art. 4(8) been enacted?   Art. 4(8) provides:  “Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount.  Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of 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.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 8 EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf>  ***Charging***  *8.—(1) Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.*  *(2) A public authority shall not make any charge for allowing an applicant—*  *(a) to access any public registers or lists of environmental information held by the public authority; or*  *(b) to examine the information requested at the place which the public authority makes available for that examination.*  *(3) A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.*  *(4) A public authority may require advance payment of a charge for making environmental information available and if it does it shall, no later than 20 working days after the date of receipt of the request for the information, notify the applicant of this requirement and of the amount of the advance payment.*  *(5) Where a public authority has notified an applicant under paragraph (4) that advance payment is required, the public authority is not required—*  *(a) to make available the information requested; or*  *(b) to comply with regulations 6 or 14, unless the charge is paid no later than 60 working days after the date on which it gave the notification.*  *(6) The period beginning with the day on which the notification of a requirement for an advance payment is made and ending on the day on which that payment is received by the public authority is to be disregarded for the purposes of determining the period of 20 working days referred to in the provisions in paragraph (7), including any extension to those periods under regulation 7(1).*  *(7) The provisions referred to in paragraph (6) are—*  *(a) regulation 5(2);*  *(b) regulation 6(2)(a); and*  *(c) regulation 14(2).*  *(8) A public authority shall publish and make available to applicants—*  *(a) a schedule of its charges; and*  *(b) information on the circumstances in which a charge may be made or waived.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 4 legal indicators?

Do you agree with our approach to Art. 4(3)(a)-(c) and 4(4)(a)-(h) where we have provided that the highest score of 3 should be obtained by Parties which have enacted an exception that is narrower than the Convention provision? If you agree with this approach in general, do you agree with it in respect of all of the exceptions in question (e.g. including Art. 4(4)(h) which relates to disclosures which would adversely affect the environment to which the information relates)? Finally, what score do you think should be obtained by a Party in respect of the exceptions mentioned in Art. 4(3)(a)-(c) and 4(4)(a)-(h) where the country has not enacted the exception *at all*? Again, does your answer differ according to the exception in question (e.g. Art. 4(4)(h) may again be considered an interesting case in point, amongst others)?

No, I do not think a Party should be penalised for not “gold plating” its domestic legislation. I think it should be possible to record where Parties have exceeded requirements with a view to gathering and commending good practice, but I do not think that Parties should be penalised for discharging their obligations.

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### Information on request – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 4(1) | 1. As a general matter, how good has the Party’s performance been in practice in terms of ensuring access to environmental information in accordance with Art. 4(1)?   Art. 4(1) provides:  “1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:  (a) Without an interest having to be stated;  (b) In the form requested unless:  (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; or  (ii) The information is already publicly available in another form.”  **Researcher’s score: 3**  The rights to environmental information introduced by the Environmental Information Directive[[44]](#footnote-45) were not new to the UK. While such rights were previously provided by EU legislation (Directive 90/313/EEC), the Convention re-shaped the rights and obligations in this area, leading to wider definitions of ‘environmental information’ and the ‘public authorities’ to which the information obligations apply. It also limited the exceptions that could be cited in refusals to disclose environmental information in the revised Environmental Information Directive and domestic implementing legislation.  Moreover, the EIRs 2004 sit within the wider framework of freedom of information legislation provided by the Freedom of Information Act 2000 (“FOIA 2000”). It has been observed that “*despite the subsequent misgivings of the Prime Minister whose government introduced it[[45]](#footnote-46), this Act has resulted in a cultural change across public authorities throughout England and Wales in terms of how information is recorded and presented, and how officials in public authorities interact with the public. A request for information may, for a public authority, also be a warning signal that an administrative or judicial challenge is on its way. This shift is compounded by the explosion of information resulting from the proliferation of electronic information platforms*”.  The Information Commissioner’s Office (covering England, Wales and Northern Ireland[[46]](#footnote-47)) and the Scottish Information Commissioner fulfil a number of functions relevant to the EIRs 2004 and the FOIA 2000 including:   * Providing Guidance to businesses and public bodies about both their obligations under the EIRs 2004 and the FOIA 2000 and good practice (for example, Although the EIRs 2004 do not specify that an applicant does not have to say why the information is sought, Guidance on the ICO website confirms this to be good practice: <https://ico.org.uk/for-the-public/official-information/>); * Examining complaints from civil society in relation to the provision of information; * Pursuing a variety of enforcement mechanisms to ensure compliance with statutory provisions (<https://ico.org.uk/action-weve-taken/enforcement/>); * Monitoring organisations to form a view of their performance in adhering to the Freedom of Information Act and Environmental Information Regulations (<https://ico.org.uk/action-weve-taken/monitoring-compliance/>); * Commissioning research to inform the nature and range of matters it may need to address (<https://ico.org.uk/about-the-ico/our-information/research-and-reports/>); and * Publishing statistics (<https://ico.org.uk/about-the-ico/our-information/key-facts/>).   I am unaware of any situations in which a public authority has refused to disclose information on the basis that an interest must be stated or has deliberately provided information in a format that is difficult for the reader to interpret where the original is not.  There is no definition of “the public” in either the EIRs 2004 or the FOIA 2000. However, there appears to be no restriction on the provision of information by reference to the body requesting it in practice. For example, Guidance published by the Information Commissioner’s Office (ICO) states: “In most cases, authorities should consider FOI and EIR requests without reference to the identity or motives of the requester. Their focus should be on whether the information is suitable for disclosure into the public domain, rather than the effects of providing the information to the individual requester.  • Anyone can make a request for information, regardless of who they are or where they live.  • There is no requirement for the requester to explain why they need the information or to provide justification for their request.  • An authority may however take the requester’s identity and motives into account in some limited circumstances.  • The requester’s identity may be taken into account when; or the authority has reason to believe that the requester hasn’t provided their real name”  See: https://ico.org.uk//media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf  To conclude, while the situation regarding the provision of environmental information in the UK is not perfect, the scope and powers of the ICO/SIC, including the availability of a free complaints mechanism – make it difficult to score the UK simply “good”. | **Scoring guide**  3 = Excellent  2 = Good  1 = Fair  0 = Poor or non-existent  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Take into account here in general the level of institutionalisation of passive (upon request) information servicing; the level of use of electronic communication; whether the country has institutionalized a records and monitoring system for compiling information request statistics and also the available statistics relating to information requests and related decisions (outcome, timeliness, format etc.) Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * availability of statistics on information requests and servicing, including research and analyses and measures taken based on them (ref.1, ref.2, ref.11, ref.12, ref.15, ref.16, ref.17, ref.18) * richness of data sources used for information servicing (ref.4, ref.19) * the role of any statistical organisations and aggregate data in information servicing (ref.8) * transforming data to provide an easier to handle information (knowledge, wisdom) (ref.10) * modalities of receiving and servicing information requests (ref.1, ref.8, ref.20, ref.21) * use of information help desks and other similar units to service environmental information requests (ref.4, ref.16) * is there an information commissioner or similar body which receives reports (e.g. annual statistics) from public authorities on information processing and servicing, perhaps also dealing with complaints from citizens (or complaints and information requests are managed by the desk officers) (ref.5, ref.13, ref.14) * establishing central body to guide the administrative organisations and officials dealing with information requests (ref.7) * protection of data owners without infringing the rights of requesters (ref.6, ref.9) * cases in which public authorities seek to insist on an interest being stated * cases in which public authorities provide information in a format that is impossible to process (e.g. PDF) in circumstances where the original is easily processable (e.g. Excel sheet), despite being asked to provide the processable version   Please justify your score and explain the factors you considered. |
| Art. 4(2)  First sentence | 1. In practice, how good is the Party’s performance in terms of complying with the first sentence of Art. 4(2)?     “**The environmental information referred to in paragraph 1 above [i.e. Art. 4(1)] shall be made available 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.** The applicant shall be informed of any extension and of the reasons justifying it.”  **Researcher’s score: 2**  The Government publishes quarterly statistics on requests for information under the FOIA 2000 and EIRs 2004: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554104/foi_statistics_q2_2016_bulletin.pdf>  Supporting tables here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554108/foi_statistics_q2_2016_statistical_tables.pdf>  While there is data on the timeliness of responses, the data appears to be aggregated for requests under the FOIA 2000 and EIRs 2004. The government target is 90% ‘in time’ responses: Out of the 41 monitored bodies, 27 met the target in April to June 2016. Table 3 (page 4) shows the timeliness of response to FOI requests for Defra, which confirms that: 79% of requests are complied with within the 20 day deadline; 13% of requests are complied with after a permitted extension and 8% receive a “late response” (i.e. after 40 days). There are other Government bodies that would be relevant in this context, including DCLG, DECC, BIS, Department of Transport and the MoJ (for which the data varies markedly).  However, my experience, as a legal practitioner, is that it is not uncommon for public bodies to inform the applicant that it is extending the deadline to 40 days on the basis that the volume and complexity of the information sought justifies an extension. Moreover, the applicant is usually informed of that fact on the deadline for disclosing the information (i.e. 20 days after receiving the request). While this may be a reflection of the fact that the information sought is more technical and/or cannot be supplied in a readily format, it can be problematic in Judicial Review proceedings, especially in relation to decisions made under the Planning Acts, in which the deadline for lodging proceedings can be very short (in planning matters it is six weeks after the publication of the Decision Notice). As a result, claimants are under pressure to lodge proceedings presumptively (and, occasionally, prematurely) because they do not always have the information needed to inform the potential claim. As such, while the practice is not widespread, it tends to have significant consequences when it is invoked.  In *Birkett[[47]](#footnote-48)*, the Court of Appeal considered whether a public authority could rely on exceptions it did not initially make use of when withholding requested environmental information. The Court of Appeal rejected the argument that allowing such exceptions to be relied on would be at odds with the purpose of the Environmental Information Directive and ultimately the Convention. The Court looked at the timescales for making a decision on whether to release requested environmental information and the requirements for such decisions to be subject to a review process, concluding that there may be complexities around deciding which exceptions applied at the time of the request and that their potential importance to the public interest should not mean that they become unavailable if the public authority does not get it right first time. The need for decisions to be taken quickly and for there to be safeguards through review procedures of those decisions – both key features of the Convention – set the framework for the Court’s judgment. | **Scoring guide**  3 = Excellent (provision of information either immediately or in considerably less than one month is typical)  2 = Good (majority of requests are serviced within the prescribed deadlines)  1 = Fair (minority of requests are serviced within the prescribed deadlines)  0 = Poor or non-existent (almost no or no requests are serviced within the prescribed deadlines); or no coherent dataset available to score this indicator\*  \*If there is no coherent dataset available to allow you to assess this indicator, please consider your own experience in practice as well as the experiences of any colleagues or interviewees. Whilst Art. 4(2) does not explicitly require the collation of such data, because it might be too burdensome on the Parties, some Parties monitor at least parts of compliance with this provision.  In scoring this indicator, authorities keeping to deadlines is not the only important factor; other important considerations would include typical or repeated traits/behaviours of the authorities e.g. at first they only respond to the request (e.g. notifying the requester that the request is accepted) and they delay the actual servicing of the requested information. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Insofar as possible, please take into consideration *inter alia*:   * how many information requests are responded to immediately? (ref.1) * to what extent are the prescribed deadlines met? (ref.2, ref.4, ref.5) * keeping to the rules regarding the extension of deadlines (ref.3) * any time gaps between responding to the request and actual provision of the information itself (ref.5) * use of the “heavy workload” argument (ref.6) * frequency of occurrence of no answer at all to requests (ref.6)   Please justify your score and explain the factors you considered. |
| Art. 4(2)  Second sentence | 1. In practice, how good is the Party’s performance in terms of complying with the second sentence of Art. 4(2)     “The environmental information referred to in paragraph 1 above [i.e. Art. 4(1)] shall be made available 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. **The applicant shall be informed of any extension and of the reasons justifying it.”**  **Researcher’s score: 3**  I can find no statistics covering this issue. However, my experience is that the applicant is routinely informed that an extension is being applied and the reasons for it. | **Scoring guide**  3 = Excellent (applicants always or almost always informed of the extension and reasons, and the reasons cited always or almost always fall within those permissible under Art. 4(2))  2 = Good (applicants normally informed of the extension and reasons, and the reasons cited normally fall within those permissible under Art. 4(2))  1 = Fair (applicants rarely informed of the extension and reasons; and where reasons are cited they rarely fall within those permissible under Art. 4(2))  0 = Poor or non-existent (applicants are typically not informed of the extension and reasons; and where reasons are cited they only very rarely fall within those permissible under Art. 4(2)); or no coherent dataset available to score this indicator\*  \*If there is no coherent dataset available to allow you to assess this indicator, please consider your own experience in practice as well as the experiences of any colleagues or interviewees. Please indicate in the comments how you came to your conclusion and the resources that were available. Whilst Art. 4(2) does not explicitly require the collation of such data, because it might be too burdensome on the Parties, some Parties monitor at least parts of compliance with this provision. |
| Art. 4(3)(a) and 4(5) | 1. Where a public authority does not hold the environmental information requested, do public authorities inform the requester promptly about the believed correct location of the information, or forward the request to the authority that may have the information, informing the applicant accordingly?   Art. 4(3)(a) provides:  “A request for environmental information may be refused if:   1. The public authority to which the request is addressed does not hold the environmental information requested;”   Art. 4(5) provides:  “Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.”  **Researcher’s score: 3 – Yes, always**  Quarterly Government statistics confirm that between April to June 2016 there were 11,037 FOI requests received across all monitored government bodies. Of those, 2,106 requests were deemed to be “not resolvable” because they involved information not held by the responding body (<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554104/foi_statistics_q2_2016_bulletin.pdf>).  However, the statistics do not confirm that, in these situations, the applicant was informed that it was possible to obtain the information from another public body and/or the request was transferred to that authority (and the applicant informed accordingly).  My experience, as a practitioner is that the applicant is informed of the fact that the information is not held by the relevant body promptly (i.e. within one week) and that the request is routinely transferred to that authority. However, my experience in this regard is somewhat limited and I would welcome a discussion with the Reviewer if this score is not judged to be an accurate reflection of the situation. | **Scoring Guide:**  3 = Yes, always  2 = Yes, frequently  1 = No, rarely  0 = No, never  For the purpose of this indicator, please regard “promptly” as being within one week of the public authority receiving the information request  The reference cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please note *inter alia*:   * conditions relating to the onward referral of information requests (ref.1)   Please justify your score and explain the factors you considered. |
| Art. 4(3)(b) and (c) | 1. In practice, how are these exemptions from the right to information on request typically interpreted?   Article 4(3) provides:  “(3) A request for environmental information may be refused if:  (b) The request is manifestly unreasonable or formulated in too general a manner;  (c) 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.”  **Researcher’s score: 2**  Quarterly Government statistics provide aggregate data for requests under the FOIA 2000 and EIRs 2004.  There were 11,037 requests for information under the FOIA 2000 and EIRs 2004 in the quarterly period April-June 2016[[48]](#footnote-49). Resolvable requests made up 73% (8,040) of the requests (i.e. it was possible to give a substantive decision on whether to release the information being sought). Of these requests:   * 3,546 (44%) were granted in full; * 3,961 (49%) were withheld in full or in part, where: (1) 55 were vexatious, as defined in Section 14 of the Act; and (2) 27 were repeated, as defined in Section 14 of the Act. * 1,219 had a cost of response which exceeded the limit as defined in Section 12 of the Act; * 2,660 involved information subject to one of the exemptions and exceptions listed under Sections 22-44; and * 533 were not yet processed.   A further 27% (2,973) were not resolvable. Of these:   * **867 (7.8%) required further clarity and “advice and assistance” on how to reformulate the request was provided.** * 2,106 involved information not held by the responding body.   Of the 2,660 cases involving information subject to one of the exemptions listed under sections 22-44, information was withheld in:     * **8.3% of cases because it was intended for future publication;** * **4.5% of cases because it was prejudice to effective conduct of public affairs; and** * **4.8% of cases because it was being used in the formulation of Government policy.**   The decision in ACCC/C/2010/53 (United Kingdom) is an interesting example of the application of the exception under Article 4(3)(c) (“material in the course of completion”.). The Communication concerned a request for access to raw environmental data on air pollution which had been collected from a monitoring station but not yet subject to data correction. The Committee held that the raw data fell within the definition of environmental information in the Convention and fell to be disclosed. | **Scoring Guide:**  3 = Article 4(3)(b) is interpreted restrictively AND with respect to article 4(3)(c), there are no exemptions in national law or practice for materials in the course of completion or for internal communications of public authorities.  2 = Article 4(3)(b) is interpreted restrictively AND with respect to article 4(3)(c), there is no exemption in national law or practice for materials in the course of completion OR for internal communications of public authorities OR any such exemption is interpreted restrictively, taking into account the public interest served by disclosure  1 = Article 4(3)(b) and (c) are not interpreted restrictively in practice but in the case of Art. 4(3)(c)) the public interest served by disclosure is typically taken into account.  0 = Article 4(3)(b) and (c) are not interpreted restrictively in practice, and in the case of Art. 4(3)(c), the public interest served by disclosure is frequently not taken into account.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Insofar as possible, please take into consideration *inter alia*:   * the practice in cases where the requested information is said to be too voluminous (ref.1, ref.5) * the practice in cases where the request is said to be formulated in too general a manner (ref.2) * the use of exemptions in connection with advice and considerations in preparatory phases of administrative decisions (Especially in the light of the principle of ensuring even procedural positions for all parties and the right to legal remedies against the whole decision, including expert opinions and other supporting materials.) (ref.3, ref.4, ref.6, ref.7, ref.8)   Please justify your score and explain the factors you considered. |
| Art. 4(4) | 1. In practice, how are these exemptions from the right to information on request typically interpreted?   Art. 4(4) provides:  “A request for environmental information may be refused if the disclosure would adversely affect:  (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;  (b) International relations, national defence or public security;  (c) 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;  (d) 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;  (e) Intellectual property rights;  (f) 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;  (g) 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;  (h) The environment to which the information relates, such as the breeding sites of rare species.  The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”  **Researcher’s score: 2**  In *G.M. Freeze v. DEFRA[[49]](#footnote-50),* the appellant wanted to obtain the six-digit National Grid reference for a field in Somerset. The farmer had sown some supposedly conventional oilseed rape seed in which there was, unbeknownst to him and the seed manufacturer, some genetically-modified seed at a concentration of 5 plants per 10,000. The crop thus grown then cross-pollinated with the neighbouring field of oilseed rape, contaminating the latter to 1 part per 10,000. Oilseed rape. G.M. Freeze said that the grid reference of the farm was “environmental information” within the meaning of the EIRs 2004. DEFRA accepted this, but said that the information was “personal data”, and hence it could justifiably refuse to provide it.    The First-Tier Tribunal of the General Regulatory Chamber agreed with DEFRA. The decision turned on whether the giving of the data “*is necessary for the purposes of legitimate interests pursued by the data controller or the third party or parties to whom the data are disclosed except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject*”: reg.13 EIR read with Schedule 2 to the Data Protection Act 1998. The Tribunal agreed that G.M.Freeze had a legitimate interest in the data, but said that the giving of the data was not “necessary”. There is interesting commentary on the case here: <https://ukhumanrightsblog.com/2011/04/11/oilseed-rape-bees-lettuces-and-mobile-phone-masts-the-right-to-information/>  In terms of data, Quarterly Government statistics provide aggregate data for requests under the FOIA 2000 and EIRs 2004.  There were 11,037 requests for information under the FOIA 2000 and EIRs 2004 in the quarterly period April-June 2016. Resolvable requests made up 73% (8,040) of the requests. Of these 8,040 requests, 2,660 (33%) involved information subject to one of the exemptions and exceptions listed under Sections 22-44. Of the 2,660 cases, the exemptions listed under sections 22-44 included[[50]](#footnote-51):   * Law enforcement (12.5%); * Commercial interests (8.3%); * Environmental Exceptions (8.2%); * Investigations and proceedings conducted by public authorities (6.1%); * Information provided in confidence (5.6%); * Prejudice to effective conduct of public affairs (4.5%); * National security (4.2%); * International relations (3.6%); * Defence (0.94%)   Note also that Regulation 9 EIRs 2004 provides that where the environmental information to be disclosed relates to information on emissions, a public authority cannot refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g):  “*the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*   1. *the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;* 2. *the interests of the person who provided the information where that person—* 3. *was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;* 4. *did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and* 5. *has not consented to its disclosure; or* 6. *the protection of the environment to which the information relates*.” | **Scoring Guide:**  3 = Very restrictively, giving strong weight to the public interest served by disclosure and whether the information requested relates to emissions into the environment  2 = Restrictively, always or almost always taking into account the public interest served by disclosure and also whether the information requested relates to emissions into the environment.  1 = EITHER not restrictively, OR the authorities do not always or almost always take into account the public interest served by disclosure OR if the information requested relates to emissions into the environment  0 = Not restrictively and authorities do not always or almost always take into account the public interest served by disclosure or if the information requested relates to emissions into the environment.  Please note that some of the exemptions might be in connection with short term economic interests (such as business secrets), while others might - in contrast - protect the environment itself (e.g. Para (h) of Art 4(4)). Naturally, restrictions in access to information falling within this second group of issues should not be considered as indicators of a poorer practice in ensuring environmental democracy. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing).  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * ‘legitimate economic interests’ and confidentiality of business secrets (ref.4) * balancing the right to access environmental information and intellectual property rights (e.g. in the case of GMOs) (ref.1) * any cases where environmental impact assessment documentation, wholly or partly, is exempted from disclosure (ref.2) * the handling of information of environmental, nature protection sensibility (ref.3)   Please justify your score and explain the factors you considered. |
| N/A | 1. In practice, are requests for environmental information refused on grounds which are not contemplated by Art. 4(3) or 4(4) of the Aarhus Convention?   **Researcher’s score: 2**  Not in my experience, although this is difficult to score as the Government statistics aggregate data for requests under the FOIA 2000 and EIRs 2004.  However, Secondly, in *Office of Communications[[51]](#footnote-52)* the Supreme Court referred a question to the CJEU as to whether environmental information could still be withheld where exceptions, considered individually, did not provide a sufficient justification for non-disclosure. The CJEU found that it was possible to view the exceptions in a cumulative way because the concept of public interest served by disclosure was one that was broad and overarching, rather than something that needed to be applied in isolation to each exception. The suggestion that this would amount to the introduction of a new exception to the Convention was rejected, having regard to the overall interest represented jointly by the interests served by refusing to disclose. | **Scoring Guide:**  3 = No  2 = Very rarely  1= Yes, sometimes but not on a regular basis.  0 = Yes, frequently, on a regular basis. |
| Art. 4(6) | 1. In practice, do the relevant authorities separate out information exempted from disclosure from other information (known as partial disclosure or severance)?   Art. 4(6) provides:  “Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above [i.e. Art. 4(3)(c) and 4(4)] can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.”  **Researcher’s score: 3 – Yes, always**  The Government received 11,037 requests for information in the period April to June 2016. Of these requests, 73% were resolvable (8,040). Of these 8,040, 3,961 were withheld in full or in part.  The supporting tables to the above report confirm that information in 1,022 requests was partially withheld during that period (all monitored bodies) and in 602 requests for Departments of state [https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/554108/foi\_statistics\_q2\_2016\_statistical\_tables.pd](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554108/foi_statistics_q2_2016_statistical_tables.pdf)  This means that partial disclosure was provided in around 12% of resolvable cases for all monitored bodies and 7% for state bodies. | **Scoring Guide:**  3 = Yes, always  2 = Yes, frequently  1 = No, rarely  0 = No, never  Please note that separation can be interpreted broadly: the progressive, flexible practice for instance, where authorities black out names, other personal data and any other sensitive data, in order to ensure serviceable material. The reference cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Take into consideration *inter alia*:   * any examples of reluctance on the part of the relevant authorities to separate out environmental information that is not exempted from disclosure (ref.1) * failure to implement Art. 4(6) in practice and no reference to this otherwise existing legal possibility in the publicly available information materials (ref.2)   Please justify your score and explain the factors you considered. |
| Art. 4(7) | 1. Are instances of refusal provided (i) in writing (if request was in writing or applicant requests), (ii) within the prescribed time frames, (iii) with reference to the reasons for refusal and (iv) with information on access to the review procedure provided under article 9?   Art. 4(7) provides:  “A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall 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. The applicant shall be informed of any extension and of the reasons justifying it.”  **Researcher’s score: 3**  The basis for this score is my experience as a legal practitioner - I can find no data or case-law on this issue. | **Scoring Guide:**  3 = All four criteria are always or almost always met in practice  2 = All four criteria are met in the majority of cases  2 = Three of the four criteria are always or almost always met in practice.  1 = Only one or two of the four criteria are always or almost always met in practice.  1= Only in a minority of cases are all four criteria met in practice.  0 = Never or almost never are all four criteria met in practice.  Note that refusal is not a black and white issue: in practice authorities that do not wish to provide the requested information might give it only in part and ignore the other aspects of the request or after such a delay that obtaining the information is by then futile. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * cases where the authority answers the information request only in part (ref.1) * cases where the authority does not give any substantial explanation for refusing the request (ref.1) * any references made by authorities to their “tacit agreement” or “positive silence” in seeking to defend their neglect of information requests (ref.2) * any references by authorities to actively disseminated information when seeking to explain their neglect of information requests (ref.2)   Please justify your score and explain the factors you considered. |
| Art. 4(8) | 1. Are any charges that public authorities make for supplying information reasonable and is a schedule of any such charges made available to applicants in advance, indicating the circumstances in which they be levied or waived and when advance payment is required?   Art. 4(8) provides:  “Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount.  Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of 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.”  **Researcher’s score: 2**  See ICO Guidance here: <https://ico.org.uk/media/1627/charging-for-environmental-information-reg8.pdf>  Also see Case C-71/14 *East Sussex County Council v Information Commissioner* , in which ESCC received a request for answers to questions in the standard property search form issued by the Law Society, the CON29R form. The Council imposed a fixed charge for providing this information, factoring in a range of costs. On appeal, the first tier tribunal asked the Court of Justice of the European Union (CJEU) to rule on the interpretation of a ‘reasonable charge’. The CJEU started by making a distinction between supplying information and allowing access and examination of information in person. A public authority can only charge for “*the costs attributable to the time spent by staff of the public authority concerned on answering an individual request for information*”. Costs associated with maintaining a database of information are not related to an individual request so cannot be recovered. The CJEU went on to say that a reasonable charge must not have a deterrent effect or otherwise prevent access to environmental information.  In *Bickford-Smith v Information Commissioner* and the Rural Payments Agency (an executive agency of DEFRA)(EA/2010/0031; 19 August 2010), the First-Tier Tribunal stated (at paragraph 79): “*Since the Rural Payments Agency had not published and made available to the Appellant a schedule of charges, seeking to charge her for the information would not accord with Regulation 8(8)”.* Similarly, in the case of *Leeds City Council v Information Commissioner and the APPS Claimants* (EA/2012/0020 and 0021; 22 March 2013) the First-tier Tribunal clarified the connection between regulation 8(1) and 8(8). At paragraph 119 the Tribunal stated that “*it is a requirement, not an option, for public authorities to publish a schedule of charges capable of being scrutinised and tested to ensure that it is fair and takes into account relevant and permissible costs. This is to safeguard applicants from abuse and inconsistency. ….. Parliament cannot have intended for a publication breach to have no implications, and that there is a reason why the ability to charge in r.8(1) is subject to*” *the publication requirement in r.8(8). It follows that the failure of the Council to publish a schedule of charges results in the loss of its entitlement to levy a charge under r.8(1).”*  In ACCC/C/2008/24 (Spain), the Spanish authorities were censured for having imposed a charge of around €2 per sheet (scheduled charges ranged from €2.05 and €2.15 per sheet). Plans cost a further €10 each to copy. The case concerned a planning application; the cost of copying non-planning materials in the authority concerned was much lower and the cost in the region concerned (Murcia) was only €0.03 per sheet. The Committee had regard to the UK Information Tribunal in deciding whether the charges were reasonable. In fn9 to paragraph 77, the Committee noted the decision of the UK Information Tribunal in *David Markinson v. Information Commissioner* (EA/2005/0014, 14 March 2006), where the Tribunal had held: “*the Council should adopt as a guide price the sum of 10p per A4 sheet, as identified in the Good practice guidance on access to and charging for planning information published by the Office of the Deputy Prime Minister and as recommended by the DCA. ... The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so*.” | **Scoring Guide:**  3 = Authorities always or almost always either do not charge for supplying information or charge no more than a reasonable amount and a schedule of any such charges is made available in advance.    2 = In the majority of cases, authorities either do not charge or charge no more than a reasonable amount and a schedule of any such charges is made available in advance.  1 = Charges for supplying information are frequently higher than what would be reasonable OR a schedule of such charges is typically not made available in advance.  0 = Charges for supplying information are frequently higher than what would be reasonable AND a schedule of such charges is typically not made available in advance.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * cases where authorities charge only for certain types of information (ref.1) * any differential treatment where different kinds of requesters (public bodies, corporate bodies, NGOs, private persons etc.) ask for information * free information provision as a general rule (ref.2) * relatively high price imposed even for simple copying of requested printed materials (ref.3) * The Opinion of AG Sharpston and the subsequent judgment in [Case C-71/14](http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-71%252F14&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=203778)   Please justify your score and explain the factors you considered. |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 4 practice indicators?

Do you think Article 4(1) should be divided into two practice indicators (one for Art. 4(1)(a) and one for 4(1)(b)), as was the case with the legal indicators? Please provide your reasons.

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### (b) Collection and active dissemination of information – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 5(1)(a) | 1. How well has Art. 5(1)(a) been enacted?   Art. 5(1)(a) provides:  “1. Each Party shall ensure that:   1. Public authorities possess and update environmental information which is relevant to their functions;”   **Researcher’s score: 3 – Effective enactment**  Regulation 4(1)(b) of the EIRs 2004 requires public bodies to take reasonable steps to organise environmental information relevant to its functions with a view to actively and systematically disseminating it to the public. Although this isn’t a literal enactment of Article 5(1)(a) of the Convention, it is reasonable to assume that “organised environmental information” would have to include up to date information. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(1)(b) | 1. How well has Art. 5(1)(b) been enacted?   Art. 5(1)(b) provides:  “1. Each Party shall ensure that:  (b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;”  **Researcher’s score: 3 – Effective enactment**  In the UK, such systems are commonly imposed by way of conditions attached to planning permissions to environmental permits. Such mechanisms are expressly recognised by the Implementation Guide[[52]](#footnote-53). In particular, the Compliance Committee has held that, at a minimum Article 5(1) covers EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation[[53]](#footnote-54).  See the requirements for publishing and advertising Environment Statements in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 - <http://www.legislation.gov.uk/uksi/2011/1824/contents/made>  And equivalent provisions in Scotland, Wales and Northern Ireland:  The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 - <http://www.legislation.gov.uk/ssi/2011/139/contents/made>  The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 - <http://www.legislation.gov.uk/wsi/2016/58/contents/made>  The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012 - <http://www.legislation.gov.uk/nisr/2012/59/contents/made> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(1)(c) | 1. How well has Art. 5(1)(c) been enacted?   Art. 5(1)(c) provides:  “1. Each Party shall ensure that:    (c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.”  **Researcher’s score: 1—Errors More than minor (score lowered by final reviewer from 3, on basis that there are no provisions requiring immediate dissemination)**  There are no provisions in the EIRs 2004 requiring public bodies to immediately disseminate information which could enable potentially affected members of the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment, whether caused by human activities or due to natural causes. However, there are equivalent provisions in other enactments. For example, section 87 of the Energy Act 2013 requires the Office of Nuclear Regulation to make such arrangements as it considers appropriate for providing information that it holds that is relevant to the ONR's purposes (including arrangements for providing information to any person or category of persons (whether or not concerned with matters relevant to the ONR's purposes) - <http://www.legislation.gov.uk/ukpga/2013/32/part/3>. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(2)(a) | 1. How well has Art. 5(2)(a) been enacted?   Art. 5(2)(a) provides:  2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:  (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities,  the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;”  **Researcher’s score: 0 – Not enacted at all**  Unlike the FOIA 2000, the EIRs 2004 do not require authorities to operate a publication scheme. The ICO recommends they do so as a matter of good practice (see later discussion) but it is not mandatory for them to do so: <https://ico.org.uk/media/for-organisations/documents/1614/proactivedissemination.pdf>  See also the EIRs Code of Conduct (“Proactive dissemination of information”): <https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(2)(b) and (c) | 1. How well has Art. 5(2)(b) and (c) been enacted?   Art. 5(2)(b) and (c) provide:  “2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:  (b) Establishing and maintaining practical arrangements, such as:  (i) Publicly accessible lists, registers or files;  (ii) Requiring officials to support the public in seeking access to information under this Convention; and  (iii) The identification of points of contact; and  (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.”  **Researcher’s score: 2 – Minor errors**  Regulators are placed under a general duty in regulation 46 of the Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675 to maintain a public register of environmental information. This includes information on applications for environmental permits and information obtained from monitoring a permitted operation. See, for example, those on the Environment Agency website available here: <http://epr.environment-agency.gov.uk/ePRInternet/searchregisters.aspx>  Regulation 9 EIRs 2004 requires public authorities to provide advice and assistance to applicants when making information requests:  *“Advice and assistance*  *9.—(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*  *(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall—*  *(a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and*  *(b) assist the applicant in providing those particulars.”*  There is no statutory provision regarding points of contact, although this is covered in Guidance (see later).  Regulation 8 EIRs 2004 prohibits public authorities from charging applicants to access public registers or lists of environmental information held by them or to examine the information requested at the place which the public authority makes available for that examination: <http://www.legislation.gov.uk/uksi/2004/3391/pdfs/uksi_20043391_en.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(3) | 1. How well has Art. 5(3) been enacted?   “3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:  (a) Reports on the state of the environment, as referred to in paragraph 4 below;  (b) Texts of legislation on or relating to the environment;  (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements;  (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing the Convention, provided that such information is already available in electronic form.”  **Researcher’s score: 3 – Effective enactment**  Article 4(4)(a) EIRs 2004 requires information referred to in Article 7(2) of the Directive to be progressively made available to the public by electronic means which are easily accessible. The information listed in Article 7(2) European Directive 2003/4/EC includes:  *(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;*  *(b) policies, plans and programmes relating to the environment;*  *(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;*  *(d) the reports on the state of the environment referred to in paragraph 3;*  *(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;*  *(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;*  *(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.*  Article 4(4)(b) also requires the following information to be made electronically available: facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(4) | 1. How well has Art. 5(4) been enacted?   Art. 5(4) provides:  “4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.”  **Researcher’s score: 3 – Effective enactment**  The EIRs 2004 (Regulation 4) oblige public bodies to publish environmental information proactively in two ways[[54]](#footnote-55):  • Information should be published by easily accessible electronic means; and  • Records should be organised in such a way that certain information can be published routinely.  Public bodies do not have to publish all the environmental information they hold, but as a minimum they must publish information to comply with their obligations under the Regulations is listed in Article 7(2) of the European Directive 2003/4/EC including information on policies, plans and procedures relating to the environment, **reports on the state of the environment (not exceeding four years)**, and environmental impact studies. It also includes data taken from monitoring activities and risk assessments that affect or are likely to affect the environment. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors, e.g. the report is to be provided at slightly greater intervals, say 5 years.  1 = Errors that are more than minor, e.g. the report is to be provided at greater intervals, say every 6 or more years and/or detailed information on the quality of or pressures on the environment is not required.  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(5) | 1. How well has Art. 5(5) been enacted?   Art. 5(5) provides:  “5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:  (a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;  (b) International treaties, conventions and agreements on environmental issues; and  (c) Other significant international documents on environmental issues, as appropriate.”  **Researcher’s score: 3 – Effective enactment/Enactment which goes further than required**  As above, while public bodies do not have to publish all the environmental information they hold, as a minimum they must publish information to comply with their obligations under the Regulations is listed in Article 7(2) of the European Directive 2003/4/EC including:   1. **texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;** 2. **policies, plans and programmes relating to the environment;** 3. **progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;** 4. the reports on the state of the environment referred to in paragraph 3; 5. data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; 6. authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3; 7. environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(6) | 1. How well has Art. 5(6) been enacted?   Art. 5(6) provides:  “6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.”  **Researcher’s score: 3 – Effective enactment**  The EU Ecolabel is a voluntary label to show that products or services meet a specific Europe-wide environmental standard. The functioning of the EU Ecolabel is set through a Regulation of the European Parliament and of the Council: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32010R0066>  See information on the Defra website: <https://www.gov.uk/guidance/apply-for-an-eu-ecolabel> and information here: <http://ec.europa.eu/environment/ecolabel/the-ecolabel-scheme.html> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(7)(a) | 1. How well has Art. 5(7) been enacted?   Art. 5(7)(a) provides:  “7. Each Party shall:  (a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;”  **Researcher’s score: 3 – Literal enactment**  Regulation 4 of the EIRs 2004 requires public bodies to actively disseminate: (a) information referred to in Article 7(2) of the Directive; and (b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.  As “Analyses of facts” could cover “*cost-benefit analyses, EIAs and other analytical information used in framing proposals and decisions*[[55]](#footnote-56)”, see also Regulations 39 and 40 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 concerning publicity for, and the inspection of, EIAs: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/39/made> and <http://www.legislation.gov.uk/uksi/2011/1824/regulation/40/made>  There are equivalent provisions in Wales, Scotland and Northern Ireland on the links provided above. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(7)(b) | 1. How well has Art. 5(7)(b) been enacted?   Art. 5(7)(b) provides:  “7. Each Party shall:  (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention;”  **Researcher’s score: 2 – Minor errors**  The Government also publishes an annual report and quarterly statistics on FOI requests: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517909/freedom-of-information-statistics-2015-Q4-annual__1_.pdf>  Section 19 of the FOIA 2000 requires public bodies to[[56]](#footnote-57) “*adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a “publication scheme”)*. However, the EIRs 2004 do not require public bodies to maintain a publication scheme, but the ICO recommends they do so to help them comply with the requirement to publish environmental information proactively[[57]](#footnote-58).  The Ministry of Justice does not publish information on access to information, including such matters on the effectiveness of costs rules for environmental (Aarhus) cases, despite requests to do so. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(7)(c) | 1. How well has Art. 5(7)(c) been enacted?   Art. 5(7)(c) provides:  “7. Each Party shall:   1. Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.”   **Researcher’s score: 3 – Effective enactment**  Defra is supported by a network of 35 agencies and public bodies with statutory responsibilities covering a wide range of functions. These statutory responsibilities include the publication of annual reports on the implementation of public services relating to the environment.  Key regulatory bodies in England include the Environment Agency (EA), Natural England (NE), the Marine Management Organisation (MMO), the Forestry Commission (FC) and the Drinking Water Inspectorate (DWI). For example, the Marine Management Organisation was established under the Marine and Coastal Access Act 2009. Schedule 1 of the MCAA 2009 requires the MMO to prepare an annual report on how it has discharged its functions during each financial year. The report must be sent to the Secretary of State as soon as possible after the end of the year to which it relates and a copy of the report must be laid before each House of Parliament: <http://www.legislation.gov.uk/ukpga/2009/23/schedule/1>  Similar duties with regard to annual reporting on functions apply to the Environment Agency under the Environment Act 1995[[58]](#footnote-59) and Natural England under Part I of Schedule I of the Natural Environment and Rural Communities Act 1996[[59]](#footnote-60).  Defra’s enforcement policy statement[[60]](#footnote-61) sets out the high-level general principles which must be followed by Defra’s executive agencies as listed above. The non-Departmental Public Bodies listed above have their own enforcement policies/statements as required by the Regulators Code[[61]](#footnote-62) which came into force in April 2014. All regulators must ensure that non-compliance with legislation is dealt with fairly and proportionately but must also, under the statutory Growth Duty introduced by the Deregulation Act 2015[[62]](#footnote-63), to have regard to economic growth in any decisions that are made. This duty does not override the primary statutory responsibilities of the individual regulatory bodies and also does not apply to decisions to instigate criminal proceedings. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(8) | 1. How well has Art. 5(8) been enacted?   Art. 5(8) provides:  “8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.”  **Researcher’s score: 3 – Effective enactment**  Article 5(8) deals with product information and requires Parties to develop mechanisms with a view to ensuring that sufficient such information is made available to the public in a manner which enables consumers to make informed environmental choices. One means of doing so is eco-labelling, as mentioned in Article 5(6)[[63]](#footnote-64). A few examples include:  Marine Stewardship Council - <https://www.msc.org/about-us/credibility/how-we-meet-best-practice>  Forest Stewardship Council - <https://us.fsc.org/en-us/what-we-do/mission-and-vision>  Organic food - <https://www.gov.uk/guidance/organic-food-labelling-rules> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 5(9) | 1. How well has Art. 5(9) been enacted?   Art. 5(9) provides:  “9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.”  **Researcher’s score: 3 – Effective enactment**  Pollutant release and transfer registers (PRTRs) are inventories of pollution from industrial sites and other sources. Annex I of the European Union Regulation on PRTRs specifies which activities need to report. In some cases, these activities are further sub-divided. The industrial or business facilities quantify and report the amounts of substances released to each environmental medium (air, water, soil) or transferred off-site for waste management or wastewater treatment. The 2003 Kiev Protocol on PRTRs requires parties to the agreement to make this information publicly accessible.  Displayed data includes:   * facility, including the facility’s parent company where applicable, and its geographical location, including the river basin; * activity; * pollutant or waste, as appropriate; * each environmental medium (air, water, land) into which the pollutant is released; * off-site transfers of waste and their destination, as appropriate; * off-site transfers of pollutants in waste water; and * period trends (time series) displayed using graphs.   Defra aims to publish data approximately one year after the end of the calendar year under report.  The database lists data on 91 pollutants, such as amount released, when and where, based on reports from facilities that have reached the required threshold for inclusion. Thus, searches can be done by facility, activity or pollutant (amongst other parameters): <https://www.gov.uk/guidance/uk-pollutant-release-and-transfer-register-prtr-data-sets> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please note the following passage from the** [**Aarhus Implementation Guide (2014)**](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) **– at p.115: “For Parties that have ratified the Protocol on PRTRs, the implementation of their obligations under the Protocol should also meet their obligations under article 5, paragraph 9. For those Parties not party to the Protocol, the Protocol nevertheless serves as an important guide to the implementation of this paragraph.”**  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 5 legal indicators?

There is a problem with the questionnaire in this section. Text does not flow into the next box – answers have to be on one page. Some of my text has therefore been cut off.

### Collection and active dissemination of information – Practice indicators

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| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| Art. 5(1)(a)-(b) | 1. In practice, do public authorities possess and update environmental information which is relevant to their functions, and have mandatory systems been established that ensure the adequate flow of information to them.   Art. 5(1)(a)-(b) provides:  “1. Each Party shall ensure that:  (a) Public authorities possess and update environmental information which is relevant to their functions;  (b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;”  **Researcher’s score: 2 - Most public authorities have established mandatory systems to ensure the adequate flow of information, and as a routine, most public authorities possess and update environmental information which is relevant to their function**  See, for example::   * Effective monitoring systems are in place for all environmental modalities – see, for example, information on air quality (<https://uk-air.defra.gov.uk/>, drinking water quality <http://www.water.org.uk/policy/drinking-water-quality/water-quality-standards>, bathing water quality <https://environment.data.gov.uk/bwq/profiles/>, radioactive waste <https://ukinventory.nda.gov.uk/> and waste and recycling - <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508787/Digest_of_Waste_and_Resource_Statistics_rev.pdf>); * EIA documentation and environmental permits are systematically available (e.g. <https://www.gov.uk/topic/environmental-management/environmental-permits>). These generally provide information on projects with significant environmental impacts, although at times the collection period for EIA data is insufficient; * The role of the environmental NGO community as a source of environmental information, is acknowledged and, to some extent, supported; and * Environmental information is available for most factors at regional levels as well as national levels. | **Scoring Guide:**  3 = Mandatory systems have been established to ensure the adequate flow of information have been established across the board, and as a routine, public authorities possess and update environmental information which is relevant to their function.  2 = Most public authorities have established mandatory systems to ensure the adequate flow of information, and as a routine, most public authorities possess and update environmental information which is relevant to their function  1 = A minority of public authorities have established mandatory systems to ensure the adequate flow of information, and/or a minority of public authorities possess and update environmental information which is relevant to their function  0 = Public authorities typically have not established mandatory systems to ensure the adequate flow of information, and/or public authorities typically do not possess and update environmental information which is relevant to their function  Here the question is the existence of proper environmental information: the regular flow of timely, relevant, reliable, comparable etc. information from sources (facilities, monitoring stations, etc.) and the availability of it at the environmental and other relevant authorities. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * whether a proper monitoring system for all environmental modalities is in place (ref.8, ref.9, ref.15) * systematic availability of EIA documentation and environmental permits as a rich source of information on the environmentally most significant projects (ref.1, ref.14) * the environmental NGO community as a source of environmental information, their role acknowledged and supported in information collection and processing (ref.2, ref.12) * the market of environmental information and the role of expert organisations and individual experts in environmental information systems (ref.10) * participation in environmental information collection and processing by authorities other than environmental ones, such as water, health, minerals and tourism, general statistical office (ref.3, ref.11, ref.13, ref.16) * “public to public” charges for information, hindering the circulation of environmental information between relevant State bodies (ref.13, ref. 16) * transparency and coordination between different data-bases, the possibility of free exchange (ref.4) * environmental information available at local/municipal level (ref.7, ref.12)   Please justify your score and explain the factors you considered. |
| Art. 5(1)(c) | 1. How effective in practice is the system of active dissemination in ‘imminent threat’ cases?   Art. 5(1)(c) provides:  “1. Each Party shall ensure that:    (c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.”  **Researcher’s score: 2 - Practical measures have been taken to ensure that in the event of any imminent threat to human health or the environment, the necessary information to enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated without delay to members of the public who may be affected**  **Final Review: Score lowered to 1 on the basis that there is no general obligation**  **to disseminate information in a broad range of ("any") imminent threat situations.**  See, for example, the National Flood Emergency Framework for England December 2014 - <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388997/pb14238-nfef-201412.pdf>  Emergency Planning and Preparedness with respect to the Nuclear Industry in the UK (see page 26) -  <http://www.onr.org.uk/documents/a-guide-to-nuclear-regulation-in-the-uk.pdf>  Emergency measures in relation to drinking water - <http://www.dwi.gov.uk/stakeholders/guidance-and-codes-of-practice/> | **Scoring Guide:**  3 = Practical measures have been taken to ensure that in the event of any imminent threat to human health or the environment, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.  2 = Practical measures have been taken to ensure that in the event of any imminent threat to human health or the environment, the necessary information to enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated without delay to members of the public who may be affected.    1 = Practical measures have been taken so that in the event of any imminent threat to human health or the environment, information to assist the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority should be disseminated to members of the public who may be affected  0 = No practical measures have been taken or any that have been taken are insufficient to ensure that in the event of any imminent threat to human health or the environment, information to assist the public to take measures to prevent or mitigate harm arising from the threat and that is held by a public authority is disseminated to members of the public who may be affected  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please note that the effectiveness of information provision in emergency situations is prima facie measured by prevented casualties and prevented material damage, while the indirect elements are the catastrophe preparedness and follow up (both from information dissemination angle). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * prevalence of use of social media and Internet tools (e.g. websites, emails) in emergency situations (ref.1, ref.3) * the role and responsibilities of operators (i.e. polluters) with regard to informing the public (ref.2) * effectiveness of dissemination of risk-related information before (risk preparedness, forecasts etc.) and after (conclusions, liability etc.) emergency situations (ref.4) * relevant cases under, and preparedness in respect of, the Environmental Liability Directive framework.   Please justify your score and explain the factors you considered. |
| Art. 5(2) | 1. In practice, has the government taken practical measures to ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, in the manner envisaged by Art. 5(2)?   Art. 5(2) provides:  2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:  (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;  (b) Establishing and maintaining practical arrangements, such as:  (i) Publicly accessible lists, registers or files;  (ii) Requiring officials to support the public in seeking access to information under this Convention; and  (iii) The identification of points of contact; and  (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.  **Researcher’s score: 2 - Practical measures have been taken by the government which in most cases ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible**  Regulators are placed under a general duty in regulation 46 of the Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675 to maintain a public register of environmental information. This includes information on applications for environmental permits and information obtained from monitoring a permitted operation. For example, information is made accessible is through the Environment Agency’s ‘What’s in your backyard?’ website[[64]](#footnote-65), which allows users to find environmental information linked to their location, ranging from air quality, landfills, river basin management plans and flood risks. This includes information risks that may be associated with certain operations, the compliance record of operators and details of overarching plans for dealing with the impact of man-made activities on the environment.  The ICO also recommends that public bodies should publicise their commitment to proactive publication and the details of what is available, publicise the fact that people can make requests for information to them and provide contact details for making a request, including a named contact and telephone number for any enquiries about requesting information: <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/what-are-the-eir/> | **Scoring Guide:**  3 = Practical measures have been taken by the government which always or almost always ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.  2 = Practical measures have been taken by the government which in most cases ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.  1 = Some practical measures have been taken by the government which in a minority of cases ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.  0 = No measures have been taken or the measures taken are not effective to ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.  However impressive the environmental information provision/collection systems may be under Indicator 1 above, this may be of limited use if the general public has little knowledge about it. The existence and effective functioning of the tools listed in Art. 5(2) b. shall be evaluated here. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * existence of national, regional or local level meta databases for environmental information (ref.1) * use of geographic information systems in order to reveal interrelationships between different databases relevant to environmental matters, use of interactive map services and suchlike (ref.1, ref.2) * does meta data contain information on any costs of underlying data (ref.1) * the existence of networks in connection with available environmental information sources (ref.3)   Please justify your score and explain the factors you considered. |
| Art. 5(3) | 1. In practice, has the Party ensured that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks, including the information indicated in Art. 5(3)(a) to (d)?   Article 5(3) provides:  “3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:  (a) Reports on the state of the environment, as referred to in paragraph 4 below;  (b) Texts of legislation on or relating to the environment;  (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements;  (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.”  **Researcher’s score: 2 -The Party has taken practical measures to ensure that the environmental information set out in Art. 5(3)(a)-(d) is progressively made available through electronic databases which are easily accessible to the public**  For example, the UK routinely provides:   * Easy electronic access to up to date environmental data, with interactive support (e.g. contacts for information) – see the web links provided above and the list of selected public registers below; * Electronic access to general type environmental documents such as plans and reports; * Electronic access to environmental permitting, EIA and SEA data; * Data on the number of visitors to the relevant websites (e.g. number of visitors to Defra air pollution website - <https://uk-air.defra.gov.uk/privacy>); and * consolidated texts of legislation as well as original unconsolidated versions.   In terms of the state of the environment reports, there is an excellent summary of the various reports published by the UK devolved administrations here: <http://forum.eionet.europa.eu/nrc-state-environment/seris/reports/?country=United%20Kingdom>).  There is, however, no single State of Environment (SOE) report published for the UK. All of the devolved reports use an indicator based approach but the methodology, in particular the assessment period, differs. It is therefore quite difficult to make comparisons between the reports. It would also appear that Wales, at least, is no longer updating its State of the Environment Report following publication in 2012.  The European Environment Agency (EEA) webpage provides a summary of independent country level key products: <http://www.eea.europa.eu/soer-2015/countries/united-kingdom>.  Wales State of the Environment Report 2012 (note the report is no longer being updated): <http://gov.wales/docs/statistics/2012/120725stateofenvironment12en.pdf>  Scotland’s State of the Environment report 2014: <http://www.environment.scotland.gov.uk/media/92572/state-of-environment-report-2014.pdf>  Northern Ireland’s Second State of the Environment Report 2013: <https://www.daera-ni.gov.uk/sites/default/files/publications/doe/corporate-report-from-evidence-to-opportunity-second-assessment-of-state-of-ni-environment-2013.pdf>  **Selected Public Registers:**   * Register of applications to release or market genetically modified organisms * Pesticide Evaluation Documents * Register of Pesticide Enforcement Notices * The Planning Register * Integrated Pollution Control Register * Local Authority Air Pollution Register * Register of Hazardous Substances Consents * Register of Sites Holding 25 tonnes of Dangerous Substances * Register of Radioactive Substances * Register of Notifications of Intended Works on Trees in Conservation Areas * Register of Drinking-water Quality * Register of Licences for Deposits at Sea * Maps of Nitrate-sensitive Areas * Trade Effluent Register * Water-quality Register * Maps showing freshwater limits of rivers * Register of Waste Management Licences | **Scoring Guide:**  3 = The Party has taken practical measures to ensure that environmental information (including but not limited to the information set out in Art. 5(3)(a)-(d)) is progressively made available through electronic databases which are easily accessible to the public.  2 = The Party has taken practical measures to ensure that the environmental information set out in Art. 5(3)(a)-(d) is progressively made available through electronic databases which are easily accessible to the public.  1 = The Party has taken some practical measures to ensure that some of the environmental information set out in Art. 5(3)(a)-(d) is made available through electronic databases which are easily accessible to the public.  0 = The Party has not taken practical measures or the measures taken have not been effective to ensure that the environmental information set out in art.5(3)(a)-(d) is progressively made available through electronic databases which are easily accessible to the public.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please take into consideration that this indicator, as usual, measures environmental democracy, not the economic development of a given country. Therefore, in considering “easily accessible”, please determine your score without reference to the availability of relevant technology (both in large cities and in the countryside). Another aspect of “easily accessible” is arguably the availability (or otherwise) of search functions on websites allowing free text searches within the entire database. Interconnected databases, timeliness, access to documents regarding individual environmental cases, user friendly settings, and interactivity are important features amongst others.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * easy electronic access to fresh environmental data, with interactive support (e.g. monthly electronic newsletters, information helpdesks) (ref.1, ref.5, ref.6, ref.7) * widespread electronic access to several databases that are environmentally relevant (ref.2) * timely, real time environmental information on the Internet (ref.9) * electronic access to general type environmental documents such as Splans and reports (ref.5) * direct electronic access to environmental permitting, EIA and SSEA data (ref.4, ref.7) * well edited, easy to handle structures in the environmental electronic information systems (ref.3) * any data available about the number of visitors to the relevant websites? (ref.10) * in respect of texts of legislation, whether consolidated texts are available or only original unconsolidated versions   Please justify your score and explain the factors you considered. |
| Art. 5(4) | 1. Since joining the Aarhus Convention, has the Party published and disseminated a national report on the state of the environment at regular intervals not exceeding three or four years, including information on the quality of the environment and information on pressures on the environment?   Art. 5(4) provides:  “4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.”  **Researcher’s score: 1**  See above. | **Scoring Guide:**  3 = Yes, annually  2 = Yes, biannually  1 = Yes, every three or four years  0 = No |
| Art. 5(4) | 1. How would you rate the quality and breadth of dissemination of the state of environment reports?   **Researcher’s score: 1 - BOTH the quality of the report (including both information on the quality of, and pressures on, the environment) OR the breadth of dissemination of the report are just adequate (but not both).**  See above, but I have marked the UK down because the devolved reports are incompatible and Wales has confirmed that it will produce no further reports. | **Scoring Guide:**  3 = Both the quality of the report (which includes both information on the quality of, and pressures on, the environment) and the breadth of dissemination of the report are of a very high standard.  2 = Both the quality of the report (which includes both information on the quality of, and pressures on, the environment) and the breadth of dissemination of the report are good.  1 = EITHER the quality of the report (including both information on the quality of, and pressures on, the environment) OR the breadth of dissemination of the report, are good (but not both).  1= BOTH the quality of the report (including both information on the quality of, and pressures on, the environment) OR the breadth of dissemination of the report are just adequate (but not both).  0 = No reports are prepared or any reports are of very poor quality and/or very poorly disseminated.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please note in your comments any issues relating to content and/or breadth of dissemination: e.g.   * content issues: holistic, systematic approach in the reports, scientific quality, style, structure etc. (ref. 3, ref.4) * breadth of dissemination of such reports, amongst state, scientific and civic organisations (ref.1, ref.2)   Please justify your score and explain the factors you considered. |
| Art. 5(5) | 1. In the past 5 years, has the government disseminated international and national environmental legislation and policy documents, as well as progress reports in respect of the implementation thereof?   Art. 5(5) provides:  “5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:  (a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;  (b) International treaties, conventions and agreements on environmental issues; and  (c) Other significant international documents on environmental issues, as appropriate.”  **Researcher’s score: 3 - Yes, all international and national environmental legislation and policy documents drafted and adopted and also progress reports in respect of the implementation thereof**  All legislation from 1988 – present day is available on this website: <http://www.legislation.gov.uk/help>. Most pre-1988 primary legislation is available here and the Government is currently in the process of uploading a large selection of secondary legislation from 1948 onwards.  Defra has an excellent search engine enabling civil society to access a wide variety of documents on strategies, policies, programmes and action plans relating to the environment, including progress reports on their implementation: <https://www.gov.uk/government/publications?keywords=Kyoto+protocol&publication_filter_option=all&topics%5B%5D=all&departments%5B%5D=all&official_document_status=all&world_locations%5B%5D=all&from_date=&to_date>=  Texts of international treaties, conventions and agreements on environmental issues can be accessed via JNCC’s website here: <http://jncc.defra.gov.uk/page-1363> | **Scoring Guide:**  3 = Yes, all international and national environmental legislation and policy documents drafted and adopted and also progress reports in respect of the implementation thereof  2 = Yes, the majority of applicable international and national environmental legislation and policy documents adopted and also progress reports in respect of the implementation thereof  1 = Yes, a minority of international and national environmental legislation and policy documents adopted and also progress reports in respect of the implementation thereof  0 = No, or very rarely.  Please note that spatial planning documents should be considered as ‘relating to the environment’ here, because they represent one of the most important factors that determine the environmental situation in a country or in parts of it. Please justify your score and explain the factors you considered. |
| Art. 5(6) | 1. Has the government taken practical measures to encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate?   Art. 5(6) provides:  “6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.”  **Researcher’s score: 3**  The UK’s 2014 Implementation Report states “*The Government believes that changes to the way we produce, use and dispose of products and provide services can result in big reductions in the major environmental impacts. The Government’s aim is to develop more integrated approaches to tackling product impacts right across their life cycle. This involves identifying product sectors with the most significant impacts and finding the best combination of market measures to bring about improvements. These measures include encouraging businesses to manage their impacts on the environment, raising public awareness and developing tools to improve green claims and other labelling. Information is available at* [*https://www.gov.uk/government/policies/encouraging-businesses-to-manage-their-impact-on-the-environment*](https://www.gov.uk/government/policies/encouraging-businesses-to-manage-their-impact-on-the-environment)”.  The Implementation Report also explains that WRAP (funded by Defra, the Welsh Government and the Scottish Government) has set up the Product Sustainability Forum to encourage organisations to work collaboratively on product environmental information. The Forum is a collaboration of over 80 organisations including grocery and home improvement retailers and suppliers, academics, NGOs and UK Government representatives. It provides a platform to work together to measure, reduce and communicate the environmental performance of the grocery and home improvement products (<http://www.wrap.org.uk/content/product-sustainability-forum>). Data and information will be published and freely available on the internet. The Product Sustainability Forum is working with UNEP to develop collaborative actions with similar initiatives around the world.  Other bodies which provide information to the public, to enable them to make informed environmental choices about products and services, include:   * The Food Standards Agency (<http://www.food.gov.uk/>); * The former Department of Energy and Climate Change (<https://www.gov.uk/government/organisations/department-of-energy-climate-change>); * The Department for Business, Innovation and Skills (<https://www.gov.uk/government/organisations/department-of-energy-climate-change>); * The Trading Standards Institute (<http://www.tradingstandards.gov.uk/>); * The Carbon Trust, which helps businesses and the public sector cut carbon emissions (<http://www.carbontrust.com/>). | **Scoring Guide:**  3 = Yes, and all or almost all operators whose activities have a significant impact on the environment do indeed regularly inform the public of the environmental impact of their activities and products  2 = Yes, and the majority of operators whose activities have a significant impact on the environment do indeed regularly inform the public of the environmental impact of their activities and products  1 = Yes, and a minority of operators whose activities have a significant impact on the environment do indeed regularly inform the public of the environmental impact of their activities and products  0 = No, no practical measures have been taken by the Party OR operators whose activities have a significant impact on the environment rarely or never inform the public of the environmental impact of their activities and products  According to the experiences of early PRTR and TRI (Toxic Release Inventory) models, direct company-community communication is really effective in decreasing the dangers and the use in general of certain dangerous chemicals. However, this seldom takes place, therefore a solid long running governmental effort to encourage this communication, even with only sporadic occurrence of such communication in practice deserves a high score. Substantial information given to the concerned public via Internet should be also taken into consideration. Objective, interactive communication between operators and the concerned public deserves an even higher score. The reference cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)   * the practice in respect of active environmental information dissemination by state-owned companies and their subsidiaries (ref.1)   Please justify your score and explain the factors you considered. |
| Art. 5(7)(a) | 1. Does the Party publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals?   Art. 5(7)(a) provides:  7. Each Party shall:   1. Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;   **Researcher’s score: 1 - Yes, in the case of a minority of environmental policy proposals**  Recent practice suggests the Government is failing to provide evidence, statistical information or even (at times) a credible narrative to justify significant policy proposals. For example, recent consultation exercises on reforms to Judicial Review (proposed to curb the “abuse of JR”) have been characterised by an almost complete lack of supporting data – see here: <http://www.wcl.org.uk/docs/Link%20Response%20to%20MoJ%20consultation%20on%20Reform%20of%20JR%20Final.pdf> and here: <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf> | **Scoring guide:**  3 = Yes, in the case of all or almost all major environmental policy proposals  2 = Yes, in the case of a majority of environmental policy proposals  1 = Yes, in the case of a minority of environmental policy proposals  0 = No, never  Please justify your score and explain the factors you considered. |
| Art. 5(7)(b) | 1. Does the Party publish data on an annual (or more regular) basis relating to access to environmental information requests (e.g. how many were received, how many satisfied, how many refused, which exemptions were used, etc),[[65]](#footnote-66) collected at a national level?   Art. 5(7)(b) provides:  7. Each Party shall:  (b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention;  **Researcher’s score: 3 – Yes, annually with quarterly breakdowns**  See information provided above. | **Scoring Guide:**  3 = Yes  2 = While such data are published, they are only published every 2-3 years  1 = While such data are sometimes published, they are not collected at the national level and/or they are published only every 4+ years  0 = No such data are never published (at the national level or otherwise)  Please justify your score and explain the factors you considered. |
| Art. 5(7)(c) | 1. Does the Party provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels?   Art. 5(7)(c) provides:  7. Each Party shall:  (c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.  **Researcher’s score: 3 - Yes, in the case of all or almost all public functions/services relating to the environment by government at all levels**  See above wrt Annual reporting by public bodies. | **Scoring guide:**  3 = Yes, in the case of all or almost all public functions/services relating to the environment by government at all levels  2 = Yes, in the case of a majority of public functions/services relating to the environment by government at all levels  2 = Yes, in the case of all or almost all public functions/services relating to the environment by government at two of the following levels: national, regional, local  1 = Yes, in the case of a minority of public functions/services relating to the environment by government at all levels  1 = Yes, in the case of a majority of public functions/services relating to the environment by government at one of the following levels: national, regional, local  0 = No, never  Please justify your score and explain the factors you considered. |
| Art. 5(8) | 1. Has the Party developed mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices?   Art. 5(8) provides:  “8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.”  **Researcher’s score: 3**  Please see the answer to 5(6) above. | **Scoring Guide:**  3 = Yes, such mechanisms have been developed and sufficient product information is made available in a manner which enables consumers to make informed environmental choices.  2 = Yes, such mechanisms have been developed and for many products sufficient information is available in a manner which enables consumers to make informed environmental choices  1 = Yes, some mechanisms have been developed and for a minority of products sufficient information is available in a manner which enables consumers to make informed environmental choices  0 = No such mechanisms have been developed OR some mechanisms have been developed but they are not adequate to ensure that sufficient information is available in a manner which enables consumers to make informed environmental choices.  When scoring please take into consideration both voluntary and regulatory mechanisms. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please take into consideration, insofar as relevant *inter alia*:   * the role and activities of market regulatory and consumer protection organisations, including NGOs (ref.1) * ’Countries have developed a variety of mechanisms to ensure that sufficient product information is available to the public. These include both voluntary and regulatory mechanisms’ (ref.2)   Please justify your score and explain the factors you considered. |
| Art. 5(9) | 1. Operation of a nationwide system of pollution inventories or registers   Art. 5(9) provides:  “9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.”  **Researcher’s score: 3 - A coherent nationwide system of pollution inventories is established and maintained up-to-date on a structured, computerized and publicly accessible database compiled through standardized reporting, including inputs, releases and transfers of the substances and products and range of activities required under the PRTR Protocol, including to on-site and off-site treatment and disposal sites**  See above. | **Scoring Guide:**  3 = A coherent nationwide system of pollution inventories is established and maintained up-to-date on a structured, computerized and publicly accessible database compiled through standardized reporting, including inputs, releases and transfers of the substances and products and range of activities required under the PRTR Protocol, including to on-site and off-site treatment and disposal sites  2 = A coherent nationwide system of pollution inventories is established and maintained up-to-date on a structured, computerized and publicly accessible database compiled through standardized reporting. It includes inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites, however it does not include all substances, products or activities required under the PRTR Protocol.  1 = A coherent nationwide system of pollution inventories has been established but is not currently up-to-date  1 = A nationwide system of pollution inventories has been established and maintained up-to-date but it is not very clear or coherent.  1 = A nationwide system of pollution inventories has been established and maintained up-to-date but it covers a very limited range of substances, products, and activities.  0 = No nationwide system of pollution inventories has yet been established.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  PRTR (Pollutant Release and Transfer Register) systems offer a win-win solution for the relevant state regulatory bodies, the operators dealing with certain hazardous materials and the concerned local communities concerning the possession of data on hazardous materials that are necessary to manage any emergency situations successfully. However, these complicated data processing systems are not equally popular in every legal system and there are countries where the cultivation of the PRTR legal institution is definitely declining. As a sign of that, data are frequently quite old in PRTR systems, so the age range of pollution covered by the systems, e.g. how old are the latest data, could be an important feature of evaluation. Take into consideration *inter alia*:   * the scope of relevant information used in PRTR systems (ref.1) * online PRTR databases available to the general public (ref.1) * further elaboration and use of the PRTR data, such as producing public reports or easy to understand materials on hazardous materials and their possible effects (ref.2)   Please justify your score and explain the factors you considered.  **Please note the following passage from the** [**Aarhus Implementation Guide (2014)**](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) **– at p.115: “For Parties that have ratified the Protocol on PRTRs, the implementation of their obligations under the Protocol should also meet their obligations under article 5, paragraph 9. For those Parties not party to the Protocol, the Protocol nevertheless serves as an important guide to the implementation of this paragraph.”** |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 5 practice indicators?

At the moment the practice indicator in respect of Art. 5(7)(b) tests only one specific aspect of that provision. Do you have a suggestion as to how this indicator could be reframed to cover more of Art. 5(7)(b)?

## III. Public participation pillar

### (a) Public participation in decisions on specific activities – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 6(1)(a) | 1. How well has Art. 6(1)(a) and Annex I been enacted?   “1. Each Party:   1. Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;”   **Researcher’s score: 3 = Effective enactment**  Article 6 requires participation in decisions to permit proposed activities listed in Annex I to the Convention and on other activities not listed there but ‘which may have a significant effect on the environment’. This includes installations for the provision of energy, the production of minerals, metals and chemicals, waste management, various types of transport infrastructure, water abstraction and treatment and intensive farming operations, among others. Also included are activities not specifically listed but where public participation is provided for under an environmental impact procedure in accordance with national legislation. Exceptions are available in respect of proposed activities serving national defence purposes and for projects undertaken exclusively or mainly for research, development and testing of new methods or projects for less than two years, unless they would be likely to cause a significant adverse effect on the environment or health.  The position in England and Wales had to be aligned with EU legislation adopted to meet the Convention requirements. The Public Participation Directive[[66]](#footnote-67) (PPD) was adopted in order to contribute to the implementation of the obligations arising under the Convention. The Directive did this by: (i) providing requirements for public participation in respect of the drawing up of plans and programmes relating to the environment under certain EU waste, nitrates and air quality legislation; and (ii) amending both the Environmental Impact Assessment (EIA) Directive[[67]](#footnote-68) and the Integrated Pollution Prevention and Control (IPPC) Directive[[68]](#footnote-69) in order to improve the public participation provisions included in this legislation.  Article 2(5) of the PPD excludes from its application plans and programmes for which a public participation procedure is carried out under the Strategic Environmental Assessment (SEA) Directive[[69]](#footnote-70) or under the Water Framework Directive[[70]](#footnote-71). This recognised that existing EU legislation would, other than in those areas addressed by the PPD, be sufficient for the purposes of the Convention[[71]](#footnote-72). The EIA Directive has been codified into a new Directive[[72]](#footnote-73) and the IPPC Directive is being replaced by the Industrial Emissions Directive[[73]](#footnote-74), and in each case the Convention’s public participation principles are integrated.  This approach, drawing on existing arrangements for public participation and integrating anything needed to supplement these into the relevant area, means that the provisions giving effect to the Convention’s public participation requirements in England and Wales are spread across a wide range of legislative regimes, including those for planning, environmental permitting and environmental assessments[[74]](#footnote-75).  For example, the Nitrate Pollution Prevention Regulations 2008[[75]](#footnote-76), implementing requirements under the Nitrates Directive in England (one of those listed in Annex I to the PPD), sets out public participation duties in regulation 47 concerning the Secretary of State’s review of the effectiveness of restrictions in nitrate vulnerable zones:  “*47.—(1) When carrying out this review the Secretary of State must ensure that the public is given early and effective opportunities to participate.*  *(2) The Secretary of State must make adequate arrangements for public participation to enable the public to prepare and participate effectively.*  *(3) The Secretary of State must ensure that—*  *(a) the public is consulted about any proposals and that relevant information about such proposals is made available to the public, including information about the right to participate in decision-making and about the body to which comments or questions may be submitted; and*  *(b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made.*  *(4) The Secretary of State must identify the public entitled to be consulted, including non-governmental organisations promoting environmental protection.*  *(5) Reasonable time must be allowed for consultation.*  *(6) Consultation must be taken into account in reaching a decision.*  *(7) Following consultation the Secretary of State must inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.”*  The Environmental Permitting (England and Wales) Regulations 2010[[76]](#footnote-77), which govern the approval processes for a significant number of the specific activities caught by the Convention, set out public participation provisions consistent with the Convention in Part 1 of Schedule 5 (grant, variation, transfer and surrender of environmental permits). Under regulation 59, the Environment Agency for England and the Natural Resources Body for Wales, must prepare and publish a statement of their policies for complying with its public participation duties, which include those set out in Schedule 5 regarding handling applications for environmental permits and those in regulations 26 and 29 concerning the use of standard rules for permits.  This integration of public participation principles in both specific and cross-cutting areas of environmental legislation is also reflected in the planning regime. Procedural requirements for decision-making under legislation such as the Town and Country Planning Act 1990[[77]](#footnote-78), the Planning and Compulsory Purchase Act 2004[[78]](#footnote-79), the Planning Act 2008[[79]](#footnote-80), the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009[[80]](#footnote-81), SI 2009/2263, the Town and Country Planning (Development Management Procedure) (England) Order 2010[[81]](#footnote-82), SI 2010/2184 and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011[[82]](#footnote-83), SI 2011/1824, include public participation requirements in the form of obligations to publicise and consult on applications, and to take into account views and information provided to decision-making authorities. This wide range of legislation applying the second pillar in England and Wales reflects its integration in the various decision-making processes that are affected.  The most recent UK National Implementation Report to the Meeting of the Parties to the Aarhus Convention[[83]](#footnote-84) gives the full list of laws, regulations and administrative provisions necessary to comply with this Directive introduced across the UK as follows:     * The Environmental Permitting (England and Wales) Regulations 2010; * The Environment Act 1995 (c.25); * Environmental Protection Act 1990 (c.43); * The Pollution Prevention and Control (Miscellaneous Amendments) Regulations (Northern Ireland) 2006; * Amendment of Pollution Prevention and Control Ordinance 2001; * The Pollution Prevention and Control (Public Participation etc.) (Scotland) Regulations 2012; * The Offshore Combustion Installations (Prevention and Control of Pollution) Regulations 2013; * Town and Country Planning Act 1990 (c 8); * Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 as amended; * Town and Country Planning (Environmental Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations 2008; * The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 as amended; * The Town and Country Planning (Environmental Impact Assessment) (Undetermined Reviews of Old Mineral Permissions) (Wales) Regulations 2009; Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011; * Environmental Impact Assessment (Scotland) Regulations 1999 as amended; * Environmental Impact Assessment (Water Management) (Scotland) Regulations 2003; * The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012; * The Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 as amended; * Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999, as amended; * Environmental Impact Assessment (Forestry) Regulations (Northern Ireland) 2000 as amended; * The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999 as amended; * Drainage (Environmental Impact Assessment) Regulations (Northern Ireland) 2006; * The Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Regulations 2010; * Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations 1999; * The Environmental Impact Assessment (Fish Farming in Marine Waters) Regulations (Northern Ireland) 2007; * Highways (Assessment of Environmental Effects) Regulations 1999 as amended; * The Roads (Environmental Impact Assessment) Regulations (Northern Ireland) 1999; * The Roads (Environmental Impact Assessment) Regulations (Northern Ireland) 2007; * Environmental Impact Assessment (Scotland) Regulations 1999, as amended; * The Harbour Works (Environmental Impact Assessment) Regulations 1999 as amended; * Harbour Works (Environmental Impact Assessment) Regulations (Northern Ireland) 2003 as amended; * The Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2000; * The Electricity Works (Environmental Impact Assessment) (Scotland) (Amendment) Regulations 2011; * The Pipe-line Works (Environmental Impact Assessment) Regulations 2000 as amended; * Nuclear Reactors (Environmental Impact Assessment for Decommissioning) Regulations 1999 as amended; * The Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 as amended; * The Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010; * The Public Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 as amended; * The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006; * The Transport and Works (Assessment of Environmental Effects) Regulations 2000; * The Transport and Works (Assessment of Environmental Effects) Regulations 2006; * Transport and Works (Scotland) Act 2007; * The Electricity Act 1989 (Requirement of Consent for Offshore Wind and Water Driven Generating Stations) (England and Wales) Order 2001; * The Electricity Act 1989 (Requirement of Consent for Offshore Wind Generating Stations) (Scotland) Order 2002; * The Offshore Electricity Development (Environmental Impact Assessment) Regulations (Northern Ireland) 2008; * The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006; * The Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006; * Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) Regulations (Northern Ireland) 2006 as amended; * The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007; * The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Wales) Regulations 2007; * The Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (Scotland) Regulations 2007; * Marine Works (Environmental Impact Assessment) Regulations 2007 as amended; * The Water Resources (Environmental Impact Assessment) Regulations 2003 as amended; * The Water Resources (Environmental Impact Assessment) Regulations (Northern Ireland) 2005 as amended; * Water Environment (Controlled Activities) (Scotland) Regulations 2011; * The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006; * The Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006; * Environmental Impact Assessment (Agriculture) Regulations (Northern Ireland) 2007; * The Environmental Impact Assessment (Agriculture) (Wales) Regulations 2007; * The Channel Tunnel Rail Link (Assessment of Environmental Effects) Regulations 1999; * The Town and Country Planning (Development Plan) (Amendment) Regulations 1997; * The Town and Country Planning (Development Plan) Regulations 1991; * The Town and Country Planning (Local Development) (England) Regulations 2004; * Town and Country Planning (Local Development Plan) (Wales) Regulations 2005; * The Town and Country Planning (Regional Planning) (England) Regulations 2004; * The Town and Country Planning (Scotland) Act 1997 c 8; * Town and Country Planning (Development Planning) (Scotland) Regulations 2008; * The Town and Country Planning (Transitional Arrangements) (England) Regulations 2004; * The Town Planning (Environmental Impact Assessment) (Amendment) Regulations 2006; * Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011; * The Town and Country Planning (Environmental Impact Assessment) (Amendment) (Wales) Regulations 2006; * The Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006; * The Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008; * Planning Act 2008; * The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009; * The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009; * Infrastructure Planning (Examination Procedures) Rules 2010; * Infrastructure Planning (Interested Parties) Regulations 2010; * Infrastructure Planning (Decisions) Regulations 2010; * Infrastructure Planning (Compulsory Acquisition) Regulations 2010; * The Town & Country Planning (Development Management Procedure) (England) Order 2010; and * Town and Country Planning (Development Management Procedure) (Wales) Order 2012.   **Scotland**  In Scotland, the projects to which environmental assessment is applicable are subject to a variety of different consenting regimes, involving different consenting authorities and resulting in a multi-regime approach to transposition of the EIA Directive. There are at least eleven discrete sets of EIA regulations for which the Scottish Parliament has legislative competence[[84]](#footnote-85). Consistent with Aarhus and the EIA Directive, there are three broad stages to the procedures:   * The developer must compile detailed information about the likely significant environmental effects in an environmental statement; * The Environmental Statement (and the application to which it relates) must be publicised and the public and statutory bodies given an opportunity to give their views about the development and environmental statement; and * The environmental statement, together with any other information, comments and representations made on it, must be taken into account by the competent authority in deciding whether or not to give consent for the development. The public must be informed of the decision and the main reasons for it.   The three stages reflect the provisions in Aarhus and the EIA Directive to allow the public to participate under Article 6. It is important that the EIA Directive leaves it to Member States to determine the detailed arrangements for consulting the public whether by written submissions or by public local inquiry The Scottish procedures reflect that by providing that in some circumstances a local inquiry is required (for example where certain persons object) but in other circumstances there is a discretion to hold an inquiry[[85]](#footnote-86) [[86]](#footnote-87). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  In addition to checking whether the wording of Article 6(1)(a) has been correctly enacted, it is also necessary to carefully check whether the legal framework requires all the activities in Annex I to be subject to this provision.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(1)(b) | 1. How well has Art. 6(1)(b) been enacted?   “1. Each Party:  (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;”  **Researcher’s score: 3 – Effective enactment**  The main mechanism for this requirement to be implemented in the UK is via The Town and Country Planning (Environmental Impact Assessment) Regulations 2011[[87]](#footnote-88) and corresponding Regulations in Wales, Scotland and Northern Ireland. Schedule 2 to the Regulations set out the “*Descriptions of development and applicable thresholds and criteria for the purposes of the definition of “Schedule 2 development*” (i.e. for which an EIA is required).  Corresponding provisions can be found in secondary legislation covering Scotland, Wales and Northern Ireland on the links below:  The Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 - <http://www.legislation.gov.uk/ssi/2011/139/regulation/47/made>  The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 - <http://www.legislation.gov.uk/wsi/2016/58/contents/made>  The Planning (Environmental Impact Assessment) (Northern Ireland) Regulations 2015 – available via <https://www.planningni.gov.uk/index/policy_legislation.htm> | **Scoring Guide:**  3 = The Party has enacted a list of activities not listed in annex I that it deems may have a significant effect on the environment and which should therefore be subject to public participation under Article 6, AND the national legislation contains a mechanism allowing for this list to be updated by secondary legislation or administrative act  2 = The Party has enacted a list of activities not listed in annex I that it deems may have a significant effect on the environment and which should therefore be subject to public participation under Article 6, BUT the national legislation does not contain a mechanism allowing for this list to be updated by secondary legislation or administrative act  1 = The Party has enacted a specific mechanism providing for the creation of a list of activities not listed in annex I that it deems may have a significant effect on the environment and which should therefore be subject to public participation under Article 6. However, no such list has been created.  0 = There is no enactment which provides for this provision to be operationalised  A score of 1 would include the situation where primary legislation has been made providing for a list of activities to be set out in secondary legislation or where primary/secondary legislation provides for the government to issue guidance on the matter, but no such legislation/guidance has been made. A score of 0 would cover the situation where there is no national legislation providing for the possibility of such a list.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(1)(c) | 1. How well has Art. 6(1)(c) been enacted?   “1. Each Party:  (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.”  **Researcher’s score: 1 – Minor errors**  Exceptions are available in the UK in respect of proposed activities serving national defence purposes and for projects undertaken exclusively or mainly for research, development and testing of new methods or projects for less than two years, unless they would be likely to cause a significant adverse effect on the environment or health.  For Scotland: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/55/made>  For Wales: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/56/made>  For Northern Ireland: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/57/made> | **Scoring Guide:**  3= The legal framework does not provide for proposed activities serving national defence purposes to be exempted from the provisions of article 6.  2 = Enactment is fully in accord  1 = Minor errors  0 = Errors that are more than minor  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(2) | 1. How well has Art. 6(2) been enacted?   Art. 6(2) provides:  “2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:  (a) The proposed activity and the application on which a decision will be taken;  (b) The nature of possible decisions or the draft decision;  (c) The public authority responsible for making the decision;  (d) The envisaged procedure, including, as and when this information can be provided:  (i) The commencement of the procedure;  (ii) The opportunities for the public to participate;  (iii) The time and venue of any envisaged public hearing;  (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;  (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and  (vi) An indication of what environmental information relevant to the proposed activity is available; and  (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.”  **Researcher’s score: 1 – Errors that are more than minor**  Please see the answer to the first question, above. By illustration, for the procedures in relation to EIA development, See Town and Country Planning (Environmental Impact Assessment) Regulations 2011 - <http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf>   * Regulations 4(5)(a) and (c) - General provisions relating to screening; * Regulation 16(2)(c) - Procedure where an environmental statement is prepared in relation to a local development order; * Regulation 17(2)(d)(iii) and 17(5)(b) - Publicity where an environmental statement is submitted after the planning application; * Regulation 20(3) (d) - Availability of copies of environmental statements; * Regulation 21 - Charges for copies of environmental statements; * 22(3)(f) - Further information and evidence respecting environmental statements; * Regulation 24(1)(b) and (1)(c)(2) – Duties to inform the public and the Secretary of State of final decisions; * Regulation 39(1)(d) - Publicity for environmental statements or further information; * Regulation 51(1)(h) - ROMP application by a mineral planning authority; * Regulation 53(4)(a) and (b) and 53(6)(b) - Development in England likely to have significant effects in another EEA State; and * Regulation 54(2)(a) and (b) and 54(2)(c) and 54(2)(c)(ii) - Projects in another EEA State likely to have significant transboundary effects.   However, there is one area of concern:  **Environmental licensing**  Under the Wild Birds and Habitats Directives protection is given to a host of birds, animals and habitats. These have then been transposed into our domestic legislation through the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 (SI 2010/490). However, in addition to these two principal conservations regimes there are a number of species specific acts under which licences may be granted in certain circumstances for activities that affect wildlife and are otherwise prohibited.  A feature of the current statutory regimes is the absence of any requirement for the publicity of and consultation on applications for licenses, as is required in relation to planning applications. Moreover, where Annex 1 development cannot proceed without the appropriate wildlife licences being granted or the development does not fall within Annex 1 but, nonetheless, a decision to grant the licence may have a significant effect on the environment, there is a case to be made that the public participation requirements of Article 6 should be applied and, in the absence of any statutory regime requiring the publication, consultation and ability of the public to make representations in relation to the grant of a licence that there is non-compliance with Article 6, paragraphs 2, 3, 4, 5, 6, 7, 8 and/or 9. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(3) | 1. How well has Art. 6(3) been enacted?   Art. 6(3) provides:  “3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.”  **Researcher’s score: 3 - Effective enactment**  In the UK, all projects likely to have a significant effect on the environment are subject to control under EIA regimes which implement EU Directive 2011/92/EU). The relevant sections of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (and corresponding provisions in devolved administrations) are reproduced below: <http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf>  **“*Procedure where an environmental statement is submitted to a local planning authority***  *16.—(1) An applicant who makes an EIA application shall submit to the relevant planning authority a statement, referred to as an “environmental statement” for the purposes of these Regulations, and shall provide the authority with 1 additional copy of the statement for transmission to the Secretary of State. If at the same time the applicant serves a copy of the statement to any other body, the applicant shall—*  *(a) serve with it a copy of the application and any plan submitted with the application (unless these have already been provided to the body in question);*  *(b) inform the body that representations may be made to the relevant planning authority; and (c) inform the authority of the name of everybody so served and of the date of service.*  *(2) When a relevant planning authority receive in connection with an EIA application a statement as described in paragraph (1) the authority shall—*  *(a) send to the Secretary of State, within 14 days of receipt of the statement, 1 copy of the statement and a copy of the relevant application and of any documents submitted with the application;*  *(b) inform the applicant of the number of copies required to enable the authority to comply with sub-paragraph (c) below;*  *(c) forward to any consultation body which has not received a copy direct from the applicant a copy of the statement and inform any such consultation body that they may make representations;*  *(d) where the relevant planning authority are aware of any particular person who is or is likely to be affected by, or has an interest in, the application, who is unlikely to become aware of it by means of a site notice or by local advertisement, send a notice to such person containing the details set out in regulation 17(2)(b) to (j) and the name and address of the relevant planning authority.*  *(3) The applicant shall send the copies required for the purposes of paragraph (2)(c) to the relevant planning authority.*  *(4) Where an applicant submits an environmental statement to the authority in accordance with paragraph (1), the provisions of article 13 of and Schedule 3 to the Order (publicity for applications for planning permission) shall apply to a subsequent application as they apply to a planning application falling within paragraph 13(2) of the Order except that for the reference in the notice in Schedule 3 to the Order to “planning permission to” there shall be substituted*  *“subsequent application in respect of”.*  *(5) The relevant planning authority shall not determine the application until the expiry of 14 days from the last date on which a copy of the statement was served in accordance with this regulation.*  ***Publicity where an environmental statement is submitted after the planning application***  “*17.—(1) Where an application for planning permission or a subsequent application has been made without an environmental statement and the applicant proposes to submit such a statement, the applicant shall, before submitting it, comply with paragraphs (2) to (5).*  *(2) The applicant shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—*  *(a) the applicant’s name, that an application is being made for planning permission or subsequent consent, and the name and address of the relevant planning authority;*  *(b) the date on which the application was made and, if it be the case, that it has been referred to the Secretary of State for determination or is the subject of an appeal to the Secretary of State;*  *(c) the address or location and the nature of the proposed development;*  *(d) that—*  *(i) a copy of the application, any accompanying plan and other documents, and a copy of the environmental statement, and*  *(ii) in the case of a subsequent application, a copy of the planning permission in respect of which that application has been made and supporting documents,*  *may be inspected by members of the public at all reasonable hours;*  *(e) an address in the locality in which the land is situated at which those documents may be inspected, and the latest date on which they will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);*  *(f) an address (whether or not the same as that given under sub-paragraph (e)) in the locality in which the land is situated at which copies of the statement may be obtained;*  *(g) that copies may be obtained there so long as stocks last;*  *(h) if a charge is to be made for a copy, the amount of the charge;*  *(i) that any person wishing to make representations about the application should make them in writing, before the date named in accordance with sub-paragraph (e), to the relevant planning authority or (in the case of an application referred to the Secretary of State or an appeal) to the Secretary of State; and*  *(j) in the case of an application referred to the Secretary of State or an appeal, the address to which representations should be sent.*  *(3) An applicant who is notified under regulation 10(2), 11(4) or 12(5) of such a person as mentioned in any of those paragraphs shall serve a notice on every such person; and the notice shall contain the information specified in paragraph (2), except that the date specified as the latest date on which the documents will be available for inspection shall not be less than 21 days later than the date on which the notice is first served.*  *(4) The applicant shall post on the land a notice containing the information specified in paragraph (2), except that the date named as the latest date on which the documents will be available for inspection shall be not less than 21 days later than the date on which the notice is first posted. This provision shall not apply if the applicant has not, and is not reasonably able to acquire, such rights as would enable the applicant to comply.*  *(5) The notice mentioned in paragraph (4) must—*  *(a) be left in position for not less than 7 days in the 28 days immediately preceding the date of the submission of the statement; and*  *(b) be affixed firmly to some object on the land and sited and displayed in such a way as to be easily visible to, and readable by, members of the public without going on to the land.*  *(6) The statement, when submitted, shall be accompanied by—*  *(a) a copy of the notice mentioned in paragraph (2) certified by or on behalf of the applicant as having been published in a named newspaper on a date specified in the certificate; and*  *(b) a certificate by or on behalf of the applicant which states either—*  *(i) that a notice was posted on the land in compliance with this regulation and when this was done, and that the notice was left in position for not less than 7 days in the 28 days immediately preceding the date of the submission of the statement, or that, without any fault or intention on the applicant’s part, it was removed, obscured or defaced before 7 days had elapsed and the applicant took reasonable steps for its protection or replacement, specifying the steps taken; or*  *(ii) that the applicant was unable to comply with paragraphs (4) and (5) because the applicant did not have the necessary rights to do so; that any reasonable steps available to acquire those rights have been taken but unsuccessfully, specifying the steps taken.*  *(7) Where an applicant indicates that it is proposed to provide a statement in the circumstances mentioned in paragraph (1), the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall (unless disposed to refuse the permission or subsequent consent sought) suspend consideration of the application or appeal until receipt of the statement and the other documents mentioned in paragraph (6); and shall not determine it during the period of 21 days beginning with the date of receipt of the statement and the other documents so mentioned.*  *(8) Where it is proposed to submit an environmental statement in connection with an appeal, this regulation applies with the substitution of references to the appellant for references to the applicant*.”  ***Development in England likely to have significant effects in another EEA State***  *53.—(1) Where—*  *(a) it comes to the attention of the Secretary of State that development proposed to be carried out in England is the subject of an EIA application and is likely to have significant effects on the environment in another EEA State; or*  *(b) another EEA State likely to be significantly affected by such development so requests, the Secretary of State shall—*  *(i) send to the EEA State as soon as possible and no later than their date of publication in The London Gazette referred to in sub-paragraph (ii) below, the particulars mentioned in paragraph (2) and, if relevant, the information referred to in paragraph (3); and*  *(ii) publish the information in sub-paragraph (i) above in a notice placed in The London Gazette indicating the address where additional information is available; and*  *(iii) give the EEA State a reasonable time in which to indicate whether it wishes to participate in the procedure for which these Regulations provide.*  *(2) The particulars referred to in paragraph (1)(b)(i) are—*  *(a) a description of the development, together with any available information on its possible significant effect on the environment in another Member State; and (b) information on the nature of the decision which may be taken.*  *(3) Where a EEA State indicates, in accordance with paragraph (1)(b)(iii), that it wishes to participate in the procedure for which these Regulations provide, the Secretary of State shall as soon as possible send to that EEA State the following information—*  *(a) a copy of the application concerned;*  *(b) a copy of any planning permission relating to the development;*  *(a) Paragraph 3 was amended by the Planning and Compensation Act 1991 (c. 34), Schedule 1, paragraph 15(6).*  *(c) a copy of any environmental statement in respect of the development to which that application relates; and*  *(d) relevant information regarding the procedure under these Regulations,*  *but only to the extent that such information has not been provided to the EEA State earlier in accordance with paragraph (1)(b)(i).*  ***(4) The Secretary of State shall also—***  ***(a) arrange for the particulars and information referred to in paragraphs (2) and (3) and any further information and any other information to be made available, within a reasonable time, to the authorities referred to in Article 6(1) of the Directive and the public concerned in the territory of the EEA State likely to be significantly affected; and***  ***(b) ensure that those authorities and the public concerned are given an opportunity, before planning permission for the development is granted, to forward to the Secretary of State, within a reasonable time, their opinion on the information supplied.”*** | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(4) | 1. How well has Art. 6(4) been enacted?   Art. 6(4) provides:  “4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.”  **Researcher’s score: 3 – Effective enactment**  See Regulations 16 and 17 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, reproduced above: <http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(5) | 1. How well has Art. 6(5) been enacted?   Art. 6(5) provides:  “5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.”  **Researcher’s score: 3 – Effective enactment**  In amending the Planning Act 2008, the Localism Act 2011 abolished the Infrastructure Planning Commission and transferred responsibility for decision making to the Secretary of State. Applications for development consent are now examined by an Examining Authority appointed by the Planning Inspectorate (<http://infrastructure.planningportal.gov.uk/>) on behalf of the Secretary of State, who makes recommendations to the Secretary of State for a final decision.  In the case of major infrastructure projects there are a number of relevant provisions in the Planning Act 2008[[88]](#footnote-89) with regard to pre-application consultation. Section 47 of the Act (reproduced below) requires an applicant to consult with the public:  ***47 Duty to consult local community***   1. *The applicant must prepare a statement setting out how the applicant proposes to consult, about the proposed application, people living in the vicinity of the land.* 2. *Before preparing the statement, the applicant must consult each local authority that is within section 43(1) about what is to be in the statement.*   *…*  *(5) In preparing the statement, the applicant must have regard to any response to consultation under subsection (2) that is received by the applicant before the deadline imposed by subsection (3).*  *(6) Once the applicant has prepared the statement, the applicant must publish it—*   1. *in a newspaper circulating in the vicinity of the land, and* 2. *in such other manner as may be prescribed.*   *(7) The applicant must carry out consultation in accordance with the proposals set out in the statement.”*  Section 48 of the Act requires the applicant to publicise the proposed application and section 49 requires the applicant to take account of responses to consultation and publicity. In addition, the Secretary of State must have regard to the adequacy of consultation (section 55) when deciding whether to accept an application. The specific requirements have been prescribed in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009[[89]](#footnote-90):   * Regulation 10 requires that the applicant’s Statement of Community Consultation must state whether the proposals fall within the scope of the Directive, and if they do, how the applicant intends to publicise and consult on the preliminary environmental information; and * Regulation 11 requires that publicity of proposals under section 48 of the Planning Act must also encompass the requirements of the Environmental Impact Assessment process   See also DCLG Guidance on Pre-Application Consultation Process under the Planning Act 2008 here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8370/2130143.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(6) | 1. How well has Art. 6(6) been enacted?   Art. 6(6) provides:  “6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that  is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:  (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;  (b) A description of the significant effects of the proposed activity on the environment;  (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;  (d) A non-technical summary of the above;  (e) An outline of the main alternatives studied by the applicant; and   1. In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.”   **Researcher’s score: 2 – Minor errors**  As to the content of an ES, see Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (below).  ***SCHEDULE 4 Information for inclusion in environmental statements***  *PART 1*  *1. Description of the development, including in particular—*   1. *a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;* 2. *a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;* 3. *an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.*   *2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.*  *3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.*  *4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from—*   1. *the existence of the development;* 2. *the use of natural resources;* 3. *the emission of pollutants, the creation of nuisances and the elimination of waste,*   *and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment.*  *5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.*  *6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.*  *7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant or appellant in compiling the required information.*  *PART 2*  *1. A description of the development comprising information on the site, design and size of the development.*  *2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.*  *3. The data required to identify and assess the main effects which the development is likely to have on the environment.*  *4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.*  *5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part.*  As for charging, Regulations 17(2)(h) and 21 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 enables Local Planning Authorities to make a reasonable charge for copies of an ES (i.e. as such, the document is not free).  ***Charges for copies of environmental statements***  *21. A reasonable charge reflecting printing and distribution costs may be made to a member of the public for a copy of a statement made available in accordance with regulation 20.*  In *David Edwards and Lilian Pallikaropoulos v. The Environment Agency*, The First Secretary of State, Secretary of State for the Environment Food and Rural Affairs - and - Cemex UK Cement Limited (formerly Rugby Limited) (Interested Party) , the Court of Appeal held that the non-disclosure of reports held by a public authority containing information about the projected emissions from a cement factory that intended to change its processes to include the burning of waste tyres, left the public in a state of ignorance, until the agency’s grant of the permit, regarding the full extent of the low-level emissions of dust and their possible impact on the environment. The Court was of the view that such information was potentially material to the agency’s decision and to the members of the public who were seeking to influence it. The Court held that the failure by the agency to disclose it at the time was a breach of its common law duty of fairness to disclose it. | **Scoring Guide:**  3 = Enactment is fully in accord, and national law does not require the public to have to make a request in order to have access to the information relevant to the decision-making.  2 = Minor errors **OR** enactment is fully in accord but the national law requires the public to have to make a request in order to have access to the information relevant to the decision-making  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(7) | 1. How well has Art. 6(7) been enacted?   Art. 6(7) provides:  “7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 17 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/17/made>  ***Publicity where an environmental statement is submitted after the planning application***  *17.—(1) Where an application for planning permission or a subsequent application has been made without an environmental statement and the applicant proposes to submit such a statement, the applicant shall, before submitting it, comply with paragraphs (2) to (5).*  *(2) The applicant shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating—*   1. *the applicant’s name, that an application is being made for planning permission or subsequent consent, and the name and address of the relevant planning authority;* 2. *the date on which the application was made and, if it be the case, that it has been referred to the Secretary of State for determination or is the subject of an appeal to the Secretary of State;* 3. *the address or location and the nature of the proposed development;* 4. *that—* 5. *a copy of the application, any accompanying plan and other documents, and a copy of the environmental statement, and* 6. *in the case of a subsequent application, a copy of the planning permission in respect of which that application has been made and supporting documents, may be inspected by members of the public at all reasonable hours;* 7. *an address in the locality in which the land is situated at which those documents may be inspected, and the latest date on which they will be available for inspection (being a date not less than 21 days later than the date on which the notice is published);* 8. *an address (whether or not the same as that given under sub-paragraph (e)) in the locality in which the land is situated at which copies of the statement may be obtained;* 9. *that copies may be obtained there so long as stocks last;* 10. *if a charge is to be made for a copy, the amount of the charge;* 11. *that any person wishing to make representations about the application should make them in writing, before the date named in accordance with sub-paragraph (e), to the relevant planning authority or (in the case of an application referred to the Secretary of State or an appeal) to the Secretary of State; and* 12. *in the case of an application referred to the Secretary of State or an appeal, the address to which representations should be sent.*   *(3) An applicant who is notified under regulation 10(2), 11(4) or 12(5) of such a person as mentioned in any of those paragraphs shall serve a notice on every such person; and the notice shall contain the information specified in paragraph (2), except that the date specified as the latest date on which the documents will be available for inspection shall not be less than 21 days later than the date on which the notice is first served.*  *(4) The applicant shall post on the land a notice containing the information specified in paragraph (2), except that the date named as the latest date on which the documents will be available for inspection shall be not less than 21 days later than the date on which the notice is first posted. This provision shall not apply if the applicant has not, and is not reasonably able to acquire, such rights as would enable the applicant to comply*.” | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(8) | 1. How well has Art. 6(8) been enacted?   Art. 6(8) provides:  “8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”  **Researcher’s score: 3 – Effective enactment**  See the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 – Part 6, Regulation 24(1)(c)(ii) see: <http://www.legislation.gov.uk/uksi/2011/1824/regulation/17/made>  *Duties to inform the public and the Secretary of State of final decisions*  *24.—(1) Where an EIA application is determined by a local planning authority, the authority*  *shall—*  *(a) in writing, inform the Secretary of State of the decision;*  *(b) inform the public of the decision, by local advertisement, or by such other means as are*  *reasonable in the circumstances; and*  *(c) make available for public inspection at the place where the appropriate register (or*  *relevant section of that register) is kept a statement containing—*  *(i) the content of the decision and any conditions attached to it;*  ***(ii) the main reasons and considerations on which the decision is based including, if***  ***relevant, information about the participation of the public;***  *(iii) a description, where necessary, of the main measures to avoid, reduce and, if*  *possible, offset the major adverse effects of the development; and*  *(iv) information regarding the right to challenge the validity of the decision and the*  *procedures for doing so.*  *(2) Where an EIA application is determined by the Secretary of State or an inspector, the*  *Secretary of State shall—*  *(a) notify the relevant planning authority of the decision; and*  *(b) provide the authority with such a statement as is mentioned in sub-paragraph (1)(c).*  *23*  *(3) The relevant planning authority shall, as soon as reasonably practicable after receipt of a*  *notification under paragraph (2)(a), comply with sub-paragraphs (b) and (c) of paragraph (1)*  *in relation to the decision so notified as if it were a decision of the authority.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(9) | 1. How well has Art. 6(9) been enacted?   Art. 6(9) provides:  “9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.”  **Researcher’s score: 3 – Effective enactment**  See Regulation 24 Town and Country Planning (Environmental Impact Assessment) Regulations 2011:  ***Duties to inform the public and the Secretary of State of final decisions***  *24.—(1) Where an EIA application is determined by a local planning authority, the authority shall—*   1. *in writing, inform the Secretary of State of the decision;* 2. *inform the public of the decision, by local advertisement, or by such other means as are reasonable in the circumstances; and* 3. *make available for public inspection at the place where the appropriate register (or relevant section of that register) is kept a statement containing—*   *(i)the content of the decision and any conditions attached to it;*  *(ii) the main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public;*  *(iii)a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development; and*  *(iv)information regarding the right to challenge the validity of the decision and the procedures for doing so.”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(10) | 1. How well has Art. 6(10) been enacted?   Art. 6(10) provides:  “10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.”  **Researcher’s score: 3 – Effective enactment**  Paragraph 13 of Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 has been amended to take account of the decision in *R (Baker) v. Bath and North East Somerset Council[[90]](#footnote-91)*, that in the case of changes to projects it is the development as changed or extended not just the extension or change which has to be considered when determining whether EIA (and subsequent consultation procedures) is required.  The Environmental Permitting (England and Wales) Regulations 2010[[91]](#footnote-92) require consultation with the public on environmental permit applications. Public participation is provided for where there is an application for an environmental permit (Schedule 5, Part 1, paragraph 5).  Substantial changes to Part A installations must also be consulted on (see the Guidance on Part A installation[[92]](#footnote-93)). The requirement to consult on a substantial change applies both to variation applications by the operator and variations initiated by the regulator (Schedule 5, Part 1, paragraph 5(2)(a) and 5(3)(a)). The regulator may decide that other variations to environmental permits should also be subject to public consultation (Schedule 5, Part 1, paragraph 5(2)(b) and5(3)(b)).  ***Public participation in relation to certain applications***  *6.—(1) Subject to sub-paragraphs (2) and (3), if this paragraph applies the regulator must, within the consultation communication period—*   1. *take the steps it considers appropriate to inform the public consultees of the application and the place and times its public register can be inspected free of charge;* 2. *invite the public consultees to make representations on the application; and* 3. *specify to the public consultees the address to which and the period within which representations are to be made.*   *(2) The regulator must not inform the public consultees of information which is to be excluded from a public register in the interests of national security unless the appropriate authority directs that it must do so.*  *(3) The regulator must not inform the public consultees of information which is to be excluded from a public register because it is confidential information, unless the public consultee is—*   1. *a public authority and the information is necessary for the exercise of its functions; or* 2. *a sewerage undertaker and the information relates to the release of any substance into a sewer vested in that undertaker.* | **Scoring Guide:**  3 = The legal framework requires a**ll** reconsiderations or updates of operating conditions for activities referred to in paragraph 1 to be subject to a public participation procedure meeting **all** the requirements of paragraphs 2 to 9.  2 = The legal framework requires reconsiderations or updates of operating conditions for activities referred to in paragraph 1 to be subject to a public participation procedure meeting the requirements of paragraphs 2 to 9 “where appropriate.”  1 = The legal framework requires reconsiderations and updates of operating conditions to be subject to a public participation procedure but not a procedure meeting the requirements of paragraphs 2 to 9.  0 = The legal framework does not require reconsiderations or updates of operating conditions to be subject to a public participation procedure.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 6(11) | 1. How well has Art. 6(11) been enacted?   Art. 6(11) provides:  “11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.”  **Researcher’s score: 3 – Effective enactment**  In 2005, at the second Meeting of the Parties to the Convention, an agreement was reached to strengthen the requirements with regard to Genetically Modified Organisms (GMOs). Amendments to the Convention introduced a new article 6 bis and annex I bis setting out requirements for “*early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms”* to complement provisions for delivering the objectives of the Cartagena Protocol on Biosafety[[93]](#footnote-94) (to which the UK is also a Party). These requirements are already reflected in EU law through the Deliberate Release Directive[[94]](#footnote-95) and the GM Food and Feed Regulation[[95]](#footnote-96).  Annex 1 bis to the Convention prescribes how this is to be achieved, which includes making public information on applications for authorisation to place on the market or deliberately release GMOs together with any assessment report. The annex specifically states that confidentiality should not be afforded to information on the applicant, the intended use of the GMO, where it is to be released, methods and plans for monitoring and the environmental risk assessment. Parties must endeavour to ensure that decisions take due account of the outcome of the public participation.  Although the amendment has been ratified by both the UK and the EU, it has not yet been brought into force because (at the time of writing) an insufficient number of Parties who were party to the Convention at the time the amendment was adopted have ratified. However, the transposition of these requirements in EU law, and therefore in England and Wales, provides for compliance with the Convention, both before and after the amendment comes into force.  Publicity requirements relating to applications for consent to release genetically modified organisms are included in regulation 12 of the Genetically Modified Organisms (Deliberate Release) Regulations 2002[[96]](#footnote-97), SI 2002/2443 in respect of England (the corresponding provision in Wales is Regulation 13 of the Genetically Modified Organisms (Deliberate Release) (Wales) Regulations 2002, SI 2002/3188 (W 304)).  ***Advertisement of applications for consent to release***  *12.—(1) Subject to paragraphs (2) and (3), a person who makes an application for a consent to release genetically modified organisms shall, not more than ten days after he sends that application to the Secretary of State, cause to be published in a national newspaper to be specified by the Secretary of State a notice containing the following information—*   1. *the name and address of the applicant,* 2. *the general description of the organisms to be released,* 3. *the location and purpose of the release,* 4. *the intended date or dates of the release,* 5. *a statement that information about the application will be placed on the register by the Secretary of State within twelve days of her receipt of the application,* 6. *the means by which that register can be inspected,* 7. *a statement that the Secretary of State will consider any representations made to her relating to risks of damage to the environment posed by the release of the genetically modified organisms within a period which she shall specify in accordance with these Regulations and shall immediately send a copy of the newspaper containing the advertisement to the Secretary of State.*   *(2) A notice published under paragraph (1) need not contain the information referred to in sub-paragraphs (c) and (d) of that paragraph insofar as the First Simplified Procedure (crop plants) Decision does not require that information to be submitted with the application and that information is not submitted with the application.”*  Part VI of the Environmental Protection Act 1990 provides the wider framework for the regulation of GMOs in England and Wales. Under section 122, the Secretary of State and Welsh Ministers must maintain a public register that includes information such as applications for consents and any advice given by the Advisory Committee on Releases to the Environment as well as “*any other information obtained or furnished under any provision of this Part*”.  Reflecting annex I bis to the Convention, regulation 33 of the 2002 Regulations (regulation 34 of the Welsh 2002 Regulations) lists the information for which the public interest requires it to be included in the register notwithstanding that it may be commercially confidential. Part IV of the 2002 Regulations imposes duties on the decision-maker, be it the Secretary of State or Welsh Ministers, in respect of consents, to allow representations to be made on applications and for these to be taken into account when making a decision. | **Scoring Guide:**  3 = **All** decisions on whether to permit the deliberate release of GMOs into the environment are subject to **all** the provisions of article 6 (i.e. no carve out for “if feasible and appropriate”)  2 = Decisions on whether to permit the deliberate release of GMOs into the environment are subject to the provisions of article 6 “to the extent feasible and appropriate”.  1 = The legal framework requires decisions on whether to permit the deliberate release of GMOs into the environment to be subject to a public participation procedure but most of the provisions of article 6 are not enacted with respect to such decision-making.  0 = The legal framework does not require decisions on whether to permit the deliberate release of GMOs into the environment to be subject to a public participation procedure  **In scoring this provision, you should have regard to (amongst other things) the** [**Lucca Guidelines**](http://www.unece.org/fileadmin/DAM/env/pp/documents/gmoguidelinesenglish.pdf)**. Since the GMO amendment is not yet in force you do not need to consider it for the purposes of this exercise.**  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 6 legal indicators?

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### Public participation in decisions on specific activities – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 6(1)(a) and (b) | 1. Breadth of activities falling under Article 6(1)(a) and (b) in practice   Article 6(1) provides:  “1. Each Party:  (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;  (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;”  **Researcher’s score: 3**  There are a number of UK cases in which the courts have considered whether a proposal can be classified as a “project” (under Article 1.2 of the EIA Directive and thus analogous to Annex I of the Convention) and thus falls within schedule 1 or schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.  In *Commission v. Ireland*[[97]](#footnote-98) the CJEU held that demolition fell within the ambit of the words “*other interventions in the natural surroundings and landscape*” and that demolition works come within the scope of the EIA Directive and may constitute a project within the meaning of Article 1.2. The UK Court of Appeal considered the same question in *R (Save Britain’s Heritage) v. Secretary of State[[98]](#footnote-99)*. The Court held that execution of demolition works fell within “*the execution of ... other ... schemes*” in the definition of project in Article 1.2. He also held that if demolition is capable of being a project or scheme it is also capable of being an “*urban development project*” within paragraph 10(b) of Annex II. As a consequence the court quashed paragraphs 2(1)(a)-(d) of the Town and Country Planning (Demolition- Description of Buildings) Direction 1995.Thus, the consequence of *Commission v. Ireland* and *Save* is that demolition projects must be screened to determine whether an EIA is required.  In *Chetwynd v. South Norfolk DC[[99]](#footnote-100)* , the High Court held that a liberal approach should be adopted to ensure where possible that developments which would be likely to have a negative impact on the surrounding environment are properly investigated[[100]](#footnote-101). In that case, which concerned a development of four fishing lakes, the judge held “*And it seems to me that ‘ infrastructure’ can cover a development which changes the characteristic of a piece of land by providing something enabling a particular use to be carried out in that land*.”  The meaning of the term “*urban development project*” was also considered in *R (Condron) v. Merthyr Tydfil BC[[101]](#footnote-102)*. In this case, the Court of Appeal held that a disposal point relating to coal mining was not an “urban development project”.  In *Bateman v. South Cambridgeshire[[102]](#footnote-103)*, Moore-Bick LJ observed that an extension to a grain storage and handling facility could not “*..by any stretch of the imagination be described as an urban development ...[[103]](#footnote-104)”*. By way of contrast, in *R (Warley) v. Wealden DC [2011[[104]](#footnote-105)]*, the judge held that the term “*urban development project”* was capable of including tennis courts.  In *R (Renfree) v Secretary of State[[105]](#footnote-106)*, the Court of Appeal considered the circumstances in which a decision maker is required to reconsider a screening opinion. The question to be considered is whether the inspector’s failure to refer the matter back to the Secretary of State irrational. By adopting that test the Court has reduced the opportunities for challenges based on a failure to reconsider screening decisions.  In *R (Birch) v. Barnsley MBC[[106]](#footnote-107)* , the Court of Appeal dismissed an appeal against the judge’s decision to quash a planning permission on the ground that the development proposed was EIA development and that the negative screening opinion was flawed. The approach taken in the screening opinion which stated that impacts should be controllable was held to be inadequate, and contrary to the underlying purpose of the regulations. Thus, the likely effects of the development must be considered at the screening stage. Although the Court of Appeal has re-affirmed that a decision on screening is an exercise of planning judgment which will only be quashed on *Wednesbury* grounds, it is clear that the courts will intervene, particularly when a decision is based upon inadequate information.  The duty to give reasons when adopting a negative screening opinion is reinforced by the provisions of regulation 4(7) of the 2011 EIA Regulations. Any reasons are likely to be subject to careful analysis, as occurred in *Bateman*. | **Scoring Guide:**  3 = All activities listed in annex I plus one or more activities which the Party has determined pursuant to article 6(1)(b) to be subject to article 6.  2 = All activities listed in annex I  1 = Most but not all activities listed in annex I OR all annex I activities are subjected to public participation in accordance with article 6 in practice, but the definition of each activity is interpreted narrowly.  0 = A significant number of activities listed in annex I are not subject to public participation under article 6 in practice.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  While there is no definition in the Convention, national practice usually defines the circle of cases that may have a significant effect on the environment and hence involve public participation in the decision-making procedures thereof. The approach “any activity in respect of which significant environmental effects cannot be excluded” should be scored the highest. At the other extreme, a general practice of adopting a restrictive interpretation of the proposed activities to which the provisions of Art. 6 apply, or the use of legal and non-legal methods to avoid public participation, shall receive the lowest score.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the definition of ‘permitting’ (falling under Art. 6(1)(a)) versus other types of decisions (arguably not captured) (ref.7) * using hybrid bills (legislative decisions in respect of individual issues) in order to avoid permitting and public participation responsibilities (ref.8) * how far article 6 is identified only with public participation in environmental impact assessment procedures (ref.1, ref.4, ref.5) * the discretionary power to exempt certain projects from EIA or from public participation (ref.5, ref.6, ref.9) * consideration of decision-making with regard to nuclear investments, operations and any modifications of facilities etc. (ref.2) * consideration of decision-making in connection with waters (water management authorities) and forests (belonging to the agricultural administration) with a likely significant environmental impact (ref.3)   Please justify your score and explain the factors you considered. |
| Art. 6(1)(c) | 1. Use of Article 6(1)(c) in practice   Article 6(1) provides:  “1. Each Party:  (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.  **Researcher’s score: 2**  There is little available material to score this question. However, reference is made to Policy Instruction Pl 13/11 on *Environmental Impact Assessment: Amendments to and consolidation of the Town and Country Planning (EIA) Regulations 1999 (as amended) and the informal Defence EIA Exemption protocol*. The Policy Instruction states:  ***“DEFENCE EXEMPTIONS***  *12. The MOD is subject to Town and Country planning legislation, but has certain limited exemptions to the requirements for EIA.* ***Exemptions can only be applied on a case-by-case basis where clear demonstration of the adverse effects on national defence is provided.*** *This is authorised by both the Secretary of State for Defence and the Secretary of State for Communities and Local Government Regulation 4(4) (a)(ii) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales6) Regulations 1999 (SI 1999/293) (as amended) provides that:*  *“the Secretary of State may direct that these Regulations shall not apply to a particular*  *proposed development specified in the direction … if the development comprises or forms*  *part of a project serving national defence purposes and in the opinion of the Secretary of*  *State compliance with these Regulations would have an adverse effect on those purposes.”*  *13. Where required, a request for a Defence (EIA) Exemption Direction (D(EIA)ED) must be*  *initiated well in advance of the submission of the planning application, ideally prior to the point when a screening opinion would be requested from the local planning authority. In order to avoid any delays in the planning process, MOD will copy all submissions and decisions related to the D(EIA)ED to the relevant Minister and planning authority affected by the proposed project (the protocol for the D(EIA)ED request is shown in Annex A).*  *14. This protocol will inform the planning authority, in a timely manner, that the exemption will be applied. To support the planning decision, in line with the SofS Safety, Health, Environmental and Sustainable Development Policy Statement, an equivalent non-statutory Environmental Appraisal must be prepared that is, “so far as reasonably practicable, at least as good as those required by legislation”. This will provide a sufficient level of environmental information to support the planning authority without compromising the national defence interest.”*  See <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33573/1113.pdf> | **Scoring Guide:**  3 = Proposed activities serving national defence purposes which may have a significant effect on the environment are always or almost always subject to participation under Article 6  2 = The power to decide not to apply Article 6 to proposed activities serving national defence purposes which may have a significant effect on the environment is sometimes exercised in practice but only if it is established that the application would have an adverse effect on national defence  1 = The power to decide not to apply Article 6 to proposed activities serving national defence purposes which may have a significant effect on the environment is always or almost exercised in practice in respect of all national defence activities narrowly defined (and without reference to actual effects)  0 = The power to decide not to apply Article 6 to proposed activities serving national defence purposes is always or almost always exercised in practice in respect of all national defence activities broadly defined (and without reference to actual effects)  In the event that your research reveals no examples of Article 6 being applied to proposed activities serving national defence purposes, please score this indicator as 0. |
| Art. 6(2) | 1. Timing, content and form of notification in practice   Art. 6(2) provides:  “2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:  (a) The proposed activity and the application on which a decision will be taken;  (b) The nature of possible decisions or the draft decision;  (c) The public authority responsible for making the decision;  (d) The envisaged procedure, including, as and when this information can be provided:  (i) The commencement of the procedure;  (ii) The opportunities for the public to participate;  (iii) The time and venue of any envisaged public hearing;  (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;  (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and  (vi) An indication of what environmental information relevant to the proposed activity is available; and   1. The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.”   **Researcher’s score: 3 - In practice, in all or almost all cases subject to article 6, the public concerned is informed, either by public notice or individually as appropriate, early in the environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of all the information set out in subparagraphs (a)-(e) of Article 6(2)**  Following receipt of a formal planning application, Local Planning Authorities (LPAs) will display public notices and/or write to homes and businesses near the proposed site inviting comments. Most LPAs also publish details online, with larger developments also advertised in local newspapers. The public can view the details of a proposal – including architectural drawings – at the LPA offices.  LPAs often consult a large number of organisations before reaching a decision. Planning law requires some bodies to be consulted on certain planning applications. Such bodies (referred to as ‘statutory consultees’) are under a duty to provide advice on the proposal in question. They include organisations such as the Environment Agency, Forestry Commission and Natural England[[107]](#footnote-108). In addition to statutory consultees, LPAs must also consider whether there are planning policy reasons to engage other consultees who – whilst not designated in law – are likely to have an interest in a proposed development (‘non-statutory consultees[[108]](#footnote-109)’). To help applicants develop their proposals, LPAs are encouraged to produce and publish a locally specific list of non-statutory consultees.  LPAs have discretion about how they inform communities and other interested parties about planning applications[[109]](#footnote-110) but they often set out in detail how they will consult the community in a Statement of Community Involvement prepared under Section 18 of the Planning and Compulsory Purchase Act 2004[[110]](#footnote-111). Consultation would normally include parish councils (who may have their own informal parish plans which are not included in the statutory scheme) and established environmental NGOs, such as the local County Wildlife Trust and regional groups of the Campaign to Protect Rural England , the RSPB and/or Friends of the Earth, with expert knowledge and data about the local area.  The UK has a great tradition and a well-developed system of consultations with citizens and civil society, which provides that anyone can respond to a planning consultation. In addition to individuals who might be directly affected by a planning application, community groups and specific interest groups (national as well as local in some cases) can provide representations on planning applications.  The time period for making comments will be set out in the publicity accompanying the planning application. This will be not less than 21 days, or 14 days where a notice is published in a newspaper. Once the consultation period has concluded a local planning authority will proceed to determine the planning application. | **Scoring Guide:**  3 = In practice, in all or almost all cases subject to article 6, the public concerned is informed, either by public notice or individually as appropriate, early in the environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of all the information set out in subparagraphs (a)-(e) of Article 6(2).  2 = In practice, in the majority of cases subject to article 6, the public concerned is informed, either by public notice or individually, in an early, adequate, timely and effective manner, inter alia, of all the information set out in subparagraphs (a)-(e) of Article 6(2).  2= In practice, in all cases subject to article 6, the public concerned is informed, either by public notice or individually, of all the information set out in subparagraphs (a)-(e) of Article 6(2), though the notice could often be given in a more timely or effective manner,  2 = In practice, in all cases subject to article 6, the public concerned is informed, either by public notice or individually, in an adequate, timely and effective manner, though one or more of the aspects set out in subparagraphs (a)-(e) of Article 6(2) may be lacking.  1 = In practice, in a minority of cases subject to article 6, the public concerned is informed, by public notice or individually as appropriate, in an adequate, timely and effective manner, inter alia, of all the information set out in subparagraphs (a)-(e) of Article 6(2).  1 = In practice, in most cases subject to article 6, the public concerned is informed but the notice may not be early, adequate timely or effective manner, and one or more aspects set out in subparagraphs (a)-(e) of Article 6(2) may be lacking.  0 = In practice, the public concerned is rarely informed, either by public notice or individually, early in the environmental decision-making procedure, or in an adequate, timely and effective manner of the information set out in subparagraphs (a)-(e) of Article 6(2).  The score here should be decided first of all on the basis of the comprehensiveness of notification by reference to the elements listed in Art. 6(2). A further important viewpoint is whether and how effectively the authorities tend to take into consideration traits of the concerned communities (especially marginalized groups on the basis of, for example, gender, language, ethnicity or age).  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Insofar as possible and relevant, please take into consideration *inter alia*:   * whether the form of notification takes into consideration the nature and size of the project (ref.1, ref.7) * using a variety of methods of notification, both general forms (media, websites) and specific ones (targeted letters) (ref.2, ref.4, ref.5); the means of notification should fit the needs of the public concerned * adequate, timely and effective notification including all matters listed in Art. 6(2) (a-e) and all accompanying information (ref.3) * substantive and procedural information included in the notification, with bona fide attempts to attract the attention of the public concerned, with repeated and/or additional notifications, if appropriate (ref.4, ref.5, ref.6, ref.8) * cases where the developer is solely responsible for notification (ref.6)   Please justify your score and explain the factors you considered. |
| Art. 6(3) | 1. The time frames provided for public participation are   Art. 6(3) provides:  “3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.”  **Researcher’s score: 2 - Across all cases, time frames are reasonable and sufficient for the majority of phases, but the time frame for one or more phase is often insufficient, taking into account the nature, complexity and size of the proposed activity**  Once a planning application has been validated, LPAs must make a decision on the proposal as quickly as possible (and in any event within the statutory time limit unless a longer period is agreed in writing with the applicant).  The DMPO 2010 provides for a period of not less than 21 days following publication of the requisite notice notwithstanding that in relation to EIA applications the time given to the local planning authority to determine the application is 16 weeks. In many cases, 21 days may be adequate for members of the public to inspect the application documents and be in a position to make considered comments in writing. Moreover, local authorities do not generally exclude from consideration representations that are made after the consultation period has ended but before a decision is taken. However, there are also cases where the scale, location or impact of the development is such that a large amount of information is submitted with the application and it is unrealistic to expect members of the public to be able to inspect or obtain, and then read and understand, the information in order to make informed comments and representations. In such cases, giving the public only 21 days within which to make representations may not be adequate to ensure effective public participation as required by Article 6[[111]](#footnote-112).  A similar point might be made in relation to the availability of the reports prepared for local planning authority development control committees. Publication of the report 5 working days before the meeting may be adequate in most cases but it may be wholly unrealistic to expect the public to absorb the contents of an officer’s report into a large and complex scheme (which may run to hundreds of pages and have annexed to it further documents) before an application is considered at a planning committee meeting.  One such case in which individuals and environmental NGOs have had to assimilate enormous quantities of information in unreasonable timeframes is the assessment documents around HS2: <https://www.theguardian.com/uk-news/2013/nov/29/hs2-planning-documents-high-speed-rail-councils> | **Scoring Guide:**  3 = In all or almost all cases, the time frames for all phases are reasonable and sufficient, taking into account the nature, complexity and size of the proposed activity.  2 = Time frames for all phases are reasonable and sufficient in the **majority of cases**, taking into account the nature, complexity and size of the proposed activity.  2 = Across all cases, time frames are reasonable and sufficient for the **majority of phases**, but the time frame for one or more phase is often insufficient, taking into account the nature, complexity and size of the proposed activity.  1 = Time frames are for all phases are reasonable and sufficient in a **minority of cases**, often failing to take into account the nature, complexity and size of the proposed activity.  1= Across all cases, time frames are reasonable and sufficient in a **minority of phases**, often failing to take into account the nature, complexity and size of the proposed activity  0 = Generally unreasonable and insufficient, failing to take into account the nature, complexity and size of the proposed activity.  In considering the issue of ‘reasonable’ time-frames, please refer to pp.142-144 of the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf).  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * insufficient time given to participants in order to prepare and participate effectively (taking into consideration the nature, complexity, size and potential effects of the proposed activity and the volume and complexity of the documentation as well as such features as organisational procedures [e.g. time needed for consultations with members, outside experts, etc.], and whether for example a limited consultation period runs over public holidays/celebration days, etc.) (ref.2, ref.5, ref.7) * occurrence of cases where the construction (or similar steps towards realising the project or activity) have already happened by the time the parties receive their notifications (ref.1) * general arrangements for regular/frequent participants (such as mailing lists) (ref.3) * from the side of the participants: are they able and willing to meet the deadlines set? (ref.4, ref.6)   Please justify your score and explain the factors you considered. |
| Art. 6(4) | 1. Do the authorities, in practice, provide for early public participation, when all options are open and effective public participation can take place   Art. 6(4) provides:  “4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.”  **Researcher’s score: 3 – Yes, always or almost always**  In *Walton v Scottish Ministers[[112]](#footnote-113)*, the Scottish courts considered what is meant by opportunities for “*early public participation at the project level when all options are open and effective participation can take place*”. The appellant argued that in making certain orders under the Roads (Scotland) Act 1984 for construction of the Aberdeen Western Peripheral Route, the Scottish Ministers acted in a manner incompatible with Article 6(4) of Directive 85/337/EC. The appellant claimed he had not been given an adequate opportunity to express his opinions on the Ministers’ preferred route option, which included a dual carriageway known as the Fastlink, either through consultation or subsequently at the public local inquiry which had a restricted remit to exclude inquiry into the need for the road, including the Fastlink.  Lord Tyre held that there was nothing in Directive 85/337/EEC which required the Ministers to seek or take account of further public opinion in relation to the Fastlink or to hold a public inquiry into the need for it. The Ministers had conducted a public consultation which had included the Fastlink as a route, and the public, including the appellant, had the opportunity then to express opinions on all the alternative routes at a time when all options had been open. Consistently with the concept of tiered decision-making underlying the European Directives, the Ministers were entitled, by the time of the public inquiry, to take the view that the focus should be on environmental and technical issues affecting the route. The Inner House upheld the Lord Ordinary’s opinion[[113]](#footnote-114). The Court’s conclusion is consistent with the findings of the Aarhus Convention Compliance Committee when it considered complaints into the same orders on the same grounds[[114]](#footnote-115). Both the Lord Ordinary and the Extra Division drew support from the reasoning of the Committee[[115]](#footnote-116). | **Scoring Guide:**  3 = Yes, always or almost always  2 = Yes, in a majority of cases  1 = Yes, but only in a minority of cases  0 = No, never  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that this indicator partly overlaps with the notification indicator, but notification does not mean in all instances the onset of the public participation procedure itself (e.g. the parties might have to wait for some meaningful information to arrive in the procedure). Please take into consideration, insofar as possible and where relevant, *inter alia*:   * all options are open vs. some parameters could still be changed, in order to enhance public acceptance of the project (ref.1, ref.4) * “providing for participation” as a genuine attempt to trigger, enhance and support public participation (ref.2) * participation in the drafting stage of basic documents in the decision-making procedure (ref.3) * open options in a tiered decision-making procedure, ensuring “early public participation” from the beginning of each new tier (ref.5, ref.6) * is public participation required in practice at the scoping and/or screening phases in EIA procedures? (ref.7)   Please justify your score and explain the factors you considered. |
| Art. 6(6) | 1. In practice, the information to which the public concerned is given access pursuant to Article 6(6) generally comprises   Art. 6(6) provides:  “6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:  (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;  (b) A description of the significant effects of the proposed activity on the environment;  (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;  (d) A non-technical summary of the above;  (e) An outline of the main alternatives studied by the applicant; and  (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.”  **Researcher’s score: 2 - Access to all information listed in Art. 6(6)(a)-(f)) is always or almost always provided free of charge and without the need for the public to make a request**  The Environment Statement may consist of one or more documents, but it must constitute a “*single and accessible compilation of the relevant environmental information and the summary in non-technical language*” (*Berkeley v SSETR* [2000] 3 All ER 897, 908).  In *R (Brown) v. Carlisle City Council[[116]](#footnote-117)* the Court of Appeal considered a challenge to a grant of planning permission based upon the contention that the ES was inadequate. The development proposed was a freight distribution centre adjacent to Carlisle airport. The developer entered into a section 106 agreement which provided that the freight distribution centre could not be built and occupied without works being carried out to repair or renew the main runway at the airport. The ES did not include an assessment of the effects of the works to the airport. It was held that the ES was deficient and as a result the grant of planning permission was unlawful. | **Scoring Guide:**  3 = Access to all information relevant to the decision-making (included, but not limited to the information listed in Art. 6(6)(a)-(f)) is always or almost always provided free of charge and without the need for the public to make a request.  2 = Access to all information listed in Art. 6(6)(a)-(f)) is always or almost always provided free of charge and without the need for the public to make a request.  2 = Access to all information relevant to the decision-making (included, but not limited to the information listed in Art. 6(6)(a)-(f)) is is always or almost always provided free of charge though the public may need to make a request for such access.    1 = Access to all information listed in Art. 6(6)(a)-(f)) is always or almost always provided free of charge though the public may need to make a request for such access.  1 = Access to all information listed in Art. 6(6)(a)-(f)) is always or almost always provided without the public needing to make a request for such access, though a fee may be charged for access.  1 = Access to some but not all information listed in Art. 6(6)(a)-(f)) is always or almost always provided free of charge (the public may or may not need to make a request for such access).  0=Access to no or only a minority of the information listed in Art. 6(6)(a)-(f)) is typically provided free of charge (the public may or may not need to make a request for such access).  In considering the issue of “minimum information”, please find a list of examples at para 88 of the [Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters](http://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf)  Please take into consideration not only the list of information but also the quality and usefulness of it. Furthermore, please consider if the information provided is balanced and presents different aspects of the proposed activity. Please justify your score and explain the factors you considered. |
| Art. 6(7) | 1. In practice, the public is enabled to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity   Art. 6(7) provides:  “7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”  **Researcher’s score: 2 - In all or almost all cases, the public is entitled to submit in writing or at a public hearing if one is held, any comments, information, analyses or opinions that it considers relevant to the proposed activity**  Any member of the public is able to make written representations in response to a planning application and the local planning authority is obliged to take those representations into account in determining the application. However, there is no statutory right for objectors to make oral representations when applications are determined by, for example, a planning committee at a meeting. As a matter of practice, many local planning authorities do allow third parties to address the committee as part of the process of determining applications but there are significant variations between local planning authorities.  Some authorities do not allow members of the public to make oral representations at all albeit the meeting is a public one and in such authority areas the application is determined on the basis of the report prepared by the planning officer and discussion amongst the members of the committee (e.g. Westminster City Council). Other authorities allow objectors to speak but, where they do so, generally impose a strict limit on the amount of time given to objectors. Frequently, third parties are given no more than 2 or 3 minutes and rarely are they allowed to speak for more than 5 minutes. In many authorities they are required to have registered to speak before the meeting.  For example, the Development Control Committee of the London Borough of Camden permits oral representations to be made (referred to as “deputations”) in the following circumstances[[117]](#footnote-118):-   * The person wishing to speak must have a planning related interest that could be affected directly by the matter under consideration (e.g. local groups and neighbouring occupiers); * A request to speak must be made by email, fax or letter by 9 am the day before the meeting and must be accompanied by a statement not more than 2 sides of A4 paper; * The person wishing to speak is limited to 5 minutes and can only raise the issues set out in the deputation statement; * Where there is more than one deputation on the same item the 5 minutes is shared between the deputations; and * If the time limit is exceeded, the Chair will immediately call for an end to the speech.   Note, however, that other authorities do not permit oral representations to be made by members of the public (e.g. Westminster City Council). Arguable, this practice is not consistent with Article 6(7) of the Convention.  **The Absence of a Third Party Right of Appeal in the Planning System**  Applicants who are refused planning permission (or are unhappy with the conditions imposed on the grant of a planning permission) have a statutory right of appeal. However, there is no such right given to objectors to appeal against a local planning authority’s decision to grant planning permission. An objector might, if the project is one of more than local significance, persuade the Secretary of State to “call in” the application for his own determination under section 77 of the TCPA 1990[[118]](#footnote-119). And, if the application is called in, the Secretary of State normally holds a Public Inquiry at which the merits of the proposed development will be considered with a full opportunity usually given to the public to make written and oral representations at the Inquiry. However, where an objector fails to have an application called in and planning permission is granted by the local planning authority, his only remedy is to challenge the decision to grant permission through judicial review. Save where the decision is *Wednesbury* unreasonable, the Court will be unconcerned with the merits of the development and limit its consideration to the lawfulness of the decision making process.  In the absence of an Article 6, paragraph 7 compliant public hearing or inquiry prior to the determination of the Convention activity the argument in favour of giving third parties a right to appeal (including full consideration of the merits) against the grant of planning permission in relation to activities that fall within the scope of the Convention has some force. Although the absence of any such right is more relevant to Article 9 and the Convention’s third pillar (access to justice) the creation of a right for third parties to have the merits of proposed development examined at a public inquiry, at which their comments could be expressed and taken into account, would further the public participation requirements of Article 6.  Two UK communications to the Compliance Committee alleged non-compliance with the Convention in respect of articles 6 and 7. These arose in the context of the proposed construction of a superstore in Kent and various planning applications in London[[119]](#footnote-120). The Committee examined the communicants’ arguments about whether the planning laws and procedures of England and Wales met the standards regarding public participation required in articles 6 and 7, including whether the fact that oral hearings might not be held at meetings of planning committees breached the Convention. In rejecting these submissions, the Committee found nothing to substantiate the more general allegations about the planning system in England and Wales. It also noted that article 6(7) of the Convention gives the public the right to submit comments, information, analyses or opinions during public participation procedures, either in writing or, as appropriate, orally at a public hearing or inquiry with the applicant. If local authorities only provide for participation of members of the public at planning meetings via written submissions this would not, according to the Committee, be in non-compliance with article 6(7)[[120]](#footnote-121). There is interesting commentary on the Communication here: <https://ukhumanrightsblog.com/2012/08/15/a-coach-and-aarhus-through-the-planning-system-third-party-rights-under-scrutiny/> | **Scoring Guide:**  3 = In all or almost all cases, the public is entitled to submit in writing or at a public hearing, any comments, information, analyses or opinions that it considers relevant to the proposed activity. In practice, hearings are routinely held for decisions to permit article 6 activities.  2 = In all or almost all cases, the public is entitled to submit in writing or at a public hearing if one is held, any comments, information, analyses or opinions that it considers relevant to the proposed activity.  1 = In all or almost all cases, the public is entitled to submit in writing or at a public hearing if one is held, comments, information, analyses or opinions but the public authority can decide not to take into account comments, information etc which it does not consider relevant to the proposed activity.  1 = In some but not all cases, the public is entitled to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity.  0 = The public is rarely or never entitled to submit comments in practice on decisions to permit article 6 activities.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * limiting the scope of possible opinions to *strictu sensu* environmental issues or even less (ref.1) * possibilities of verbal submissions of opinions at a public hearing, the scope for direct exchange with the representatives of the developer and the authorities (ref.2) * possibilities for the expression of opinions in hybrid decision-making procedures (ref.3) * any substantive or formal requirements regarding the opinions which may be submitted (such as a requirement for ‘motivated’, reasoned opinions, specific written form etc.) (ref.4, ref.6, ref.7) * potential for the developer or the developer’s experts to filter or rephrase public opinion for the authorities (ref.5)   Please justify your score and explain the factors you considered. |
| Art. 6(8) | 1. In practice, how is due account typically taken of the outcome of the public participation?   Art. 6(8) provides:  “8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.”  **Researcher’s score: 2 - In the majority of cases, public authorities produce a response document including the authority’s response (positive or negative) to the comments submitted with clear and sufficient reasons**  In planning terms, the main response document is the Officer’s Report, which sets out the decision-makers reasoning and the way in which it has considered responses in making a recommendation as to whether to grant approval or not. There is a considerable body of case-law from the courts on the content of Officer’s Reports that cannot be included here – but to summarise:  • Reports should be accurate and cover, amongst other things, the substance of any objections and the views of those consulted;  • Relevant information should include a clear exposition of the development plan; site or related history; and any other material considerations;  • Reports should have a written recommendation of action. Oral reporting (except to update a report) should be avoided and carefully minuted when it does occur;  • Reports should contain technical appraisals which clearly justify a recommendation;  • If the report’s recommendation is contrary to the provisions of the development plan, the material considerations which justify the departure must be clearly stated.  It is particularly important to do so, not only as a matter of good practice, but because failure may constitute maladministration, or give rise to judicial review on the grounds that the decision was not taken in accordance with the provisions of the development plan and the council’s statutory duty under s38A of the Planning and Compensation Act 2004.  My experience, as a legal practitioner, is that the Officer’s Report is lawful in the great majority of planning cases.  In certain situations, a proposal will be determined by way of planning inquiry (further information can be found here: <http://researchbriefings.files.parliament.uk/documents/SN06790/SN06790.pdf>). The Inspector’s Report will demonstrate how he or she has taken submissions into account in reaching a decision. | **Scoring Guide:**  3 = Public authorities always or almost always publish a response document after a public consultation, documenting the comments submitted and the authority’s response (positive or negative) with clear and sufficient reasons  2 = In the majority of cases, public authorities produce a response document including the authority’s response (positive or negative) to the comments submitted with clear and sufficient reasons  2= Public authorities always or almost always produce such a response document including the authority’s response (positive or negative) but the reasons for accepting/rejecting the comments are normally very brief or generalized (e.g. “against government policy” without explaining which policy it would be against).  1 = Public authorities produce a response document including the authority’s response (positive or negative) to the comments submitted with clear and sufficient reasons in a minority of cases  1= Public authorities often produce a response document including the authority’s response (positive or negative) but the reasons for accepting/rejecting the comments are normally very brief or generalized.  0 = Public authorities very rarely or never produce such a response document  For a discussion of such response documents, see the box on p.156 of the [Aarhus Convention Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf).  Please justify your score and explain the factors you considered. |
| Art. 6(9) | 1. In practice, is the public promptly informed and are decisions provided in writing together with reasons and considerations?   Art. 6(9) provides:  “9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.”  **Researcher’s score: 3 - In all or almost all cases the public is promptly informed of the decision, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account**  See above. | **Scoring Guide:**  3 = In all or almost all cases the public is promptly informed of the decision, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account.  2= In all or almost all cases the public is promptly informed of the decision, and the full text of the decision is accessible, but frequently no explanation is provided of how the outcome of public participation was taken into account.  2 = In a majority of cases the public is promptly informed of the decision, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account.  1= In a majority of cases, the public is informed of the decision, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account, but this does not happen promptly.  1= In a majority of cases, the public is promptly informed of the decision, and the full text of the decision is accessible, but no explanation is provided of how the outcomes of the public participation were taken into account.  1 = In a minority of cases the public is promptly informed of the decision, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account.  0 = Never or only very rarely is the public promptly informed of the decision, using all the mediums used to notify the public at the start of the public participation procedure, and the full text of the decision is accessible, including an explanation of how the outcomes of the public participation were taken into account.  Regarding promptitude, please see the [Aarhus Convention Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf), at p.157, and also paragraph 137 of the [Maastricht Recommendations on Public Participation](https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf).  Please take into consideration that the reasoning is an especially important part of the decision - first of all, because it largely determines the scope and content of any legal remedies. An example of good practice may feature reasoning that explains the factual, expert and legal bases of the decision. The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the modalities and form of dissemination of information about the decision (ref.1) * explanations, reasoning broken down to the level of indicating responses to individual comments provided by the public (ref.1) * do the time periods for informing the public take account of relevant time frames for initiating review procedures? (ref.2)   Please justify your score and explain the factors you considered. |
| Art. 6(10) | 1. In practice, where a public authority reconsiders or updates the operating conditions for an activity referred to in Article 6(1), how frequently are the public participation provisions of the Convention applied?   Art. 6(10) provides:  “10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.”  **Researcher’s score: 2**  I can find very little information about the extent to which the public can participate in the **renewal** of permits. When applying for a permit, the Environment Agency will normally put the information in the application on a public register and may consult other public bodies when assessing it. If the Agency thinks the proposed activities could have potentially significant environmental impacts, it may publish a notice of the application for public comment. However, there is nothing to confirm that this is also the position when permits are renewed. In the absence of that, I have had to score the UK as for the position on initial applications for permits.  In planning terms, there can be a problem with multi-stage consent procedures. In the case of *Barker[[121]](#footnote-122)*, the ECJ held in relation to the EIA Directive that where the national law provides for a multi-stage consent procedure involving a principal decision (e.g. the grant of an outline consent) and an implementing decision (e.g. reserved matters approval) environmental assessment may be necessary in respect of a project even after the grant of the outline decision and before the approval of reserved matters. In such a case, the ES would have to be produced and published in accordance with the EIA Regs 2011 implementing the EIA Directive. However, the submission of an application for approval of reserved matters is not an application for planning permission and the publicity and consultation requirements in the DMPO 2010 (which otherwise ensure compliance with Article 6) do not apply in relation to such applications. Consequently, and by analogy with the ECJ’s decision in there is scope to argue that applications for reserved matters where they are concerned with activities within the scope of Article 6(1) should be subject to the same public participation procedures as the principal application for outline planning permission to ensure compliance with Article 6.  A similar difficulty arising from the absence of any statutory regime might occur even where there is a single consent. In *R (Midcounties Cooperative Limited) v Wyre Forest District Council* [2010] EWCA Civ 841 the local planning authority granted planning permission and imposed a badly worded condition which was intended to restrict the sales floor area of a proposed supermarket to a certain size. The claim failed in part because the owners and local planning authority had also entered into a section 106 agreement that limited the net sales area in a manner which was clear. This allowed the CA to hold that the planning permission and condition together with the s.106 provided a clear and certain form of control of the intended sales area. However, in reaching that conclusion Laws LJ at paragraph 25 said:-  “*It is true that the restriction imposed by the s.106 agreement does not have all the force of a planning condition. If it is desired to develop land without fulfilling an extant planning condition, a fresh application for permission must be made pursuant to s.73(1) of the 1990 Act to develop the land without complying with the condition; and “[o]n such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted” (s.73(2) ). A s.106 agreement, by contrast, can be varied by further agreement, and can be discharged on application made to that effect after five years (s.106A ).”*  As with reserved matters applications, an application to vary or discharge a s. 106 agreement does not require advertisement and/or consultation under the statutory planning regime although a decision taken in relation to the discharge or variation of a s. 106 may be one which requires the public to be given the opportunity to participate in the manner contemplated by Article 6. | **Scoring Guide:**  3= In practice, a**ll** reconsiderations or updates of operating conditions for activities referred to in paragraph 1, are subject to public participation procedures meeting **all** the requirements of paragraphs 2 to 9.  2 = In practice, reconsiderations or updates of operating conditions for activities referred to in paragraph 1, are subject to a public participation procedure meeting the requirements of paragraphs 2 to 9“where appropriate.”  1 = In practice, reconsiderations and updates of operating conditions are subject to public participation procedures but not a procedure meeting the requirements of paragraphs 2 to 9.  0 = In practice, reconsiderations or updates of operating conditions are not subject to public participation procedures.  Please refer to page 159 of the Aarhus Convention Implementation Guide (2014) regarding the “and where appropriate” language of Art. 6(10).  Please consider that time in environmental matters is often an important factor, because as time goes on projects might turn out to have unexpected environmental effects or simply the knowledge about these effects develops; therefore, even if the operation of the activity has not changed, the reconsideration or updating of its operating conditions might raise substantial new issues.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the relevance of changes in the legal environment in respect of the activity/project (such as new binding conditions and deadlines – therefore time lags in themselves might amount to significant modification even without any modification in the technical plan) (ref.1) * whether full (or partial) access to participation is given in the case of reconsiderations or updates of operating conditions (ref.1) * the question of “where appropriate” and the size of the facility and the level of public interest in it (ref.1) * any applications of the CJEU’s judgments in Cases C-275/09 Brussels airport and/or C-121/11 Pro-Braine, to the effect that the mere renewal of an existing permit to operate a project cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ for the purposes of the EIA Directive, with the result that public participation obligations are not applied (ref.2)   Please justify your score and explain the factors you considered. |
| Article 6(11) | 1. How well has Art. 6(11) been applied in practice?   Art. 6(11) provides:  “11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.”  **Researcher’s score: 3**  When an application is made, the Government invites representations on any risks of damage being caused to the environment by a release. For example, Defra is currently considering an application from the Oxford Vaccine Group to release a genetically modified organism, reference 16/R48/01: <https://www.gov.uk/government/publications/genetically-modified-organisms-oxford-vaccine-group-16r4801> | **Scoring guide:**  **3=** In practice, **all** decisions on whether to permit the deliberate release of GMOs into the environment have been subject to public participation procedures that comply with **all** the provisions of article 6 (i.e. no carve out for “if feasible and appropriate”)  2 = In practice, decisions on whether to permit the deliberate release of GMOs into the environment have been subject to public participation procedures that comply with the provisions of article 6 “to the extent feasible and appropriate”.  1 = In practice, decisions on whether to permit the deliberate release of GMOs into the environment have been subject to a public participation procedure but most of the provisions of article 6 were not applied with respect to such decision-making.  0 = In practice, decisions on whether to permit the deliberate release of GMOs into the environment have not been subject to a public participation procedure  Where this has never arisen on the facts, i.e. the Party has not in practice considered permitting the deliberate release of a genetically modified organism into the environment, please note this fact in your comment and do not provide a score. If we do not obtain a score for each Party, the results of this indicator will be ‘hived off’ (i.e. will not count towards the overall score), and will be considered separately in the report. |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 6 practice indicators?

The practice indicator for Article 6(7) refers in its scoring guide to the entitlement to participate. A related issue is the arrangements (if any) authorities make for public participation, including inter alia the consideration (if any) they give for traits of concerned communities (especially marginalized groups either on the basis of, for example, gender, language, ethnicity or age). Do you think these aspects should be assessed? If so, in respect of which provision (Art. 6(7), 3(2), somewhere else)?

### (b) Public participation concerning plans, programmes and policies relating to the environment – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 7, first sentence  Indicator 1 | 1. How well has the phrase “the preparation of plans and programmes relating to the environment” been enacted?   The first sentence provides:  “Each Party shall make appropriate practical and/or other provisions for the public to participate during **the preparation of plans and programmes relating to the environment**, within a transparent and fair framework, having provided the necessary information to the public.”  **Researcher’s score: 3 – Effective enactment**  The provisions of Article 7 of the Convention fall within the competence of the EU. The EU has implemented some of these requirements through Directive 2003/35/EC (the PPD) and its successor legislation and through Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment[[122]](#footnote-123) (“the SEA Directive”), which applies to a wide range of public plans and programmes.  The UK was required to bring into force the laws, regulations and administrative provisions necessary to comply with the EU legislation. The relevant domestic legislation includes the following:   * The Air Quality Standards Regulations 2010; * The Air Quality Limit Values (Amendment) Regulations (Northern Ireland) 2004; * The Air Quality Standards (Scotland) Regulations 2010; * The Air Quality Standards (Wales) Regulations 2010; * The Environmental Assessment of Plans and Programmes Regulations 2004; * Environmental Assessment (Scotland) Act 2005; * The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004; * The Environmental Assessment of Plans and Programmes Regulations (NI) 2004 (Statutory Rule 2004 No 280); * Part III of the Planning (NI) Order 1991; * Part III of the Planning (NI) Order 1991, as amended by S.I. 2003/430 (N.I.8); * The Waste and Contaminated Land (Northern Ireland) Order 1997; * The Planning (Control of Major-Accident Hazards) Regulations 1999; * The Planning (Development Plans) Regulations (NI) 1991; * The Planning (Development Plans) Regulations (NI) 1991 (S.R. 1991 No.119, as amended by S.R. 1994 No.394; * The Planning (Development Plans) Regulations (NI) 1991 No 119 as amended by S.R. 2004 No.438; * Planning and Compulsory Purchase Act 2004 (c 5); * Planning and Compensation Act 1991 (c 34); * Public Health (Air Quality) (Ozone) (Amendment) Rules 2005; * Public Health (Amendment No 2) Ordinance 2005 No 3510 of 29 December 2005, (No 71 of 2005); * The Nitrate (Public Participation etc.) (Scotland) Regulations 2005; * The Nitrates Action Programme Regulations (Northern Ireland) 2006; * The Protection of Water Against Agricultural Nitrate Pollution (Amendment) Regulations (Northern Ireland) 2005; * The Nitrate Pollution Prevention Regulations 2008; * The Transfrontier Shipment of Waste Regulations 2007; * The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006; * The Transport and Works (Assessment of Environmental Effects) Regulations 2006; * Transport and Works (Scotland) Act 2007; * The Nitrate Pollution Prevention (Wales) Regulations 2008   It is impossible for me to review all of these documents but, by way of example, Regulation 13 of The Environmental Assessment of Plans and Programmes Regulations 2004[[123]](#footnote-124) provides for active consultation in respect of consultation bodies and public consultees. There is a somewhat more passive duty with regard to the general public (although sufficient to comply with the requirements of Article 7(1)) of the Convention:  ***Consultation procedures***  *13.—(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.*  *(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall—*  *(a) send a copy of those documents to each consultation body;*  *(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority’s opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive (“the public consultees”);*  *(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and*  *(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.*  *(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents.*  ***(4) The responsible authority shall keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge*.**  *(5) Nothing in paragraph (2)(c) shall require the responsible authority to provide copies free of charge; but where a charge is made, it shall be of a reasonable amount*.”  There are also legal requirements to involve the public throughout the preparation of local and regional plans, as outlined in the Planning and Compulsory Purchase Act 2004 and detailed in the Town and Country Planning (Local Planning) (England) Regulations 2012; and the Planning Act 2008 and detailed in the Infrastructure Planning (National Policy Statement Consultation) Regulations 2009. Neighbourhood planning is enabled under the Town and Country Planning Act 1990 and the Neighbourhood Planning (General) Regulations 2012.  The Equality Act 2010 places duties on public authorities to promote disability gender and race equality, which includes requirements to involve or consult the various equalities strands in the work of the authority.  The Planning Act 2008 created a new development consent regime for Nationally Significant Infrastructure Projects (NSIPs). The Act provides for a more efficient, transparent and accessible planning system for nationally significant projects in the field of transport, energy, water, waste and waste-water infrastructure. This regime provides for the Government to produce National Policy Statements (NPSs) that integrate environmental, social and economic objectives and provide clarity on the need for infrastructure. The UK’s most recent Implementation Report states that the regime aims to be more transparent and provide better opportunities for the public and local communities to get involved in decisions that affect them. There are three opportunities to become involved: the debate about what national policy means for planning decisions; the development of specific projects; and the examination of applications for development consent.  **Scotland**  The SEA Directive was transposed into Scottish law by the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, which were subsequently repealed by the Environmental Assessment (Scotland) Act 2005 which came into force with effect from 20 February 2006[[124]](#footnote-125). It has been accepted that the 2005 Act adequately transposes the requirements of the SEA Directive into Scottish law and in any event that the terms of the SEA Directive can be relied on directly in Scottish law[[125]](#footnote-126).  Modernisation of the planning system in Scotland was introduced through the Planning etc. (Scotland) Act 2006 and associated secondary legislation. This includes opportunities for local people to be more involved in the planning system and improvements designed to contribute to efficiency, effectiveness and sustainable economic development. More information can be found at (<http://www.scotland.gov.uk/Topics/Built-Environment/planning>). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Issues to consider include:are all plans and programmes relating to the environment covered by the enactment? How is “relating to the environment” defined, e.g. what level of connection with the environment is needed (e.g. only if the plan would have a significant impact or environmental component, or any connection to the environment would be enough? Does the Party define “relating to the environment” narrowly by reference to the authority responsible for the plan/programme).  The broader the interpretation given to “the preparation of plans and programmes relating to the environment” in the enactment, the higher the score.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 7(1), first sentence  Indicator 2 | 1. How well has “having provided the necessary information to the public” been enacted for the purpose of Article 7(1)?   The first sentence provides:  “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, **having provided the necessary information to the public.**”  **Researcher’s score: 3 – Effective enactment**  See above. | **Scoring guide**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Please consider that enactment is fully in accord where the legislation specifically addresses the information to be provided to the public and defines “necessary information” broadly. A narrow definition of necessary information should result in a score of 1. |
| Art. 7, second sentence | 1. How well the second sentence of Art. 7 been enacted?   The second sentence provides:  “Within this framework [i.e. the framework mentioned in the first sentence], article 6, paragraphs 3, 4 and 8, shall be applied.”  Article 6(3): “The public participation procedure shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.”  Article 6(4): “Each Party shall provide for early and effective public participation, when all options are open and effective public participation can take place.”  Article 6(8): “Each Party shall ensure that in the decision-making due account is taken of the outcome of the public participation.”  **Researcher’s score: 3 – Effective enactment**  Again, I cannot review every statutory instrument but, see, for example, the relevant provisions of the Environmental Assessment of Plans and Programmes Regulations 2004[[126]](#footnote-127) (Regulations 8, 9, 11 and 13) :  ***Restriction on adoption or submission of plans, programmes and modifications***  *8.—(1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted or submitted to the legislative procedure for the purpose of its adoption—*  *(a) where an environmental assessment is required in consequence of the determination or of a direction under regulation 10(3), before the requirements of paragraph (3) below have been met;*  *(b) in any other case, before the determination has been made under regulation 9(1).*  *(2) A plan or programme for which an environmental assessment is required by any provision of this Part shall not be adopted or submitted to the legislative procedure for the purpose of its adoption before—*  *(a) if it is a plan or programme co-financed by the European Community, the environmental assessment has been carried out as mentioned in regulation 7;*  *(b) in any other case, the requirements of paragraph (3) below, and such requirements of Part 3 as apply in relation to the plan or programme, have been met.*  *(3) The requirements of this paragraph are that account shall be taken of—*  *(a) the environmental report for the plan or programme;*  *(b) opinions expressed in response to the invitation referred to in regulation 13(2)(d);*  *(c) opinions expressed in response to action taken by the responsible authority in accordance with regulation 13(4); and*  *(d) the outcome of any consultations under regulation 14(4).*  ***Determinations of the responsible authority***  *9.—(1) The responsible authority shall determine whether or not a plan, programme or modification of a description referred to in—*  *(a) paragraph (4)(a) and (b) of regulation 5;*  *(b) paragraph (6)(a) of that regulation; or*  *(c) paragraph (6)(b) of that regulation,*  *is likely to have significant environmental effects.*  *(2) Before making a determination under paragraph (1) the responsible authority shall—*  *(a) take into account the criteria specified in Schedule 1 to these Regulations; and (b) consult the consultation bodies.*  *(3) Where the responsible authority determines that the plan, programme or modification is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination.*  ***Consultation procedures***  *13.—(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.*  *(2)* ***As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall—***  *(a) send a copy of those documents to each consultation body;*  *(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority’s opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive (“the public consultees”);*  *(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and*  *(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.*  ***(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents.***  *(4) The responsible authority shall keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge.*  *(5) Nothing in paragraph (2)(c) shall require the responsible authority to provide copies free of charge; but where a charge is made, it shall be of a reasonable amount.*  ***Publicity for determinations and directions***  *11.—(1) Within 28 days of making a determination under regulation 9(1), the responsible authority shall send to each consultation body—*  *(a) a copy of the determination; and*  *(b) where the responsible authority has determined that the plan or programme does not require an environmental assessment,* ***a statement of its reasons for the determination.***  *(2) The responsible authority shall—*  *(a) keep a copy of the determination, and any accompanying statement of reasons, available at its principal office for inspection by the public at all reasonable times and free of charge; and*  *(b) within 28 days of the making of the determination, take such steps as it considers appropriate to bring to the attention of the public—*  *(i) the title of the plan, programme or modification to which the determination relates;*  *(ii) that the responsible authority has determined that the plan, programme or*  *modification is or is not likely to have significant environmental effects (as the case may be) and, accordingly, that an environmental assessment is or is not required in respect of the plan, programme or modification; and*  *(iii) the address (which may include a website) at which a copy of the determination and any accompanying statement of reasons may be inspected or from which a copy may be obtained.* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 7, third sentence | 1. How well has the third sentence of Art. 7 been enacted?   The third sentence provides:  “The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.”  **Researcher’s score: 3 – Effective enactment**  See above with regard to the identification of consultation bodies and public consultees under Regulation 13 of The Environmental Assessment of Plans and Programmes Regulations 2004.  ***“Consultation procedures***  *13.—(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report (“the relevant documents”) shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.*  *(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall—*  *(a) send a copy of those documents to each consultation body;*  *(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority’s opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive (“the public consultees”)”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 7, fourth sentence | 1. How well has the fourth sentence of Art. 7 been enacted?   “To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.”  **Researcher’s score: 0**  While the UK Government applies Consultation Principles[[127]](#footnote-128) outlining what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation, there are no relevant enactments. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 7 legal indicators?

The legal indicators for Article 7 (first sentence) do not address the wording “within a transparent and fair framework”. Do you think an additional legal indicator should be created to address this? Or do you think that the indicators for Article 3(1) are sufficient to cover this (NB. Art. 3(1) says “clear, transparent and consistent framework” while Art. 7 says “transparent and fair framework”)?

### 

### Public participation concerning plans, programmes and policies relating to the environment – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 7  Indicator 1 | 1. In practice, are all plans and programmes relating to the environment subject to public participation during their preparation?   Article 7 provides:  “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.”  **Researcher’s score: 2 – Yes, in most cases**  For a general discussion on the case-law surrounding consultation, please see the answer to question 8(2) Practice Indicators.  In terms of specific case-law, in the Northern Irish case of *Seaport Investments Limited[[128]](#footnote-129)*, the court considered challenges to two plans on grounds of failure to comply with the SEA Directive. The judge held that the environmental report was inadequate, and that the timing of its preparation was such that there was no opportunity for the environmental report to inform the preparation of the plan.  The Northern Irish Court of Appeal referred the *Seaport* case to CJEU[[129]](#footnote-130). The CJEU () found the Northern Irish arrangements, whereby the Department of the Environment as responsible authority (the plan making authority) consulted an agency (now the Northern Ireland Environment Agency) which formed part of the same department, was compatible with Article 6(3). The Court also held that national authorities are not required to specify precisely periods for consultation; such periods can be laid down on a case by case basis.  In *Cala Homes v. Secretary of State[[130]](#footnote-131)*, the High Court held that revocation of a regional strategy amounts to a significant change and so will qualify as a modification of the relevant development plan, and as such will be subject to the requirements of the SEA Directive. | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = No, there are a significant number of cases where the public is given no possibility to participate during the preparation of a plan or programme relating to the environment.  0 = No, never, or rarely  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that in the most legal systems there are not clear definitions of plans, programmes or policies and this allows for public participation to be outmanoeuvred in some instances. This first indicator for Article 7 examines the very existence of the possibility of participation in the cases of the preparation of plans and programmes. Spatial plans should be considered plans ‘relating to the environment’ for these purposes. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * definitional elements in respect of plans, programs and policies, such as references to the author of the document (e.g. legislative or administrative bodies or both) (ref.4)situations that operate at the boundary between Article 6 and Article 7 Aarhus (ref.1) * the situation in respect of financial, investment etc. plans (ref.7) * the use of “ouster clauses” (legislative arrangements that exclude or limit court review of certain cases) to avoid public participation obligations (ref.2) * number of major plans that are in fact the subject of substantial public discussion (ref.3) * EU level environmental policy formulation and public participation in respect thereof (ref.5) * any differences in treatment between planning procedures based on legal provisions and ‘loser’ planning procedures (e.g. unregulated phases of planning behind the scenes with no public participation) (ref.10, ref.15)   Guidance on how to identify a plan or programme relating to the environment for the purposes of article 7 is provided in paragraphs 154 and 155 of the [Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters](https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf).  Please justify your score and explain the factors you considered. |
| Art. 7  Indicator 2 | 1. In practice, is the public able to prepare and participate effectively during the preparation of plans and programmes relating to the environment? In particular:   – is all necessary information provided to the public?  – is there early public participation when all options are open?  – are there reasonable timeframes that enable the public to prepare and participate effectively?  – is due account taken of the outcome of the public participation?  Article 7 provides:  “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.”  **Researcher’s score: 2 – Yes, in most cases**  In *Save Historic Newmarket Ltd v. Forest Heath DC[[131]](#footnote-132)*, the strategic environmental assessment which assessed a core strategy was held to be inadequate as it was not possible to discern from the report the reasons for rejecting alternatives.  Two cases have reached the Supreme Court where appellants have placed reliance on provisions in the SEA Directive - but in each case without success. The Supreme Court considered the meaning of modification of a plan or programme under the SEA Directive in *Walton v Scottish Ministers*. The appellant argued that the Scottish Ministers had modified a plan or programme when adopting the Fastlink as part of its preferred route and in adding a new objective to a transport strategy (the Modern Transport System). Lord Reed observed that the SEA Directive does not provide a definition of plan or programme, which is a concept of EU law and much wider than development plans in domestic law. Under reference to European case-law, Lord Reed concluded that the decision to construct the Fastlink did not alter the framework for future development consents of projects, but instead altered a particular project. The decision to incorporate the Fastlink did not modify the legal or administrative framework which had been set for future development consent of projects. The SEA Directive was not therefore applicable[[132]](#footnote-133). It was arguable that the adoption of the Modern Transport System was within the scope of Article 2(a) and 3(2)(a) of the SEA Directive but the Court did not require to decide the point. The Aarhus Convention Compliance Committee reached a similar conclusion when it considered the same argument.  More recently, the Supreme Court considered the application of the SEA Directive in *R (on the application of Buckinghamshire CC) v Secretary of State for Transport[[133]](#footnote-134)* where the appellant unsuccessfully argued that the Government's proposals for the HS2 high speed rail line published in a command paper (“the DNS”) should have been subject to a SEA. Although the Supreme Court held that the consultation leading to the DNS had not provided the public with sufficient information about the environmental impacts of the rail line and the reasonable alternatives to it so as to amount to a SEA, it concluded that the lack of information did not render the DNS unlawful. The DNS did not “*set the framework for development consent*”, which was a necessary precondition for the applicability of the Directive, and the Directive therefore did not apply. Whilst the DNS might be seen as helping to set the framework for a subsequent debate, and was intended to influence its result, it did not in any way constrain the decision making of Parliament which ultimately had the power to decide whether to grant consent under hybrid bill procedures, without being bound by “criteria” contained in earlier government statements[[134]](#footnote-135). The Supreme Court interpreted the European case-law as indicating that “setting the framework” means more than mere influence[[135]](#footnote-136).  Assuming the SEA Directive is applicable, the Supreme Court also considered in *Walton* what remedy might be available had an applicant been able to establish that there had been a failure to comply with its provisions. Lord Carnwath, with whom the others agreed, considered that if the Court was satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and that a challenge would fail under domestic law because the breach has caused no substantial prejudice, there was nothing in principle or authority to require the court to adopt a different approach merely because the procedural requirement arose from a European rather than a domestic source.  The Supreme Court’s approach was followed in another Scottish challenge, *McGinty v Scottish Ministers[[136]](#footnote-137)*, which reached the Inner House of the Court of Session. The petitioner argued under Articles 5 and 6 of the SEA Directive that he had not been provided with an effective opportunity to participate in the preparation of the Second National Planning Framework (NPF2) which designated Hunterston as a national development power station and transshipment hub. The Court recognised that the designation of Hunterston would be a material consideration in determination of a subsequent application for consent. The Hunterston project had emerged as a candidate for designation in a Supplementary Assessment and notice of opportunity to consult was provided by an e-newsletter sent to 7000 subscribers, and by notices in the Edinburgh Gazette. No notice was published in the local paper and the local community council, including the petitioner, was unaware of the right to comment.  The petitioner argued that the Ministers had failed to comply with requirements for publication of notices since the means used did not ensure that the contents of the notice were likely to come to the attention of the public affected, or likely to be affected by, or having an interest. The Edinburgh Gazette was not of wide publication and not readily available to, or even known by, members of the general public. However, the Inner House held that since the NPF2 was a national plan or programme and the Gazette a national paper designed to perform the function of disseminating official, regulatory and legal information, it was “circulating in the area” within the meaning of the 2005 Act. The court observed that Article 6(5) of the SEA Directive leaves the means whereby early and effective participation is given to the public, to be determined by Member States, and the court should be very slow to substitute its own view on what is a matter of public administration for that of the responsible authority[[137]](#footnote-138).  In the same case, the petitioner more successfully argued that the consultation documents did not obtain the requisite information, particularly consideration of reasonable alternatives, and did not therefore comply with the 2005 Act or Article 5 of the SEA Directive. However, whilst the Court held that there may have been some force in those submissions, it ultimately concluded that since the NPF2 had left the project open to the full rigour of a specific environmental assessment at a later stage, there would be less need for a comprehensive report at the initial stage, and the complaint was therefore technical rather than material. On remedy, the Court held that petitioner could not claim to be disenfranchised by any flaw in the consultation process since the Ministers had given an undertaking that all of the issues of concern to him would be considered by the reporter appointed to conduct any inquiry relative to development consent, when there would be a full environmental impact assessment. Through these means, the appellant was guaranteed the opportunity to put precisely the same objections to an inquiry as he would have made as part of an earlier consultation. In those circumstances, the Court concluded that it need not provide a remedy where the appellant had suffered no prejudice. | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = Only in a minority of cases  0 = No, never, or rarely  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  This second indicator for Article 7 examines the quality of public participation, namely if the members and organisations of the public receive notification about the start of the planning procedure in advance in due time, how the section of the public that is enabled to participate is selected, how due account is taken of the public’s opinion in the planning decision, etc.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * any plans made subject to referendum? (ref.6) * access to numerical data concerning public participation in strategic decision-making (ref.9, ref.12) * participation possibilities only (or greater) for handpicked parts of the public, such as a bias in favour of narrow interest groups when determining those who can participate (ref.18) * any differences in treatment between planning procedures based on legal provisions and ‘looser’ planning procedures (e.g. unregulated phases of planning behind the scenes with no public participation) (ref.10, ref.15) * possibility to participate in the preliminary (idea gathering, brainstorming etc.) phases of the general decision-making procedures (ref.11) * availability of draft plans on the Internet (ref.17) * public notice regarding the onset of the planning procedure; early participation (ref.14, ref.21, ref.23) * reasonable time given to the public to form its opinion (ref.20, ref.21, ref.22, ref.23) * genuine possibility of the public influencing the content of plans (ref.13) * public participation in the monitoring of the implementation of plans (such as progress reports) (ref.16) * form of public consultations (e.g. only electronic, or personal exchange, hearings etc.) (ref.19) * feedback from the evaluation of public comments (ref.19)   Please justify your score and explain the factors you considered. |
| Article 7  Indicator 3 | 1. In practice, are all policies relating to the environment subject to public participation during their preparation?   Article 7 provides:  “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.”  **Researcher’s score: 2 – Yes, in most cases**  In *R (Greenpeace) v Secretary of State for Trade and Industry[[138]](#footnote-139)* , Sullivan J drew on Article 7 of the Aarhus Convention. In finding that it would have been difficult to see how ‘a promise of anything less than “the fullest public consultation” would have been consistent with the Government's obligations under the Aarhus Convention’, the Convention became one of the groundings for the case. | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = No, there are a significant number of cases where the public is given no possibility to participate during the preparation of a policy relating to the environment.  0 = No, never, or rarely  Guidance on how to identify a policy relating to the environment for the purposes of article 7 is provided in paragraphs 156 of the [Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters](https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf) |
| Article 7  Indicator 4 | 1. In practice, are the opportunities for the public to participate in the preparation of policies relating to the environment effective? For example, do the opportunities meet the public participation requirements set out elsewhere in Article 7 (necessary information provided to the public, reasonable timeframes, early participation when all options are open, due account taken of the outcome of participation)?   **Researcher’s score: 2 - Yes, in most cases**  For a summary of the relevant case-law in England and Wales, please see the answer to Practice question 8(2). | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = No, there are a significant number of cases where the opportunities for the public to participate during the preparation of a policy relating to the environment are not effective.  0 = No, never, or rarely |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 7 practice indicators?

### (c) Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 8, first sentence | 1. How well has the first sentence of Art. 8 been enacted?   The first sentence provides:  “Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by  public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.”  **Researcher’s score: 0 – Has not been enacted at all**  The UK’s most recent Implementation Report to the Fifth Meeting of the Parties to the Aarhus Convention[[139]](#footnote-140) appears to confirm there are no relevant enactments in this respect. It states (see Paragraph 77): “*Public participation in the preparation of plans that affect the environment is current practice in the UK*.” | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 8(a) | 1. How well has Art. 8(a) been enacted?   Art. 8(a) provides:  “To this end [i.e. the end mentioned in the first sentence of Art. 8], the following steps should be taken:  (a) Time-frames sufficient for effective participation should be fixed;”  **Researcher’s score: 0 – Not enacted at all**  The UK’s most recent Implementation Report to the Fifth Meeting of the Parties to the Aarhus Convention[[140]](#footnote-141) appears to confirm there are no relevant enactments in this respect.  Consultation Principles for Government were introduced in July 2012 and revised in 2016[[141]](#footnote-142). The Principles outline what the public can expect from the Government when it runs formal, written consultation exercises on matters of policy or policy implementation. No timeframes are given. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 8(b) | 1. How well has Art. 8(b) been enacted?   Art. 8(b) provides:  “To this end [i.e. the end mentioned in the first sentence of Art. 8], the following steps should be taken:  (b) Draft rules should be published or otherwise made publicly available;”  **Researcher’s score: 0 – Has not been enacted**  The Government’s website confirms that some Bills are published in draft for consultation before introduction[[142]](#footnote-143). However, there would appear to be no enactment requiring consultation. This assessment is supported by the text of the Aarhus Convention Implementation Guide[[143]](#footnote-144), which states: “*In addition to publishing draft rules in an official government publication, the environment ministries in some countries, such as the Czech Republic, Georgia, Hungary, Latvia, Slovenia, Ukraine and the United Kingdom, have the practice of publishing draft laws on electronic networks, sometimes using their own facilities and sometimes taking advantage of NGO initiatives*.” (own emphasis added) | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 8(c) | 1. How well has Art. 8(c) been enacted?   Art. 8(c) provides:  “To this end [i.e. the end mentioned in the first sentence of Art. 8], the following steps should be taken:   1. The public should be given the opportunity to comment, directly or through representative consultative bodies.”   **Researcher’s score: 1 – Errors that are more than minor**  The UK’s most recent National Implementation Report to the Meeting of the Aarhus Convention states: “*Local government and other partners have a tradition of involving communities in decisions and services and there is a lot of good practice across the UK. The localism agenda means that government is committed to devolving decision-making down to the most appropriate level, which in turn means that local councils and communities have a greater mandate to work together to shape the communities and services locally that they want to see. The new community rights brought in through the Localism Act 2011 are key to this, providing for example, a right for a community group to challenge the way in which a service is delivered if they feel it could be done better* “. Thus, while some rights exist, they are patchy at best. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 8, final sentence | 1. How well has the final sentence of Art. 8 been enacted?   The final sentence provides:  “The result of the public participation shall be taken into account as far as possible.”  **Researcher’s score: 0 – Not enacted at all**  There would appear to be no statutory requirement to take the outcomes of public consultation into account when formulating a Bill. For example, the Cabinet Office’s Guide to Making Legislation[[144]](#footnote-145) (2015) states that, when instructing the Office of the Parliamentary Counsel to draft a Bill (page 60), the instructions: “ *… might mention the results of any consultation carried out into the establishment of the proposed licensing regime and any ministerial commitments to establish it. If the proposal to legislate is a response to recent case law this fact should be mentioned.”* | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 8 legal indicators?

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450239/Guide_to_Making_Legislation.pdf>

### 

### Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 8  Indicator 1 | 1. Are **all** draft executive regulations and other generally legally binding rules that may have a significant effect on the environment, subject to public participation?   Article 8 provides:  Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by  public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.  To this end, the following steps should be taken:  (a) Time-frames sufficient for effective participation should be fixed;  (b) Draft rules should be published or otherwise made publicly available;  (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.  The result of the public participation shall be taken into account as far as possible.  **Researcher’s score: 2 – Yes, in most cases**  The UK’s most recent Implementation Report to the Meeting of the Parties states, in relation to Article 8 of the Aarhus Convention that: “*Public participation in the preparation of plans that affect the environment is current practice in the UK.*  Some, but not all, draft Bills are issued for consultation before being formally introduced to Parliament – see: <http://www.parliament.uk/about/how/laws/draft/>  In some cases, there may be a legitimate expectation that the Government will consult the public because, for example:   * It has promised to do so (*R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); * Because it consulted in similar circumstances before (*R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [57b]); or * Because the public (or members of it) have been given a legitimate expectation that some benefit they enjoy would continue (such that it should not be taken away without them being given an opportunity to comment) (R v Devon County Council, ex p. Baker [1995] 1 All ER 73; Luton BC v Secretary of State for Education [2011] EWHC 217 (Admin) [83-91]). | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = No, there are a significant number of cases where the public is practically excluded from the procedure of preparing executive regulations and/or other generally applicable legally binding rules that may have a significant effect on the environment  0 = No, never, or rarely  Note: this includes all draft legislation/regulations at **all levels of government**, including local government and municipalities (including with respect to spatial plans where they are adopted by normative acts) that **may have a significant effect on the environment**.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Legislative decision-making performed or prepared by public authorities might take place at several levels of the State, including municipalities. Also, there may be several stages within one procedure. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * public participation in drafting secondary legislation (such as decrees of the Government or ministers, statutory instruments, etc.) (ref.15) * existence of regulatory impact assessment (ref.6) * public participation in respect of the drafting of local ordinances (ref.9)   Please justify your score and explain the factors you considered. |
| Art. 8  Indicator 2 | Do the public participation procedures on executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment, meet the requirements of Article 8, i.e.:   * Time-frames sufficient for effective participation; * Draft rules published or otherwise made publicly available; * The public has opportunity to comment, directly or through representative consultative bodies * Result of public participation is taken into account as far as possible   Article 8 provides:  Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.  To this end, the following steps should be taken:  (a) Time-frames sufficient for effective participation should be fixed;  (b) Draft rules should be published or otherwise made publicly available;  (c) The public should be given the opportunity to comment, directly or through representative consultative bodies.  The result of the public participation shall be taken into account as far as possible.  **Researcher’s score: 2 – Yes, in most cases**  As above, not all draft Bills are published for consultation. Where they are published, the timeframes for responding are flexible. The Government’s 2016 Consultation Principles[[145]](#footnote-146) state: “*Consultations should last for a proportionate amount of time. Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses*.”  The Principles also state: “*Publish any response on the same page on gov.uk as the original consultation, and ensure it is clear when the government has responded to the consultation. Explain the responses that have been received from consultees and how these have informed the policy. State how many responses have been received*.”  There is also a very large body of case-law on consultation. A summary of the position in England and Wales is as follows (taken from a paper by David Wolfe (as was) and Gwion Lewis (2011) Consultation and the Law, An Overview for Discussion - <http://www.publiclawproject.org.uk/data/resources/71/PLP_2011_Lewis_and_Wolfe_duty_to_consult.pdf> )  The basic rule is that, whether or not a public body was required to consult, if it does so, then it must[[146]](#footnote-147) comply with the following overarching obligations (unless detailed statutory rules supplant these)[[147]](#footnote-148):   * Consultation must be at a time when proposals are at a formative stage. * The proposer must give sufficient reasons for its proposals to allow consultees to understand them and respond to them properly. * Consulters must give sufficient time for responses to be made and Considered. * Responses must be conscientiously taken into account in finalising the decision[[148]](#footnote-149). * All of those are aspects of an overriding requirement for ‘fairness’[[149]](#footnote-150). The process must be substantively fair and have the appearance of fairness[[150]](#footnote-151).   **Supplementary principles**   * **Scope of consultation:** it is for the consulter to decide the issues on which it wants to consult[[151]](#footnote-152). * **The extent of consultation**: depends on all the circumstances[[152]](#footnote-153). But where the issue was a boundary change ‘persons who may be interested’ included the public as a whole[[153]](#footnote-154) It can be lawful to consult only representative bodies provided *the court* considers it fair to do so[[154]](#footnote-155). * **Formative stage**: all issues being consulted upon must be at a formative stage so is it no good consulting just on issues of timing and implementation where the principle has already been decided upon[[155]](#footnote-156). * **Phased or staged consultation**: there is no objection in principle to consulting/deciding in stages (e.g. issues of principle followed by issues of implementation[[156]](#footnote-157)) provided the stages are not so rigidly defined as to, in effect, preclude full consideration (and response in relation to) the issues in the round[[157]](#footnote-158). ‘The full package must be sufficiently identified as part of the final stage of publication, and there must be adequate time after publication of the final part of the package for the package to be considered as a whole and for representations to be made[[158]](#footnote-159)’. * **Explanation for the consultation**: The obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response[[159]](#footnote-160). The reasons given for what is proposed must include a candid explanation[[160]](#footnote-161) (indeed a true explanation![[161]](#footnote-162)) and an explanation of the factors or criteria which the consulter considers important to its decision-making[[162]](#footnote-163). There is not necessarily an obligation to state the disadvantages of a proposal[[163]](#footnote-164). Although there is no general obligation to disclose unpublished internal advice[[164]](#footnote-165) or representations from other consultees[[165]](#footnote-166), that remains subject to the overarching requirement to give sufficient reasons for consultees to be able to respond intelligently[[166]](#footnote-167), such that, where the decision was being informed by private representations, those representations needed to be made available to consultees. If the public are being consulted then the consultation document must be available to all, in a language which is simple and clear and not bedevilled with jargon[[167]](#footnote-168). It is not permissible to rely on ‘mediation by opinion makers’ for (eg) complex financial information[[168]](#footnote-169). It should be clear what is being consulted upon: where only ‘issues’ were raised, consultees were entitled to proceed on the basis those were the issues and not some underlying decision of principle: could they reasonably foresee that, following consideration of responses, the issue of principle would be decided[[169]](#footnote-170)? But note that an invitation also to provide “any general comments you may have” can lead to the inference that underlying issues are in play[[170]](#footnote-171). * **Information and documents to be provided**: The obligation to provide information to consultees can require the provision of significant amounts of information, and in a form which allows consultees properly to understand and make “meaningful and informed representations”[[171]](#footnote-172) on what is being consulted upon[[172]](#footnote-173). Where the decision-maker has access to important documents which are material to the determination whose contents the public would have a legitimate interest in knowing then those documents should be disclosed in the consultation process[[173]](#footnote-174). If fairness requires it then the consulter may be obliged to provide consultation responses from some consultees to others for the latter’s comment[[174]](#footnote-175). Information can be supplemented during the process, but the less information that is provided at the outset, the more likely it is to be unfair to provide substantial information later in the process[[175]](#footnote-176). * **Consultation on a single option**: A public body can consult on a single, preferred, option but that is unlikely to be lawful unless other options are identified and the preferred option explained in a way which allows consultees properly to argue in favour of alternatives[[176]](#footnote-177). The consulter should not prematurely preclude options from consideration[[177]](#footnote-178). * **Changes mid process/new options**: If the public body fundamentally changes[[178]](#footnote-179) its proposal mid-process or is minded to proceed in a way which was not part of the proposal consulted upon, then basic fairness may require it to re-consult or consult afresh on the changed proposal[[179]](#footnote-180). Depending on the circumstances, further consultation may be required on matters and issues that the initial consultation may have thrown up[[180]](#footnote-181). * **Considering the responses**: The person or people actually making the decision do(es) not need to read every consultation response in order to have been taken conscientiously to have taken them into account. They are entitled to rely on others to summarise responses[[181]](#footnote-182). But that process must be a fair and neutral one and not omit significant material[[182]](#footnote-183) points. Indeed, it “*includes a positive duty to provide sufficient information and guidance to enable members to reach a decision...”[[183]](#footnote-184).* Once consultation has completed a decision-maker is not required to disclose his own thought processes for criticism before reaching a decision but if, in the course of decision-making the consulter becomes aware of a new factor of potential significance, fairness may require that concerned parties be given an opportunity to comment[[184]](#footnote-185). | **Scoring Guide:**  3 = Yes, in all or almost all cases  2 = Yes, in most cases  1 = No, there are a significant number of cases when the public is practically excluded from the procedure of preparing executive regulations and/or other generally applicable legally binding rules that may have a significant effect on the environment  0 = No, never, or rarely  Note: this includes all draft legislation/regulations at **all levels of government**, including local government and municipalities that **may have a significant effect on the environment**.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  The quality and effectiveness of public participation in the preparation of legislative materials by public authorities depend on a line of factors, familiar from Art. 6. Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * accessibility of legislative drafts (ref.1, ref.3) * NGOs’ or expert organisations’ role as facilitators (ref.1, ref.13, ref.14) * direct consultations with advisory boards, commissions, working groups with NGO participation, accredited organisations (ref.2, ref.3, ref.7) * early participation and participation in the preliminary phases of drafting (ref.5, ref.11) * sufficient time allowed to the public for forming its opinion? (ref.4, ref.8, ref.16) * existence of regulatory impact assessment (ref.6) * “e-democracy” interactive participation modes on the Internet (ref.10, ref.15) * fairness of the participation procedure (ref.11, ref.12, ref.14, ref.17, ref.18) * significant modification of drafts after public participation (only or not only because of the participation process) (ref.4)   Please justify your score and explain the factors you considered. |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 8 practice indicators?

## IV. Access to justice pillar

### Access to justice – Legal indicators

| **Aarhus provision** | **Legal indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 9(1)  First para | 1. How well has the first paragraph of Art. 9(1) been enacted?   The first paragraph provides:  “1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of  law or another independent and impartial body established by law.”  **Researcher’s score: 3 – Effective enactment**  Article 9(1) is technically contingent on the obligations under pillar I of the Convention and Directive 2003/4/EC on public access to environmental information. The Directive provides for internal reconsideration of the acts or omissions of the public authority, and this requirement has been adopted in the EIRs 2004. The role of the Information Commissioner provides the relevant facility for a review by an independent and impartial body established by law. The Information Commissioner examines complaints from members of the public who feel that their request for information has not been dealt with properly by the public authority. The First-tier Tribunal (Information Rights), Upper Tribunal and, ultimately, the Supreme Court give further and higher levels of appeal. This process is set out in more detail below.  If a public body refuses to disclose information, the applicant can request the authority to conduct an internal review under Regulation 11 of the EIRs 2004: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/11/made>  There is a legal requirement under the EIRs that internal reviews must be carried out as soon as possible and at most within 40 working days. The authority cannot charge for carrying out an internal review.  If the public body upholds its decision to withhold information, the applicant can submit a complaint to the Information Commissioner’s Office (ICO). In cases where a clear and serious breach of the legislation has taken place, the ICO will take direct action on the specific concern raised. If the ICO considers that there has been a serious failure to comply with the law, it will provide advice and instruction to help ensure the organisation confirm. It may also take enforcement action, and has the capacity to serve serving monetary penalties of up to £500,000.  Applicants can appeal an ICO decision concerning a freedom of information request or an ICO fine or enforcement notice for breaking the rules around freedom of information. The case will be dealt with by an independent tribunal in the General Regulatory Chamber. The applicant has 28 days to appeal after the ICO issues its decision.  On appealing to the tribunal, the regulator has 28 days to respond to the appeal. The regulator submits a response and the applicant can respond with more evidence or arguments within the next 14 days. The appeal can either be decided using the documents in the case or at a hearing. The hearing may be attended by a judge (sometimes with 2 other tribunal members) and a representative from the regulator or the government department  The tribunal will issue a decision as soon as it can after the hearing and the appellant usually receives a copy of the full written decision within 4 weeks of the hearing.  Similar provisions with regard to internal review exist in Scotland under the Environmental Information (Scotland) Regulations 2004. Regulation 16 covers internal review by public bodies: <http://www.legislation.gov.uk/ssi/2004/520/regulation/16/made>  There is a right of appeal to the Scottish Information Commissioner, who has legal powers to investigate the handling of information requests by Scottish public authorities. Where investigations find that authorities have acted unlawfully, the Commissioner can order release of information and enforce decisions through the courts. If the complainant is unhappy with the SIC’s decision, it is possible to pursue an appeal to the Court of Session on a point of law (e.g. the Commissioner adopted the wrong definition of a legal term, or misinterpreted his powers). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(1)  Second para | 1. How well has the second paragraph of Art. 9(1) been enacted?   The second paragraph provides:  “In the circumstances where a Party provides for such a review by a court of law, it shall 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.”  **Researcher’s score: 3 – Effective enactment**  I assume the Information Commissioner’s Office (and the SCI in Scotland) fulfils this purpose: <https://ico.org.uk/> and <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx>  (see above). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(1)  Third para, 1st sentence | 1. How well has the first sentence of the third paragraph of Art. 9(1) been enacted?   The first sentence of the third paragraph provides:  “Final decisions under this paragraph 1 shall be binding on the public authority holding the information.”  **Researcher’s score: 3 – Effective enactment**  The ICO has a number of powers to ensure public bodies comply with the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. They include non-criminal enforcement and assessments of good practice. Specifically, where authorities or public sector bodies repeatedly or seriously fail to meet the requirements of the legislation, or conform to the associated codes of practice, the ICO can take the following action:   * conduct assessments to check organisations are complying with the Act; * serve information notices requiring organisations to provide the ICO with specified information within a certain time period; * issue undertakings committing an authority to a particular course of action to improve its compliance; * serve enforcement notices where there has been a breach of the Freedom of Information Act or Re-use of Public Sector Information Regulations, requiring organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law; * issue recommendations specifying steps the organisation should take to comply; * issue decision notices detailing the outcome of the ICO’s investigation to publically highlight particular issues with an organisation’s handling of a specific request; * prosecute those who commit criminal offences under the Act; and * report to Parliament on freedom of information issues of concern.   The First–tier Tribunal (Information Rights) specifically hears appeals of enforcement notices, decision notices and information notices issued by the Information Commissioner. Decisions issued by the Information Rights Tribunal are binding on the parties. In Scotland, the judgments of the Court of Session are also binding on the parties. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(1)  Third para, 2nd sentence | 1. How well has the second sentence of the third paragraph of Art. 9(1) been enacted?   The second sentence of the third paragraph provides:  “Reasons shall be stated in writing, at least where access to information is refused under this paragraph [i.e. Art. 9(1)].”  **Researcher’s score: 3 – Effective Enactment**  Decisions of the Information Rights Tribunal are reasoned and publicly available: <http://informationrights.decisions.tribunals.gov.uk//Public/search.aspx>  Judgments of the Scottish Outer Court of Session are reasoned and publicly available: <https://www.scotcourts.gov.uk/search-judgments/court-of-session> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(2)  First para | 1. How well has the first paragraph of Art. 9(2) been enacted?   The first paragraph provides:  “2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned  (a) Having a sufficient interest  or, alternatively,   1. Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below [i.e. Art. 9(3)], of other relevant provisions of this Convention.”   **Researcher’s score: 1 – Ambiguous enactment**  I have taken this question to examine the extent to which Judicial Review procedures provide claimants with the possibility of challenging both the procedural and substantive legality of decisions, acts or omissions.  Part 54(1) of the Civil Procedure Rules set out the scope of Judicial Review in England and Wales:  *“(1) This Section of this Part contains rules about judicial review.*  *(2) In this Section –*  *(a) a ‘claim for judicial review’ means a claim to review the lawfulness of –*  *(i) an enactment; or*  *(ii) a decision, action or failure to act in relation to the exercise of a public function*.”  Generally, it does not matter if the judge, faced with the same decision, would have decided the merits of the case differently – the point of JR is the ‘supervision’ of administrative decision making[[185]](#footnote-186).  The absence of legislative provisions specifying that an application for JR can be brought on the basis of procedural or substantive illegality gives rise to important limitations in the effectiveness of JR. For a discussion on the relevant case-law, please see the answer to question 6 in the practice indicators section. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Please note that the breadth of enactment of “sufficient interest” and “impairment of a right” is considered in the next indicator.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(2)  Second para | 1. How well has the second paragraph of Art. 9(2) been enacted?   The second paragraph provides:  “What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above [i.e. Art. 9(2)(a)]. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above [i.e. Art. 9(2)(b)].”  **Researcher’s score: 3 – Effective enactment**  Section 31(3) of the Supreme Court Act 1981 provides: “*No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates*” (see: <http://www.legislation.gov.uk/ukpga/1981/54/pdfs/ukpga_19810054_en.pdf>)  In determining whether a claimant has sufficient interest (or standing), the High Court considers the merits of the application, the nature of the claimant’s interest and the circumstances of the case. While these rules are rules of court and it is for the courts to interpret them, the question of “standing” is not an act of discretion but an assessment of fact and law. There is generally a liberal approach to standing in the UK (see discussion later under practice).  Section 31(3) of the SCA 1981 applies to all applications for JR in England and Wales. There are no separate requirements in terms of standing for environmental cases or for cases brought by environmental NGOs. There is no legislative requirement as to the formal structure or standing of an NGO or community group relevant to the question of standing.  Local residents can form a group to challenge a decision and the courts do not require the body to have a distinct legal entity. Such groups may be unincorporated or incorporated.  The standing principles in Northern Ireland are the same as in England and Wales, with the “sufficient interest” test appearing in the relevant court rules and the same liberal approach in modern case law (see later). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Please consider in scoring this indicator the breadth of any enacted definition of “sufficient interest” and “impairment of a right”. The broader the definitions, the higher the score (and vice versa).  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(3), Indicator 1 | 1. How well has Art. 9(3) been enacted?   Art. 9(3) provides:  “3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above [i.e. Art. 9(1) and (2)], each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”  **Researcher’s score: 3 – Effective enactment**  With the exception of the costs regime for environmental cases, there are no special provisions or requirements relating to applications for Judicial Review concerning environmental matters: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.1>  With respect to the environmental costs regime, Rule 45.43 limits the recoverable costs in Aarhus Convention claims as follows[[186]](#footnote-187):  “*Limit on costs recoverable from a party in an Aarhus Convention claim: Rule 45.43*  *5.1 Where a claimant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is –*  *(a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person;*  *(b) in all other cases, £10,000.*   * 1. *Where a defendant is ordered to pay costs, the amount specified for the purpose of rule 45.43(1) is £35,000.”*   CPR 45.41 currently defines an Aarhus Convention claim very broadly as “*a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject[[187]](#footnote-188)*.”  As a result, JR applications concerning environmental matters (including all planning matters) are currently eligible for costs protection. This even includes cases in which the claimant seeks to shoot wild birds (see *McMorn (R, on the application of) v Natural England* [2015] EWHC 3297 (Admin): <http://www.bailii.org/ew/cases/EWHC/Admin/2015/3297.html>  Note that there are also provisions making it difficult for defendants to challenge the status of a claim as an Aarhus Convention claim and, as a result, there are currently less than ten challenges to such claims per year[[188]](#footnote-189). Please note that there are proposals to change the award of costs to the status of a claim as an Aarhus Convention claim to the standard basis – see: <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  Please consider, *inter alia*, how “national law relating to the environment” has been enacted in the legal framework. Enactment will be fully in accord where the legal framework covers any national law relating to the environment (including e.g. energy, transport, infrastructure etc). An enactment that defines “national law relating to the environment” narrowly (e.g. as covering just “environmental law” narrowly conceived) should be considered as containing errors that are more than minor.  Please note that the wording “where they meet the criteria, if any, laid down in its national law” is the subject of a separate indicator below, so should not be assessed for the purpose of this indicator.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(3)  Indicator 2 | 1. The criteria, if any, enacted in national law which members of the public must meet as a precondition for the purpose of Article 9(3) provide for   Art. 9(3) provides:  “3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above [i.e. Art. 9(1) and (2)], each Party shall ensure that, **where they meet the criteria, if any, laid down in its national law,** members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”  **Researcher’s score: 2**  There are no statutory criteria restricting access to Judicial Review. While it is helpful for claimants to have participated in the decision-making process leading up to the administrative decision, a failure to do so will not ordinarily represent a bar to proceeding.  The position with regard to statutory review is more restrictive. For a critique of the position, please see the answer to question 4 (Article 9(2) in the Practice indicators section. | **Scoring Guide:**  3 = Very broad access to justice (e.g. in the sense that there are no enacted criteria restricting access, or the enacted rules on standing and prior participation are such as to provide for very broad access to justice)  2 = Broad access to justice (e.g. in the sense that the enacted rules on standing and prior participation are such as to provide for broad access to justice)  1 = Restrictive access to justice (e.g. in the sense that the enacted rules on standing and prior participation are such as to provide for only restrictive access to justice)  0 = Very restrictive or non-existent access to justice (e.g. in the sense that the enacted rules on standing and prior participation are such as to provide for very restrictive or non-existent access to justice)  By “prior participation” we are referring to any rules which provide for access to justice only for those who have participated in the earlier decision-making/administrative process, or which require an argument to have been raised by a member of the public during an earlier stage in the decision-making process if it is to be raised subsequently by that member of the public. This would qualify as a major restriction in terms of access to justice, because NGOs and local communities are typically not in the position to participate in numerous first instance procedures just for the sake of preserving the right to potentially pursue a legal remedy later. |
| Art. 9(4)  1st sentence  Indicator 1 | 1. How well has the first sentence of Art. 9(4) been enacted insofar as it relates to adequate and effective remedies, including injunctive relief?   The first sentence provides:  “In addition and without prejudice to paragraph 1 above, **the procedures referred to in paragraphs 1, 2 and 3 above [i.e. Art. 9(1), (2) and (3)] shall provide adequate and effective remedies, including injunctive relief as appropriate**, and be fair, equitable, timely and not prohibitively expensive.”  **Researcher’s score: 1 - Incomplete enactment**  The lodging of an application, or the granting of permission, does not have an automatic suspensive effect in the UK.  In April 2011, the Aarhus Compliance Committee found that the high costs involved in pursuing injunctive relief effectively amount to prohibitively expensive procedures that are in non-compliance with Article 9(4) of the Aarhus Convention[[189]](#footnote-190). Similarly, in *Commission v UK*, the CJEU held that the requirement that proceedings not be prohibitively expensive applies also to the financial costs resulting from measures which the national court might impose as a condition for the grant of interim measures in cases falling within Articles 3(7) and 4(4) of the EC Public Participation Directive[[190]](#footnote-191) and that “*the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive*”.  In light of the CJEU judgment, in 2013 Practice Direction 25A (Interim Injunctions) was duly amended as follows:  “*5.1B*  *(1) If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking –*  *(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and*  *(b) make such directions as are necessary to ensure that the case is heard promptly.*  *(2) ‘Aarhus Convention claim’ has the same meaning as in rule 45.41(2).”*  Whilst seemingly an improvement, the fact that a claimant may still have to provide the court with a cross-undertaking in damages remains a dissuasive factor. This is demonstrated by the fact that very few applications for interim relief have been made in England and Wales following the introduction of this new provision in the CPR[[191]](#footnote-192) and no applications for interim (injunctive) relief were made in Northern Ireland between 1st April 2013 and 31st December 2015[[192]](#footnote-193).  Finally, please also note that the Ministry of Justice has consulted the public on amending the rules covering injunctive relief which, if enacted, would reduce the score still further[[193]](#footnote-194). See WCL’s response here (pages 13-15): <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf>  Similar proposals have also been consulted upon in Northern Ireland – see Northern Ireland Environment Link’s response here: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(4)  1st sentence  Indicator 2 | 1. How well has the first sentence of Art. 9(4) been enacted insofar as it relates to fair and equitable procedures?   The first sentence provides:  “In addition and without prejudice to paragraph 1 above, **the procedures referred to in paragraphs 1, 2 and 3 above [i.e. Art. 9(1), (2) and (3)] shall** provide adequate and effective remedies, including injunctive relief as appropriate, and **be fair, equitable, timely and not prohibitively expensive**.”  **Researcher’s score: 1 – Contradictory enactment**  I have awarded the UK a lower score on the basis that the introduction of shortened time limits for bringing an application for JR in some cases is rendering the system unfair for claimants.  As of July 2013, the requirement for proceedings to be issued “promptly” no longer applies to JRs relating to decisions under planning legislation. Applications concerning decisions made under the Planning Acts must be brought within six weeks of the date of issue of the Decision Notice in England and Wales to align them with those for statutory planning appeals. The time limit for bringing a JR of a procurement decision was shortened to thirty days at the same time (see Rule 54.5: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.1>  Moreover, there is now a time limit of three months for JR applications in Scotland where previously no deadline existed. Concerns have been raised about both of these issues with the Aarhus Convention Compliance Committee in the context of the UK’s implementation of Decision V/9n: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9n_United_Kingdom/frObserver/frObserver_CAJE_V9n_comments_on_Party_concerned_s_second_progress_report_17.12.2015.pdf>  NGOs report that the six week time limit in England and Wales is preventing individuals and groups from challenging planning decisions. The effect of this time limit is that compliance with the Pre-Action Protocol (PAP) within the timeframe is often impossible (as shown by the fact that there is no longer an obligation to comply with it). As such, claimants will often be required to file a claim without knowing the basis on which the claim will be defended, and therefore the strength of their claim. The reality is that if a community group is not already formed, comprehensively organised, sufficiently funded, fully engaged in the process leading up to the relevant decision and already in touch with lawyers - then it is unlikely to be able to mount a legal challenge.  The thirty day time limit is exceptionally challenging. In one case concerning the legality of the 20km Norwich Northern Distributor Road (NNDR), the claimant was unable to comply with the PAP procedure because of the thirty day time limit for lodging proceedings. The defendant immediately conceded that it had acted unlawfully and the decision to approve the road scheme was quashed by the High Court. However, the defendant then challenged the quantum of costs submitted by the claimant on the basis that it had not complied with the PAP. In our view, it would be far preferable to extend the deadline so that the PAP procedure could be fully complied with and preventing claimants from having to issue proceedings, which may otherwise not have been progressed, pre-emptively.  For the now rare cases in which public funding may be available, the problem above is compounded as claimants are in the difficult position of having to lodge proceedings pre-emptively in order to meet the statutory limit without knowing whether their application for public funding will be agreed.  The leading environmental practitioner in Northern Ireland confirms that these concerns are also echoed there.  Finally, I would argue that the imposition of a cross-cap of £35,000 in CPR 45.43 is unfair and contrary to the letter and spirit of the Aarhus Convention. There is no basis for such a measure in the Aarhus Convention - the ACCC has confirmed that the principles of prohibitive expense and fairness apply to the claimant (not the defendant public body). The effect of the cross-cap is that claimant lawyers are unable to recover their costs in complex environmental cases on winning cases (see the Northern Irish case study under Article 9(4) and prohibitive expense below). | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(4)  1st sentence  Indicator 3 | 1. How well has the first sentence of Art. 9(4) been enacted insofar as it relates to timely procedures?   The first sentence provides:  “In addition and without prejudice to paragraph 1 above, **the procedures referred to in paragraphs 1, 2 and 3 above [i.e. Art. 9(1), (2) and (3)] shall** provide adequate and effective remedies, including injunctive relief as appropriate, and **be** fair, equitable, **timely** and not prohibitively expensive.”  **Researcher’s score: 2 – Effective enactment**  Following widespread concerns about the length of time it was taking for JRs to be determined, the Government established a separate Planning Court as part of the Administrative Court to deal with all JRs and statutory challenges involving planning matters in accordance with Civil Procedure Rule 54.21 and Practice Direction 54E[[194]](#footnote-195). New, rigorous time limits are now applied to planning cases and any planning challenge can be expedited if the judge considers it necessary to deal with the case justly:   * applications for permission to apply for JR must be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service; * oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal; * applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue; * substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and * JRs must be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14.     In practice, however, these time limits are not always complied with (see the question on the practice indicator, below).  In terms of cases generally, the Ministry of Justice reports the mean time taken from lodging a case to the permission decision stage has remained relatively stable between 2006-2013 where the number was 118 and 126 days respectively (reaching a low of 89 in 2008 and 2010); prior to this, the number was stable at approximately 65 days. For those cases lodged in 2015 classed as closed (88% of cases lodged), the mean time taken has reduced back to pre-2006 levels, at 65 days. This may be driven by the reduced caseload, due to most of the Immigration and Asylum cases moving to the UTIAC.  The mean time taken from lodging a case to the oral renewal stage decision has fluctuated over the years. From 2000-2004, the average time was 130 days. This increased rapidly, up to a peak of 267 days in 2007. The figure then fell sharply to 180 days in 2008 before rising to an average of 229 days from 2009 to 2013. For those cases lodged in 2015 classed as closed (88% of cases lodged), the number has fallen to 138 days.  The mean time taken from lodging a case to the final hearing decision showed a similar pattern; 205 days in 2000 peaking to 425 days in 2006 and fluctuating since then. The 2013 figure stood at 374, while the 2014 figure fell considerably to 254 days. For the 88% of cases lodged in 2015 classed as closed, the mean timeliness has fallen to 209 days.  Civil Justice Statistics Quarterly, England and Wales, April to June 2016:  <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/549424/civil-justice-statistics-april-june-2016.pdf> | **Scoring guide**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(4)  1st sentence  Indicator 4 | 1. How well has the first sentence of Art. 9(4) been enacted insofar as it relates to ‘not prohibitively expensive’ procedures?   The first sentence provides:  “In addition and without prejudice to paragraph 1 above, **the procedures referred to in paragraphs 1, 2 and 3 above [i.e. Art. 9(1), (2) and (3)] shall** provide adequate and effective remedies, including injunctive relief as appropriate, and **be** fair, equitable,timelyand **not prohibitively expensive**.”  **Researcher’s Score: 1 – Incomplete and Incorrect enactment**  **(please also note there are adverse proposals to amend the environmental costs regime currently under consideration – these are discussed below)**  The extraordinarily high cost of pursuing JR in the UK has generated significant debate in the last decade, ultimately forcing the devolved administrations to introduce separate costs regimes for environmental JRs in 2013[[195]](#footnote-196). These regimes now cap the liability of unsuccessful claimants for the costs of the defendant public body in Judicial Review to pre-determined, quantifiable amounts and make special provision for interim relief (see below). The introduction of the new costs regimes has undoubtedly improved access to environmental justice. However, it has a number of imperfections (see below) and both recent changes and proposed amendments serve to constrain advancements in this context.  **Legal costs**  Costs can typically include lawyers’ fees, witness and expert fees, court fees, travel, copying and VAT.  The court fees do not vary according to the value of the case (i.e. the German civil law system incorporating ‘Streitwert’ does not apply). However, the court fees for JR in England and Wales have doubled since 2014. A fee of £140 (previously £60) is payable when a claimant lodges an application for permission to apply for JR at the High Court. A further £700 (previously £215) is payable if permission is granted and the claimant wishes to pursue the claim[[196]](#footnote-197). If permission is refused on the papers, there is a £350 fee on request to reconsider at a hearing a decision on permission and a further £350 payable if permission is granted (making a similar total of £840 payable).  The cost of applying for permission to appeal to the Supreme Court was increased in 2011 from £800 to £1000[[197]](#footnote-198) and the current cost of filing a notice of appeal is £1600. If permission is granted, there is a charge of £800 to proceed and £4280 to file a statement of facts and issues, making the court fees alone for the Supreme Court total in excess of £6,000.  **Costs – the general rule**  The general principle in the UK is that “costs follow the event” (i.e. the unsuccessful party pays the costs of the successful party). However, following judgments of the CJEU in *Commission v United Kingdom*[[198]](#footnote-199) and *Edwards v Environment Agency*[[199]](#footnote-200), the Ministry of Justice introduced special costs rules for JRs concerning environmental matters (“Aarhus Convention claims”), which took effect in England and Wales[[200]](#footnote-201) on 1st April 2013.  Civil Procedure Rule 45.41 (2) defines an Aarhus Convention claim as: “*a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the … [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject*”. The regime in England and Wales currently excludes cases brought by way of statutory review (unlike Northern Ireland (see below) although current proposals may bring statutory reviews falling under the ambit of the EC Public Participation scheme within the ambit of the Aarhus costs rules.  Practice Direction 45[[201]](#footnote-202) sets limits on the costs recoverable from a party in an Aarhus Convention claim in England and Wales. The cap on the costs recoverable from an unsuccessful claimant is £5,000 in respect of an individual and £10,000 in all other cases. However, PD45 also limits the costs that can be recoverable by a successful claimant to £35,000 (the “cross-cap”).  Where the claimant asserts the claim is an Aarhus Convention claim, these figures apply unless the defendant challenges that fact and the court upholds the challenge. Where the court does not uphold the challenge, it will normally order the defendant to pay the claimant’s costs of defending the claim on an indemnity basis. This has the effect of generally dissuading defendants from challenging the status of the claim (although, again, note that current proposals would change the award of costs from an indemnity basis to a standard basis, thus making it less onerous for defendants to challenge the status of the claim).  The UK’s First Progress Report to the Aarhus Convention Compliance Committee in respect of Decision V/9n[[202]](#footnote-203) confirmed the Government undertook a cross-departmental exercise to review the costs regime for cases under the Aarhus Convention in late 2013. Also, the CJEU’s judgment in the case of *Edwards[[203]](#footnote-204)* was given shortly after the CPR revisions came into force.  The Supreme Court asked the CJEU if the question whether the cost of litigation is or is not ‘prohibitively expensive’ within the meaning of article 9(4) of the Convention and the Public Participation Directive should be decided on an objective basis (e.g. the ability of an ‘ordinary’ member of the public to meet the potential liability for costs), a subjective basis (by reference to the means of the particular claimant) or a combination of these. The CJEU rejected the necessity of a purely objective approach, finding that a court carrying out this assessment “*cannot act solely on the basis of the claimant’s financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime*”.  Alongside the need to ensure that the costs of proceedings is not “objectively unreasonable”, the CJEU acknowledged the need to make a subjective assessment of the situation of the parties. The Supreme Court applied these principles to the *Edwards* case when the reference returned from the CJEU. Lord Carnwath SCJ gave guidance on the principles as follows:  “*(i) A reasonable prospect of success Lack of a reasonable prospect of success in the claim may, it seems, be a reason for allowing the respondents to recover a higher proportion of their costs. The fact that 'frivolity' is mentioned separately (see below), suggests that something more demanding is envisaged than, for example, the threshold test of reasonable arguability.*  *ii) The importance of what is at stake for the claimant As indicated by Advocate General Kokott, this is likely to be a factor increasing the proportion of costs fairly recoverable. As she said, a person with 'extensive individual economic interests' at stake in the proceedings may reasonably be expected to bear higher risks in terms of costs.*  *iii) The importance of what is at stake for the protection of the environment Conversely, and again following the Advocate General's approach, this is likely to be a factor reducing the proportion of costs recoverable, or eliminating recovery altogether. As she said, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest.*  *iv) The complexity of the relevant law and procedure This factor is not further explained. Its relevance seems to be that a complex case is likely to require higher expenditure by the respondents, and thus, objectively, to justify a higher award of costs. Although mention is only made of complexity of law or procedure, the same presumably should apply to technical or factual complexity.*  *v) The potentially frivolous nature of the claim at its various stages The respondents should not have to bear the costs of meeting a frivolous claim. In domestic judicial review procedures, whether at first instance or on appeal, this issue is likely to be resolved in favour of the claimant by the grant of permission.”*  The Supreme Court also found that the factors affecting the judgment of what is subjectively or objectively reasonable may be changed on appeal and that the figure of £25,000, claimed by the respondents, to be “*neither subjectively nor objectively excessive*”.  It would appear that the judgment in *Edwards* and the Government review formed the basis of proposals to amend the costs regime for environmental cases consulted upon in Autumn 2015 (see later).  Even before these proposals, there was widespread concern amongst environmental NGOs that the adverse caps of £5,000 and £10,000 were too high, particularly for individual claimants. The CJEU judgments in *Commission v UK*[[204]](#footnote-205) and *Edwards*[[205]](#footnote-206) confirm that the figures of £5,000 and £10,000 must be “not prohibitively expensive” for claimants on both an objective and subjective basis. Similarly, it has been noted that the cross-cap of £35,000 is unfair and contrary to the letter and spirit of the Aarhus Convention. There is no basis for such a measure in the Aarhus Convention – the ACCC has confirmed prohibitive expense applies to the claimant (not the defendant public body) and, as such, I would argue that provision for a cross-cap should be removed from the CPR.  **Appeal costs**  There are no special provisions covering the costs of appeals in Aarhus Convention claims. Civil Procedure Rule 52.9A makes general provision in relation to the costs of an appeal:  *(1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.*  *(2) In making such an order the court will have regard to –*  *(a) the means of both parties;*  *(b) all the circumstances of the case; and*  *(c) the need to facilitate access to justice.*  *(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).*  *(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.*  Thus, while a claimant at first instance can ascertain their adverse costs liability in advance of lodging an application, an appellant has no prior certainty.  **Exclusion of statutory appeals**  The costs regimes for Aarhus Convention claims introduced in 2013 only apply to applications for JR. Civil Procedure Rule 45.41 (2) defines an Aarhus Convention claim as: “*a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the … [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject*”.  Thus, appeals against statutory bodies (such as appeals under sections 288 of the Town and Country Planning Act 1990) are not covered. This shortfall (which contrasts with the position in Northern Ireland) was highlighted in the case of *Venn*[[206]](#footnote-207), in which Lord Justice Sullivan noted that the availability of Protective Costs Orders for environmental cases falling within the Aarhus Convention had been deliberately limited to JRs and did not extend to statutory appeals or applications.  **Protected Costs Orders (PCOs)**  In private law cases (e.g. nuisance proceedings), claimants must apply to the court for a Protected Costs Order (PCO). A PCO is an order of the court that the claimant is not liable to pay the costs of a successful defendant or that his liability to pay will be limited to a particular amount.  The decision to grant a PCO is one of the discretion of the courts, and until recently they were fairly rare. In the context of JR proceedings, they were given a significant boost by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*[[207]](#footnote-208) (“*Corner House*”). In *Corner House*, the Court of Appeal held that a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:  (a) The issues are of general public importance;  (b) The public interest requires that those issues should be resolved;  (c) The claimant has no private interest in the outcome of the case;  (d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and  (e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.  The court also made it clear that if the lawyers acting for the claimant were acting *pro bono* this would be likely to enhance the merits of the application for a PCO. Shortly afterwards, in *McArthur v Lord Advocate*[[208]](#footnote-209), the Scottish Court of Session recognised its competency to grant Protective Expenses Orders (PEOs), with similar guidelines to those set out in Corner House, above.  However, *Corner House* was not an environmental case and was not driven by Aarhus conditions concerning the principle of “not prohibitively expensive”. Some of the limitations imposed by the Court of Appeal were problematic in practice – for example, in *Berkeley[[209]](#footnote-210),* Mr Justice Underhill refused an application for a PCO on the basis that the issues raised, despite involving a large development in a prominent local site, was not one of general public importance. Moreover, it was clear that the text of “no private interest” is not one that appears in the Aarhus access to justice provision, nor the EU Directives replicating them.  In 2010, the Court of Appeal in *Garner* recognized that the *Corner House* limitations could not apply where EU access to justice provisions applied and that they must be modified, "*insofar as it is necessary to secure compliance with the directive*". Essentially the tests of general public importance and no private interest no longer applied, at least in cases where the EU Directive was involved[[210]](#footnote-211).  The principles established in *Garner* have now, as far as JR is concerned, been superseded by the introduction of the new costs rules for Aarhus Convention claims in 2013 discussed above. However, the position with regard to private law cases remains uncertain and unsatisfactory. In *Morgan v Baker*[[211]](#footnote-212), the Court of Appeal held that the requirement of the Aarhus Convention that costs in environmental proceedings should not be "prohibitively expensive" was, at most, a matter to which the court might have regard in exercising its discretion with regard to costs. Similarly, in *Miller Argent*[[212]](#footnote-213), the Court of Appeal held that while private nuisance actions were, in principle, capable of constituting procedures which fell within the scope of the Aarhus Convention, the requirement in Article 9(4) of the Convention that proceedings should not be prohibitively expensive was no more than a factor to be taken into account when considering a claimant’s application for a PCO. In *Miller Argent*, the Court of Appeal held that the judge at first instance had correctly exercised his discretion when refusing to make a group litigation order under CPR r.19.11 for prospective claimants to bring an action in private nuisance and, as no submissions on the Aarhus Convention had been made during the course of the application, he was right to order that the applicants pay the costs of the application.  **Criminal Justice and Courts Act 2015**  Part 4 of the Criminal Justice and Courts Act 2015[[213]](#footnote-214) inserted a number of provisions into the Senior Courts Act 1981 concerning applications for JR[[214]](#footnote-215).  **Information about financing of JR applications**  Section 85 of the CJCA 2015 inserts new provisions into section 31(3) of the Senior Courts Act 1981 requiring applicants to provide the court with any information about the financing of the application. Section 86 of the CJCA 2015 requires the court or tribunal to have regard to this information when considering costs. In particular, the court must consider whether any other person (other than a party to the proceedings) identified in that information as someone who is providing financial support for the purposes of the proceedings (or likely or able to do so) should be liable for costs. At the time of writing, it would appear these amendments will not unduly impact on individuals and NGOs bringing environmental JRs, although further clarification from the Ministry of Justice is being sought.  **Interveners**  Section 87 CJCA 2015 applies to “interveners”[[215]](#footnote-216).  Section 87(3) of the Act provides that a relevant party to the proceedings may not be ordered by the High Court or the Court of Appeal to pay the intervener’s costs in connection with the proceedings, unless exceptional circumstances apply. However, where a relevant party to the proceedings applies to the court and the court is satisfied that one of the conditions below is satisfied, the court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener’s involvement in that stage of the proceedings[[216]](#footnote-217). The conditions are as follows:   * the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent; * the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court; * a significant part of the intervener’s evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or * the intervener has behaved unreasonably.   The court is not required to make an order for costs against an intervener if it considers that there are exceptional circumstances that make it inappropriate to do so (these exceptional circumstances will be specified in rules of court).  Prior to the CJC Act 2015, the position on costs in legal proceedings was entrusted largely to the courts' general discretion to be exercised in light of all the circumstances of the case[[217]](#footnote-218). Statutory provisions directing courts as to when they can, and cannot, order costs to be paid in relation to proceedings before them are unusual. In practice, individuals and NGOs seeking to intervene in proceedings were asked to provide assurances to the court that they will not seek to make an application for an order for costs against any of the relevant parties, i.e. that they will simply cover their own costs.  As a result of the CJCA 2015, interveners will be at risk of an order for costs where costs have been incurred by a relevant party as a result of the intervener’s involvement and the court is satisfied that one of the four listed circumstances are satisfied. As such, the Act introduces a new and unwelcome element of uncertainty with regard to adverse costs.  Most of the conditions in section 87 are uncontroversial - the court can already make an order for costs against any party that has behaved unreasonably. The most worrying condition is that the intervener’s evidence and representations, taken as a whole, are not considered to have been of significant assistance to the court. This will place a relatively high burden on the intervener to contribute something that none of the relevant parties have raised themselves. In reality, this provision is likely to be an unhelpful step and will defer individuals and NGOs from intervening in cases.  **Current proposals for JR in England, Wales and Northern Ireland**  In July 2015, the Ministry of Justice consulted the public on proposed changes to the costs regime for environmental cases in England and Wales[[218]](#footnote-219). Shortly afterwards, the Department of Justice in Northern Ireland consulted on similar proposals[[219]](#footnote-220), which essentially include the following:   * **Definition of Aarhus Convention claim** – the proposal to extend costs protection to statutory reviews falling within the ambit of the EC Public Participation Directive in England and Wales is welcome. However, it will not make a significant difference to the current position. Statutory reviews covering key environmental issues, such as the meaning of harm in the Green Belt and the impact of wind farms and solar energy development will not be eligible for costs protection. The Government must ensure that statutory reviews covering all environmental issues are brought within the scheme (as is currently the case in Northern Ireland) if it is to comply with the Aarhus Convention; * **Eligibility for costs protection** – The proposal to confine eligibility to a member of the public could exclude community groups, Parish Councils and even environmental NGOs from costs protection. The proposals may also exclude legislation impacting on the environment that does not specifically mention the environment in its title or heading (such as environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships) from review; * **Costs protection and permission** – Proposals in England and Wales to make costs protection contingent on obtaining permission to proceed with an application for JR will prevent the UK from complying with the PPD and the Aarhus Convention; * **Level of the caps** – Allowing defendants to challenge the level of the cap conflicts with the requirement for claimant’s to have certainty with regard to costs exposure. Proposals to increase the caps from £5,000 (individuals) and £10,000 (other cases) to £10,000 and £20,000 respectively do not satisfy the requirement for costs to be both subjectively and objectively reasonable. It should also be noted that these figures do not represent the claimant’s total costs liability – they must also pay the court fee (just under £1,000) and their own legal costs, which on average total at least £25,000. The total costs exposure of £31,000 – £36,000 is already prohibitively expensive for many claimants, particularly individuals; * **Schedule of financial resources** - Requiring claimants to submit a schedule of financial resources specifying third party support is unnecessary and unworkable. Charity membership is an affordable way for people with limited resources to contribute to the protection and enhancement of the environment and civil society. Vulnerable people, such as children, the elderly and those with disabilities are often members of charities – but the knowledge that they might be exposed to court costs is likely to deter them from joining environmental charities and hence participating in activities associated with improving the environment; * **Multiple claimants** – Applying separate costs caps to individual claimants could render the claimants’ collective costs exposure objectively unreasonable; * **Challenging Aarhus Convention claims** - Replacing the award of costs on an indemnity basis for challenging the status of an Aarhus claim with the standard basis will encourage defendants to challenge claims and lead to unnecessary satellite litigation; and * **Interim relief (injunctions)** – There is no basis for proposals to restrict the ability to obtain interim relief. Information disclosed by the MOJ in November 2015 confirms there were only twelve applications for injunctive relief in Aarhus claims between April 2013 and May 2015. Requiring applications for interim relief to be made by a member of the public will prevent many claimants from being able to access relief. Proposals to introduce a subjective element to decisions on cross-undertaking in damages, and for the court to have regard to the combined financial resources of multiple claimants when making decisions about cross-undertakings in damages, also conflict with CJEU judgments in *Commission v UK* and *Edwards*, the PPD and the Aarhus Convention.   The implications of these proposals for environmental protection are detailed in consultation responses submitted by Wildlife & Countryside Link[[220]](#footnote-221) and Northern Ireland Environmental Link[[221]](#footnote-222).  Costs in Scotland  The Protective Expenses Order (PEO[[222]](#footnote-223)) regime in Scotland caps adverse costs liability for certain parties to £5,000. Until 2015, the rules only applied to individuals and NGOs promoting environmental protection - community groups and similar bodies were not eligible. The caps were also limited to judicial and statutory review cases falling within the scope of the EC Public Participation Directive (PPD). However, recent amendments to the regime include extending the scope of the Rules to cover cases falling under Article 9(1) and 9(3) of the Convention and modifying the categories of persons eligible for a PEO to include Members of the Public and Members of the Public Concerned.  While it is too early to evaluate the success of the scheme, Friends of the Earth notes that legal action remains, as a whole, prohibitively expensive for most individuals, communities and NGOs. Litigants still have to raise their own legal costs which for a complex JR, accounting for lawyers and court fees, can add up to tens of thousands of pounds.  In particular, barriers to legal aid in Scotland mean that very few awards are granted in environmental cases[[223]](#footnote-224), and the system effectively prohibits aid for public interest cases (which most Aarhus challenges are). When deciding whether to grant legal aid under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002[[224]](#footnote-225), the Scottish Legal Aid Board (SLAB) looks at whether ‘other persons’ might have a joint interest with the applicant. If so, SLAB is prohibited from granting legal aid if it would be reasonable for those other persons to help fund the case. Moreover, the test states that the applicant must be “seriously prejudiced in his or her own right” without legal aid in order to qualify. Furthermore, as in England and Wales, community groups are unable to apply for legal aid under the Scottish regime.  These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. A recent Freedom of Information request confirmed that in the last 5 years the Scottish Government had not had any discussions with SLAB on the impact of Regulation 15 in environmental cases. FoE considers the removal of Regulation 15 essential for compliance with Article 9(4) of the Aarhus Convention and the PPD.  These long-term difficulties were exacerbated in 2013 by the introduction of a cap on the expenses of a JR to be covered by legal aid (including Counsel’s fees, solicitors’ fees and outlays) of £7,000. This is an entirely unrealistic figure to run a complex environmental JR. While applications can be made to increase the figure, the cap is likely to reduce the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel’s fees and outlays which are not covered by the cap. Due to the low levels of payment for legal aid compared with market rates, and the complexities of judicial review cases, individuals can struggle to find a lawyer willing to represent them on this basis.  Data collection on awards of Legal Aid in Environmental cases is poor. A letter from the Scottish Legal Aid Board to the Scottish Parliament’s Equal Opportunities Committee in June 2015 contains a breakdown of numbers of Legal Aid applications and awards in environmental cases[[225]](#footnote-226). However this data is problematic in terms of getting a full picture of awards in Aarhus cases. For example how ‘an environmental aspect’ is defined has a significant bearing on these statistics.  On total costs for taking an Aarhus judicial or statutory review, the Scottish Government is effectively unable to provide figures for Petitioners costs where Legal Aid is not awarded[[226]](#footnote-227). It is hard to see how the current measures to ensure access to justice in these cases can be justified without a clear understanding of the costs petitioners are actually faced with.  There are a number of other amendments which are welcome. The ability to apply for a PEO has been extended to appeals to the Court of Session arising from decisions of the Scottish Information Commissioner on Environmental Information requests, and relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment. The scope of the ability to apply for Protective Expenses Orders is now more closely aligned with the Convention itself.  However, because the rules apply only to cases taken in the Court of Session, applications for PEOs cannot be made in cases regarding noise nuisance or other environmental nuisances in the Sheriff Court. The rules provide that applications for PEOs must be made quickly after the case is raised; this is often impracticable given the level of detail expected in a PEO application, particularly in relation to financial information, and the short time period for raising challenges (sometimes as short as 6 weeks after the decision was made). One of the criteria for determining whether a PEO is made is consideration by the court as to whether an application has ‘no real prospect of success’. This means that within the application for a PEO, in addition to detailed financial information, an applicant has to be ready to argue the substantive issues. All of that has to be done quickly after the case is raised. These pressures of time, particularly if individuals are attempting to raise funds, are likely to mean that few solicitors are willing to take on such cases given the risks if the solicitors are unable to carry out intensive work at relatively short notice.  Costs in Northern Ireland  The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 became operative in Northern Ireland on 15th April 2013[[227]](#footnote-228). They contain similar provisions to those pertaining to England and Wales, limiting adverse costs liability to £5,000 for individuals and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association. The cross-cap in Northern Ireland is £35,000. All these figures are exclusive of VAT. The caps apply to all environmental cases (a hugely controversial and last-minute amendment to the recent Planning Bill to restrict the availability of planning judicial reviews to European grounds only was thwarted by the Environment Minister[[228]](#footnote-229)).  However, experience suggests that the caps remain prohibitively expensive in Northern Ireland. One practitioner[[229]](#footnote-230) reports that a PCO of £10,000 was too high for one of his clients who could not afford to pay his own legal costs and potentially suffer adverse costs of £10,000 (plus VAT). The claimant then tried to continue the case as a litigant in person but was unable to do so and the case could not continue. The same practitioner also highlighted the detrimental effect of the cross-cap of £35,000[[230]](#footnote-231). In straightforward JRs the cross cap may not be problematic - but this is not the case in complex environmental cases involving issues of public importance cases. This issue is illustrated by the following two cases.  The first case concerned a proposed 50 mile dual carriageway scheme at a cost of £800m[[231]](#footnote-232). The road affected 250 farmers, over 100 of whom supported the case. A PCO was obtained, but only after a difficult and fully contested hearing, under the pre-regulation law. The Order granted by the High Court was that the objectors would have to pay £20,000 if they lost but there was no cross cap in the event that they won. In the event, the claimants were successful and therefore their full costs were recovered. The case ran for 6 days in the High Court, was highly technical and very challenging. Their costs came out at between £100k + £150k for the costs of a solicitor, senior and junior counsel, a roads consultant, an environmental consultant and an agricultural consultant. Some of the consultants, counsel and the solicitor proceeded on the basis of concessionary fees (the “true” costs would have been nearer £250,000). The claimants’ position would have deteriorated under the 2013 Regulations because, whilst their liability to adverse costs would have been reduced to £10,000, had they lost (they were an unincorporated association) they would have recovered only £35,000 leaving them with a shortfall of close to £100k (or over £200k against the “true costs.”). There is little doubt this case would not have been brought had the claimants faced this kind of shortfall, win or lose.  The second case was conducted after the Regulations came into force. It concerned the construction of a sports stadium at a value of approximately £81m. The grouping opposing the development consisted of roughly 200 nearby households. The case was again taken on the basis of concessionary fees by both the solicitor and senior counsel (managing without junior counsel reduced costs). Unpredictably, the case ran for 13 days making it, probably, the longest judicial review in Northern Ireland legal history. The residents were successful. They will recover £35,000 plus VAT leaving them approximately £18,000 out of pocket. Had the stadium case been charged at commercial rates the “true” costs would have exceeded £100,000 and the shortfall would have been, beyond argument, prohibitively expensive.  While these cases might be seen as atypical (as they were at the top end in terms of scale and complexity), it is difficult to see how, under current administrative review procedures, the costs for many environmental JRs can be kept below £35,000 by the time solicitor, counsel and all necessary consultants are paid. Environmental challenges are often complex, multifaceted and accompanied by voluminous documentation.  Additionally, it is reported that:   * Legal aid is invariably denied in Northern Ireland when a group of objectors have a similar interest in objecting to a scheme in development. Accordingly, financial assistance from public funds is rarely available for potential applicants in environmental legal challenges; * The indemnity costs rule applies with full force in Northern Ireland. If successful, objectors can only recover the costs they agreed to pay their own legal team. If these were reduced or are concessionary then that is all that can be recovered from the unsuccessful public authority[[232]](#footnote-233); and * Contingent and no-win no fee arrangements are unlawful in Northern Ireland.   In a case brought by Greenpeace[[233]](#footnote-234), the English High Court held: “*the Aarhus Convention is itself irrelevant; it has only been incorporated into UK law to the extent that an EC Directive is involved; the Directives were not involved, other than as an element of background”. Greenpeace took this case to the Aarhus Convention Compliance Committee (ACCC), which pointed out that the UK: “being a Party to the Convention, is bound by the Convention under international law and that the nature of its national legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention*.”  To conclude, despite the introduction of bespoke cost rules for environmental cases, legal costs in the UK remain high and, in some cases, prohibitively expensive for individuals and community groups. This is largely because losing parties have to pay the court fee, their own legal costs (which routinely amount to £25,000 and often rather more) plus a cap of either £5,000 or £10,000 – and winning parties are often unable to recover their full costs in more complex environmental cases because of the cross-cap of £35,000. As such, claimants in England and Wales and Scotland are routinely facing costs of £31-36k on losing a case (often more in Scotland) and may even suffer significant financial losses when winning complex cases. These problems will be exacerbated if current reforms are enacted. | **Scoring guide**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(4)  2nd sentence | 1. How well has the second sentence of Art. 9(4) been enacted?   The second sentence provides:  “Decisions under this article [i.e. Art. 9] shall be given or recorded in writing.”  **Researcher’s score: 3 – Effective enactment**  All judgments and Decisions are given in writing. | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art 9(4)  3rd sentence | 1. How well has the third sentence of Art. 9(4) been enacted?   The third sentence provides:  “Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”  **Researcher’s Score: 3 – Effective enactment**  Judgments and Decisions of UK courts and tribunals are publicly available:  High Court and Court of Appeal - <https://www.judiciary.gov.uk/judgments/>  Supreme Court - <https://www.supremecourt.uk/decided-cases/index.html>  Northern Ireland - <https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/Pages/default.aspx>  Court of Session - <https://www.scotcourts.gov.uk/search-judgments/court-of-session>  Information Rights Tribunal - <http://informationrights.decisions.tribunals.gov.uk//Public/search.aspx> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(5)  Indicator 1 | 1. How well has Art. 9(5) been enacted insofar as it relates to the provision of information?   Art. 9(5) provides:  “5. In order to further the effectiveness of the provisions of this article [i.e. Art. 9], each Party shall ensure that **information is provided to the public on access to administrative and judicial review procedures** and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”  **Researcher’s score: 3 – Effective enactment**  The Courts and Tribunal Service explains the process of JR: <https://www.judiciary.gov.uk/you-and-the-judiciary/judicial-review/>  Information about legal aid in England and Wales: <https://www.gov.uk/legal-aid/eligibility>  Judicial Review in Scotland: <http://www.parliament.scot/Research%20briefings%20and%20fact%20sheets/SB09-75.pdf>  Legal aid in Scotland: <http://www.slab.org.uk/public/civil/eligibility/>  Judicial Review in Northern Ireland: <http://www.courtsni.gov.uk/en-gb/services/jr/pages/default.aspx>  Legal aid in Northern Ireland: <https://www.nidirect.gov.uk/articles/legal-aid> | **Scoring Guide:**  3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |
| Art. 9(5)  Indicator 2 | 1. How well has Art. 9(5) been enacted insofar as it relates to considering the establishment of appropriate assistance mechanisms?   Art. 9(5) provides:  “5. In order to further the effectiveness of the provisions of this article [i.e. Art. 9], each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and **shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”**  **Researcher’s score: 1 - Incomplete and contradictory enactment**  Despite dramatic cuts in public funding since 2010, legal aid is still available for Judicial Review cases[[234]](#footnote-235). Whether an individual qualifies for public funding will depend on the merits of the case (including the likelihood of success and benefit to the client[[235]](#footnote-236)) and the completion of a financial eligibility check[[236]](#footnote-237). In reality, public funding is very difficult to obtain in environmental cases unless the case is of wider public interest. NGOs are not eligible for public funding in any event.  In addition, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides that legal aid will only be granted to an individual for JR cases where the claim has the potential to produce a real benefit for the individual, a member of the individual’s family or the environment.  These difficulties were examined by the Aarhus Compliance Committee in the context of Communication ACCC/C/2008/C33 concerning costs, in which the Committee concluded that “the system as a whole is not such as “*to remove or reduce financial […] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider*[[237]](#footnote-238)”.  Despite these findings, the Government in England and Wales has markedly reduced the availability of public funding and has given no consideration to the merits of making environmental NGOs eligible for legal aid in order to improve the UK’s compliance with Article 9(4) and 9(5) of the Aarhus Convention.  Moreover, while the UK purports to treat any member of the public equally, regardless of nationality, citizenship and domicile (and, as such, any legal person has equal access to the courts), the Government has proposed that applicants for civil legal aid should in future have to satisfy a residence test (see the consultation paper *Transforming Legal Aid: delivering a more credible and efficient system*).  In Scotland, concerns have been raised about the impact of Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002 with the Scottish Government and the Scottish Legal Aid Board (SLAB). However, no efforts have been made to address the problem.  Legal Aid is available in Northern Ireland for JRs where the applicant satisfies a financial means test and a merits test. Depending on the level of their disposable income and their disposable capital, a person may be assessed as being financially eligible with a contribution. However, it is invariably denied when a group of objectors have a similar interest in objecting to a scheme in development. Accordingly, financial assistance from public funds is rarely available for potential applicants in environmental legal challenges. | 3 = Enactment is fully in accord  2 = Minor errors  1 = Errors that are more than minor  0 = Has not been enacted at all  While the second clause of Art. 9(5) is of the form “shall consider”, this is still capable of being an enactable obligation. For example, a State could enact a national law establishing an advisory body to consider and report on the question of the establishment of appropriate assistance mechanisms.  **Please refer to the** [**“Guidelines for assessing legal indicators” above**](#_Guidelines_for_assessing) |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 9 legal indicators?

How do you think the legal indicators for Article 9(4) (first sentence) should deal (if at all) with the following issue? In addition to enacting specific rules to tackle fairness, equity, timeliness and prohibitive expense (e.g. specific legislation on legal costs in environmental matters), arguably Parties are obliged to enact a general obligation(s) that the procedures referred to in Art. 9(4) must be fair, equitable, timely and not prohibitively expensive. Thus, it would not be enough for a party to say that its detailed court rules in practice provide for fair and equitable procedures in circumstances where there is no general, overarching obligation that such procedures must be fair and equitable. To give an example of the issue in practice: Ireland has not enacted such a general obligation, and its High Court in [An Taisce v An Bord Pleanála [2015] IEHC 604](http://www.courts.ie/Judgments.nsf/0/66689207160EAA7F80257EE00038BC45)) was therefore legally able to pronounce (wrongly) that judicial procedures do not need to be fair and equitable (notwithstanding the Aarhus Convention and EU law purporting to implement the Convention).

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### Access to justice – Practice indicators

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Art. 9(1), first para | 1. In practice, has the Party ensured access to a review procedure before a court of law or another independent and impartial body established by law in respect of information requests?   The first paragraph of Article 9(1) provides:  “1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.”  **Researcher’s score: 3**  I would welcome a discussion on how to score the UK for this question. There are cases in which public bodies have refused to recognise that the information sought is environmental information for the purposes of disclosure under the EIRs 2004 (e.g. *Department for Energy and Climate Change v The Information Commissioner* (EA/2014/0103[[238]](#footnote-239)) and *The Cabinet Office and High Speed 2 (SH2) Ltd v The Information Commissioner and Joe Rukin* (EA/2015/0207 and 0208)). I also have my own experience of taking the Ministry of Justice to the Information Rights Tribunal for refusing to provide data about environmental JRs (the MoJ arguing that while the JRs themselves are environmental, data on them is not). The MoJ eventually conceded this point a week before the Hearing and disclosed the information.  Thus, if the point is whether a narrow interpretation precludes the matter being brought before the Information Rights Tribunal, I think the correct score should be “3” because the scope of the Tribunal appears to be broad. If however, it relates to the practice of public bodies withholding information on the basis that it is not environmental information (and thus fails to meet the public interest test under the FOIA 2000 regime), I would be inclined to score “2”. | **Scoring Guide:**  3 = Access to a review procedure before a court or another independent and impartial body is provided for any person making a request for information within the scope of the definition of environmental information in article 2(3)  2 = Access to a review procedure before a court or another independent and impartial body is provided for any person making a request for environmental information but due to the narrow interpretation of environmental information in practice, not all environmental information requests are covered.  2 = Access to a review procedure before a court or another independent and impartial body is provided with respect to requests for environmental information but due to a narrow reading of “any person”, not all persons have access (eg foreign citizens, legal persons).  1 = Persons making information requests may have access to a review procedure, but that procedure is not independent or impartial (e.g. the review procedure is to be made to the authority that decided the information request).  0 = No, there is no access to a review procedure before either a court of law or other  body (whether impartial and independent or not) to challenge the handling of requests for environmental information.  Take note that this indicator is about the existence and breadth of application of review procedures before a court or other independent/impartial body against a decision in access to information cases, while the next indicator is about the existence *and quality* of other remedies (internal review or review by an independent and impartial body other than a court of law) where a review by court is provided for.  **Please justify your score and explain the factors you considered** |
| Art. 9(1), second para  Indicator 1 | 1. Where the Party provides for such a review by a court of law, does the Party in practice ensure access to a 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 second paragraph of Article 9(1) provides:  “In the circumstances where a Party provides for such a review by a court of law, it shall 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.”  **Researcher’s score: 3 - Access is provided to both a reconsideration by the public authority that handled the request and to an independent and impartial review body, and such access is free of charge**  The procedure outlined with regard to a review by the public body concerned and appeal to the Information Commissioner’s Office (see the legal indicator discussion, above) is free of charge. | **Scoring Guide:**  3 = Access is provided to both a reconsideration by the public authority that handled the request and to an independent and impartial review body, and such access is free of charge.  2 = Access is provided to both a reconsideration by the public authority that handled the request and to an independent and impartial review body, and such access is inexpensive  2= Access is provided to an independent and impartial review body, and such access is free or inexpensive.  1 = Access is provided to a reconsideration by the public authority that handled the request, and such access is free or inexpensive.  1=Access is provided to both a reconsideration by the public authority that handled the request and to an independent and impartial review body, but such access is neither free nor inexpensive.  0 = Access has not been provided to either a reconsideration by the public authority that handled the request or to an independent and impartial review body.  Note that this indicator is not applicable in countries where access to justice in environmental information matters is ensured solely by means other than court procedures.  **Please justify your score and explain the factors you considered.** |
| Art. 9(1), second para  Indicator 2 | 1. Where the Party provides for such a review by a court of law, does the Party in practice ensure access to an **expeditious** procedure established by law for reconsideration by a public authority or review by an independent and impartial body other than a court of law?   The second paragraph of Article 9(1) provides:  “In the circumstances where a Party provides for such a review by a court of law, it shall 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.”  **Researcher’s score: 1 - Access to an independent and impartial review procedure other than a court of law is ensured and the procedure is expeditious (but this should be scored as 1 where a prior reconsideration by the public authority that handled the request is required, and that procedure is not expeditious).**  I have scored the UK a “1” because while access to an independent and impartial review procedure other than a court of law is ensured and the procedure is expeditious, the prior reconsideration by the public authority that handled the request is often *not* expeditious. It is not uncommon for the public body to extend the period of 20 working days referred to in paragraph 5(2) to 40 working days on the basis that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period (or to make a decision to refuse to do so) under Regulation 7 EIRs 2004. This has particular problems in the field of JR, where the tight deadlines for lodging an application can force claimants to lodge proceedings before relevant information is disclosed. | **Scoring Guide:**  3 = Access to a reconsideration by the public authority that handled the request *and* to a review by an independent and impartial body other than a court of law are ensured, and both procedures are expeditious.  2 = Access to an independent and impartial review procedure other than a court of law is ensured and the procedure is expeditious (but this should be scored as 1 where a prior reconsideration by the public authority that handled the request is required, and that procedure is not expeditious).  1 = Access to a reconsideration by the public authority that handled the request is ensured and the procedure is expeditious, but access has not been provided to an independent and impartial review body.  1 = Access to a reconsideration by the public authority that handled the request *and* to a review by an independent and impartial body other than a court of law are ensured, but neither procedure is expeditious.  0 = Access has not been provided to either a reconsideration by the public authority that handled the request or to an independent and impartial review body.  Note that this indicator is not applicable in countries where access to justice in environmental information matters is ensured solely by means other than court procedures.  **Please justify your score and explain the factors you considered.** |
| Art. 9(2)  Indicator 1 | 1. In practice, are the terms “sufficient interest” and “impairment of a right” interpreted consistently with the objective of giving members of the public concerned (other than environmental NGOs, which are assessed in the next indicator) wide access to justice within the scope of the Aarhus Convention?   Article 9(2) provides:  “2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned  (a) Having a sufficient interest  or, alternatively,  (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below [i.e. Art. 9(3)], of other relevant provisions of this Convention.  What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of  subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.  The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.  **Researcher’s score: 2 (Yes, in the majority of cases)**  There are few modern examples of individuals or environmental groups being refused standing to bring an application for Judicial Review. Perhaps because the courts have exhibited a broad approach to sufficient interest, the Government was not prompted to amend the Supreme Courts Act 1981 to reflect the requirements of the Aarhus Convention. While concern has been expressed that the courts could return to a narrower interpretation of sufficient interest at any time and that the SCA 1981 should be amended to guarantee appropriate access[[239]](#footnote-240), there has as yet been no imperative for the Government to do so.  There are two recent cases in which standing has been directly addressed in the context of the Aarhus Convention[[240]](#footnote-241):  In *Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd[[241]](#footnote-242)* the Court of Appeal rejected the applicant’s challenge under section 288 of the Town and Country Planning Act 1990 on the merits, but went on to consider whether he would in any event have been a “*person aggrieved*” for the purpose of a challenge under s.288 of the Town and Country Planning 1990 Act[[242]](#footnote-243). In his judgment, Pill LJ considered Article 10a of the EIA Directive, *Miljöskyddsförening v Stockholm*[[243]](#footnote-244) (in which the ECJ considered the rights of “*small, locally established environmental protection associations*”) and *Commission v Ireland[[244]](#footnote-245)*. He concluded the following principles could be extracted from the authorities and applied when considering whether a person is aggrieved within the meaning of s.288 of the 1990 Act:   * Wide access to the courts is required under s.288 of the 1990 Act; * Participation in the planning process which led to the decision sought to be challenged is normally required. What constitutes sufficient participation will depend on the opportunities available and the steps taken; * There may be situations in which failure to participate is not a bar to challenging a decision; * A further factor to be considered is the nature and weight of the person’s substantive interest and the extent to which it is prejudiced. The sufficiency of the interest must be considered; * This factor is to be assessed objectively - there is a difference between feeling aggrieved and being aggrieved; * What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288; * The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person’s interest if he has not participated in the planning procedures; and * While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings.   The judge did not consider the appellant’s participation in the planning process sufficient in the circumstances to acquire standing under s.288. The judge made no finding as to whether the appellant would also fail under the interest limb of the test, though it was considered likely that he would do so.  This case would now have to be considered in the light of the wide approach to the “person aggrieved test” taken by the Supreme Court in *Walton v Scottish Ministers[[245]](#footnote-246)*. In *Walton*, the Supreme Court held (*Obiter dictum*) that whether somebody was a "person aggrieved" depended on the particular legislation involved and the nature of the complaint made[[246]](#footnote-247). A wide interpretation was appropriate, particularly in the context of statutory planning appeals as the quality of the natural environment was of legitimate concern to everyone. In particular, a person would ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and if their complaint was that the decision was not properly made. The petitioner was, in this case, a "person aggrieved". He had made representations to the ministers, had taken part in the local inquiry, lived in the vicinity of the peripheral road and was an active member of various local environmental organisations. As a participant in the procedure, he was entitled to be concerned about a perceived failure to follow a fair procedure[[247]](#footnote-248). The Supreme Court also observed that he would have had standing, as a party with sufficient interest, to raise common law proceedings for JR[[248]](#footnote-249).  In *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change*[[249]](#footnote-250)*,* the claimantwas a limited company formed by local residents to oppose a proposal to build two biomass power stations in Wales. The group applied for a Protected Costs Order (PCO) to support an application for a JR of consent for the power stations granted by the Secretary of State (for which there were ongoing appeals). The issue of standing arose in the context of the PCO application, and *Coedbach’s* attempt to rely on the Aarhus Convention. The judge noted the claimant was a limited company whose aims and objects were to protect a particular local environment and that it played no part in the decision-making process leading to the grant of the consents to the Interested Party. As such, the judge concluded the claimant was not a member of the public concerned for the purposes of the EC Public Participation Directive[[250]](#footnote-251) (PPD).  Until 2011, the situation with regard to standing in Scotland was based more upon the protection of rights and was, therefore, significantly more restrictive. However, in 2011 the Supreme Court held in *Axa* that the standing test “title and interest”, which is derived from private law, had no place in JR procedures in the field of public law. The Supreme Court advocated that a preferable test was one of “directly affected”.  Had the question simply concerned JR applications, I would have scored the UK a “3”, but because statutory reviews are also relevant I have lowered to score to reflect the more restrictive position established in *Ashton*. | **Scoring Guide:**  3 = Yes, in all cases  2 = Yes, in the majority of cases  1 = No, in a minority of cases  0 = No, not at all  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please consider in scoring this indicator that whenever restrictive conditions (such as possession of directly neighbouring land or any procedural conditions) have developed in practice for the sufficient interest test or the impairment of right test, the score should be lower.  Please note that standing for NGOs in similar cases is examined by the following indicator.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * procedural conditions re access to justice (such as a requirement to have participated in the entirety of previous processes, which could present a financial barrier) (ref.1) * how far the direct impairment of rights is a condition of access to justice, especially in cases where the direct connection to any person is rather difficult to establish, such as wildlife protection (ref.3, ref.6, ref.8, ref.9)   **Please justify your score and explain the factors you considered.** |
| Art. 9(2), Indicator 2 | 1. In practice, are NGOs which meet the requirements referred to in article 2, paragraph 5 deemed to have a sufficient interest, and deemed to have rights capable of being impaired for the purposes of Art. 9(2)?   Article 9(2) provides:  “2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned  (a) Having a sufficient interest  or, alternatively,  (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another  independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject  to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below [i.e. Art. 9(3)], of other relevant provisions of this Convention.  What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of  subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.  The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.  **Researcher’s score: 3 - Always, in all cases and the requirements in article 2(5) are not restrictive**  The notion that NGOs are justified in bringing such cases to court was established in the 1990s in cases such as *R v H.M. Inspectorate of Pollution, ex parte Greenpeace* (D.C. 1994), *R v Somerset County Council, ex parte Richard Dixon* (1998) Env LR 111 and *R v Poole Borough Council, ex parte Beebee* (H.L. 1991). In Dixon, the High Court held that public law was concerned about the misuse of public power, and that a person or organisation with no particular stake in the issue or the outcome might, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. There have been no cases that I am aware of in which an environmental NGO has been refused access to court on the basis of standing. | **Scoring Guide:**  3 = Always, in all cases and the requirements in article 2(5) are not restrictive  2= In all cases, though the requirements in article 2(5) are quite restrictive  2 = In most cases, and the requirements in article 2(5) are not restrictive  1=In most cases, though the requirements in article 2(5) are quite restrictive  1 = In a minority of cases.  0 = Rarely or never.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Please take into consideration that when standing for an NGO is subject to additional conditions, such as certain provisions in their bylaws, certain geographical, or practical requirements, the score should be lower.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * procedural conditions re access to justice (such as a requirement to have participated in the entirety of previous processes, which could present a financial barrier) (ref.1) * how far the direct impairment of rights is a condition of access to justice for NGOs, especially in cases where the direct connection to any person is rather difficult to establish, such as wildlife protection (ref.3, ref.6, ref.8, ref.9) * access to justice for NGOs not directly dealing with environmental protection (focusing on topics such as human rights, public health etc.) (ref.7)   **Please justify your score and explain the factors you considered.** |
| Art. 9(2), Indicator 3 | 1. In practice, do members of the public concerned meeting the relevant conditions specified in Art 9(2) have access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [public participation in decisions on specific activities] and, where so provided for under national law and without prejudice to Art. 9(3), of other relevant provisions of the Aarhus Convention?   Article 9(2) provides:  “2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned  (a) Having a sufficient interest  or, alternatively,  (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another  independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject  to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below [i.e. Art. 9(3)], of other relevant provisions of this Convention.  What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.  The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.  **Researcher’s score: 1**  Members of the public concerned meeting the relevant conditions specified in art 9(2) can challenge the procedural legality of any decision, act or omission subject to the provisions of article 6. However, the ability to challenge substantive legality is currently restricted to challenges that the decision, act or omission is *Wednesbury* unreasonable.  **Scope/Intensity of JR in the UK**  In 2010, the Aarhus Convention Compliance Committee briefly considered whether the scope or intensity of JR in the UK satisfies the requirements of Article 9(2) of the Convention in Communication ACCC/C/2008/C33 (in the context of a separate complaint on the legal costs and prohibitive expensive[[251]](#footnote-252)). At that time, the Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) of the Convention including, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. Particular reference was made to criticisms by the House of Lords[[252]](#footnote-253) and the ECHR[[253]](#footnote-254), concerning the very high threshold for review imposed by the *Wednesbury* test. While the Committee, on the basis of the information before it in C33, did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest (perhaps picking up on submissions made by the UK Government during the hearing) that the application of the “proportionality principle” by the courts in England and Wales could provide a more appropriate standard of review in cases within the scope of the Aarhus Convention.  In practice the main way in which substantive legality can be contested in JR is by applying the *Wednesbury* unreasonableness test where an authority has made a judgment on substantive issues. However, the courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker and, in practice, the *Wednesbury* unreasonable test is very difficult to satisfy. It has been under sustained attack for several decades (it has, for example, been noted that the primary limitation of JR in England and Wales is its focus on procedural, rather than substantive, impropriety[[254]](#footnote-255)).  ***Wednesbury* and environmental cases**  There is no special provision in the common law for environmental cases. The courts generally apply the ‘strict *Wednesbury*’ threshold, which seems incongruous given the pervasive presence of EU law in the environmental sphere and the fact that the English courts (in particular) apply the proportionality test in other areas of UK law which implement EU obligations[[255]](#footnote-256) (such as employment law[[256]](#footnote-257)).  The standard of review is partly a function of the degree to which the courts consider it necessary to defer to the executive. Thus, where the decision-maker has discretion to balance competing considerations, the courts tend to be more deferential. Thus, in the majority of town and country planning cases, the view of the court is that it is entirely for the decision maker to attribute to the relevant considerations such weight as it thinks fit. In *R (on the application of Jones v Mansfield District Council*[[257]](#footnote-258), Lord Justice Carnwath (as he was then) held that the principles for the exercise of the court’s discretion are well-established:  *“60. Secondly, as explained by the European Court in Bozen (see Dyson LJ para 31ff) responsibility for the “discretion” given by the Directive to “Member States” is shared by the legislative, administrative and judicial authorities. Having myself raised a doubt on the point, I agree with Dyson LJ that, within the statutory framework set by the legislature, determination of “significance” (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional “Wednesbury” grounds.*  *61. Quite apart from the legal analysis, that view clearly makes practical sense. It enables an authoritative decision as to the procedure to be made at the outset, without risk of subsequent challenge except on legal grounds. Furthermore, the word “significant” does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities, under the guidance of the Secretary of State.”*  In *Evans*[[258]](#footnote-259), the Court of Appeal explicitly confirmed that *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning EIA screening decisions. In *Foster*[[259]](#footnote-260), the claimants sought permission to apply for JR of the decision of the Forest of Dean District Council to grant planning permission for a mixed use development in Cinderford, Gloucester. Their objections were based on the potential impact on bats (in particular, the lesser horseshoe bat) and bat roosts nearby. Counsel for the claimants referred to the judgment of the Court of Justice of the European Union (CJEU) in *Sweetman*[[260]](#footnote-261) in submitting in the light of this passage, a *Wednesbury* standard of review by would not reflect European law: it was clear that it is for the national court to establish whether the assessment of the implications for the SAC meets the requirements.  “*So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned: see European Commission v. Spain (Case C-404/09), paragraph 100 and the case law cited. It is for the national court to establish whether the assessment of the implications for the site meets these requirements.”*  The judge (Cranston, J) observed that there was “*an air of unreality about this submission*”, in that the CJEU could not have been suggesting that national courts must decide when the assessment has *lacunae*, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. In his words, “*Judges may be clever, but not that clever”.* Justice Cranston also observed that this approach was also to misunderstand the role of courts in European societies and that, to his mind, the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker.  The judge also stated that counsel’s submission was contrary to binding authority binding (albeit in a different context), referring to *Smyth v Secretary of State for Communities and Local Government[[261]](#footnote-262)*, in which Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review, in effect making its own assessment afresh. Sales LJ reaffirmed earlier authority that the standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of Review of “*manifest error of assessment*” applied by the CJEU in equivalent contexts:  “[80] *I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of “manifest error of assessment” applied by the CJEU in equivalent contexts: see R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA CIv 114; [2013] JPL 1027, [32]-[43], in which particular reference is made to Case C-508/03, Commission of the European Communities v United Kingdom [2006] QB 764, at paras. [88]-[92] of the judgment, as well as to the Waddenzee case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the Evans case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue*.”  **The position in other jurisdictions of the UK**  In Scotland, the Inner House of session also set out its view on the scope of JR in bleak terms in the case of *Viking[[262]](#footnote-263)*. The case concerned a grant of permission by the Scottish Ministers for the Viking Wind Farm on central Shetland in 2012. The Petitioner (Sustainable Shetland) applied for a JR, seeking reduction of the Scottish Ministers’ decision on the grounds, *inter alia,* that they had failed to take into account their duties under the EC Wild Birds Directive in respect of a species of bird called the whimbrel. In October 2013, Lady Clark of the Outer House held the Scottish Ministers had failed to comply with their obligations under the Birds Directive. In 2014, the Inner House overturned Lady Clark’s Opinion on the basis that her jurisdiction should be confined to an examination as to whether the grant of consent had been a lawful decision as opposed to whether the Scottish Ministers had demonstrated a proper understanding of, and compliance with, the Directive. The Inner House held that the obligation to comply with the Birds Directive is an entirely factual question for the Scottish Ministers to determine and that “*once that conclusion was arrived at, the Wild Birds Directive, and any associated problems of interpretation and application, fell out of the picture as far as this proposal was concerned*”.  The case went to the Supreme Court[[263]](#footnote-264), which considered the respective approach of the courts below - the Lord Ordinary on the one hand requiring the Scottish Ministers to, in effect, conduct a full review of their functions under the Birds Directive and that of the Inner House – that the Directive was but one of a number of material considerations to be taken into account in reaching a lawful decision whether to grant consent under the Electricity Act 1989. Lord Carnwath held that, in principle, the Inner House was “*clearly right*” in that the ministers’ functions in this case derived, not from the Birds Directive, but from their statutory duty to consider a proposal for development under the Electricity Act 1989. However, he also held that it did not follow that, once it had been decided that the impact on whimbrel population was not of significance, the Directive (in the words of the Inner House) “*fell out of the picture*”. If there had been evidence that the proposal, while having no significant effect in itself on the whimbrel population, might prejudice the fulfilment of the ministers’ duties under the Directive, this would have been a potential objection which required consideration. As such, while the Supreme Court considered the approach of the Inner House too extreme, it stopped short of providing any view on whether JR fulfils the requirements of Article 9(2) of the Convention.  In *RSPB v Defra*[[264]](#footnote-265), British Aerospace applied to Natural England for a licence to cull 1,700 pairs of lesser black-backed gulls and 500 pairs of herring gulls in the Ribble Estuary Special Protection Area (SPA). Natural England consented to the culling of 200 pairs of lesser black-backed gulls and 25 pairs of herring gulls, but refused to consent to the balance of the cull. The company appealed to the Secretary of State. Following a public inquiry, the Secretary of State directed Natural England to give consent to the culling of a further 475 pairs of herring gulls and, in a separate notification, 552 pairs of the lesser black-backed gulls and to further operations to maintain the post-cull levels. The Secretary of State was obliged to comply with obligations imposed by Article 6 of the Habitats Directive but concluded that the cull would not adversely affect the integrity of the SPA.  When examining which population of Black-Headed gulls on the Ribble Estuary SPA gave the most representative figure, the Secretary of State had discounted a 1999 figure of 14,300 individuals. Sullivan, LJ commented that ascertaining the baseline figure for the assemblage was not simply a mathematical exercise, it required the Secretary of State to exercise his planning judgment as to which counts would give the most representative figure. The Secretary of State had given reasons for excluding the 1999 figure. While those reasons were “*intelligible*”, the judge observed that: “*If this was an appeal on the merits I would have said that they are unconvincing, but I am unable to conclude that they are irrational*”.  *In McMorn (R, on the application of) v Natural England* [2015] EWHC 3297 (Admin)[[265]](#footnote-266), the High Court broke the mould in holding that *Wednesbury* principles can accommodate a more intensive review where the challenge falls within the scope of Aarhus (as here wrt licences for the shooting of buzzards):  “*204. An intense form of review was required here because, Aarhus claim or not, the decisions of NE affected the Claimant’s livelihood directly, without right of appeal, and NE’s policy required that licences should not be unreasonably withheld. But I have concluded that this is an Aarhus claim, and that a more intensive form of scrutiny is justified, for reasons I come to in dealing with costs.”*  However, this view was short-lived. In *R (on the application of Dilner) v. Sheffield City Council [2016] EWHC 945* (Admin)[[266]](#footnote-267), Mr Dilner and a number of environmental campaigners challenged the tree-felling policies of Sheffield City Council. One of the claimants’ arguments was that tree-felling required an environmental assessment under the Environmental Impact Assessment Directive. This environmental claim fell within the protections conferred by the Aarhus Convention, and hence, relying on the judgment of Ouseley, J in the High Court (above), it required intense scrutiny. The judge (Gilbart J) robustly rejected the argument, and did not follow Ouseley J’s ruling. In so-doing, Gilbart re-stated the now orthodox position in the domestic courts - that a claim’s Aarhus status makes no difference to the standard of review (although it remains important to the question of cost protection). Paragraphs 184-187 of the *Dilner* judgment contain a useful summary of the relevant court decisions on the standard of review.  I can provide many examples of clients in the private context who have sought to challenge planning decisions on substantive grounds, only to be advised by counsel that on the basis of the above jurisprudence there is no point pursuing a claim. For these reasons, I conclude the UK does not provide a forum in which civil society can challenge the procedural and substantive legality of decisions, acts or omissions.  As for the remaining text, I am unaware of challenges with regard to the interpretation of decision”, “act” or “omission”. | **Scoring Guide:**  3 = Members of the public concerned meeting the relevant conditions specified in art 9(2) in practice can challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, other provisions of the Aarhus Convention as provided for under national law. What constitutes a “decision”, “act” or “omission” subject to the provisions of article 6 Aarhus, is interpreted broadly.  2 = Members of the public concerned meeting the relevant conditions specified in Art 9(2) in practice can challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6. What constitutes a “decision”, “act” or “omission” subject to the provisions of article 6 Aarhus, is interpreted broadly.  2 = Members of the public concerned meeting the relevant conditions specified in art 9(2) in practice can challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, other provisions of the Aarhus Convention as provided for under national law. Under this scenario, “decision”, “act” or “omission” is not interpreted broadly.  1 = Members of the public concerned meeting the relevant conditions specified in art 9(2) in practice can challenge the substantive and/or procedural legality of any decision, act or omission subject to the provisions of article 6. Under this scenario, “decision”, “act” or “omission” is not interpreted broadly.  0 = Members of the public concerned are not granted access in practice to challenge the legality of decisions, acts or omissions subject to article 6.    Please note that Parties may extend access to justice beyond decisions, acts or omissions subject to Article 6 of Aarhus (e.g. extending to include article 7 or 8 or article 3(4) of Aarhus). The highest score of 3 captures this possibility.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing).  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:  Art 9(2) refs:   * access to alternative dispute resolution, state supervision bodies in environmental and public participation matters (such as environmental, future generation, health etc. or general ombudsman, civil or administrative prosecutors, state auditors, environmental board etc.) (ref.10, ref.11) * interpretation of what amounts to an environmental case in court practice (ref.5) * court review of individual projects that were permitted by a decision of normative/legislative nature (ref.3) * access to justice in long, tiered decision-making procedures (ref.4) * the directions and trends in the development of the court practice concerning NGO participation (ref.2) * the effect (if any) of decisions of the European Court of Justice (ref.3) * availability of data on the numbers and outcomes of legal remedies in environmental matters (ref.10, 11, 12,13)   **Please justify your score and explain the factors you considered.** |
| Art. 9(3) | 1. In practice, has the Party ensured that members of the public meeting the relevant criteria (if any), have access to administrative and/or judicial procedures to challenge acts or omissions which contravene provisions of national law relating to the environment?   Art. 9(3) provides:  “3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above [i.e. Art. 9(1) and (2)], each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”  **Researcher’s score: 2**  There are criteria laid down in national law for members of the public to have access to the courts to pursue an application for JR (“sufficient interest”). As such, we are not in an *actio popularis* scenario (which would attract a score of “3”). Moreover, the situation with regard to standing in statutory review procedures is more restricted. Generally, however, a broad interpretation is given to “acts” “omissions” and “national law relating to the environment”.  For discussion, see the answer to 4 in the practice indicators section above. | **Scoring Guide:**  3 = There are no or very minimal criteria laid down in national law for members of the public to have access  AND “acts” and “omissions” are interpreted broadly in practice AND “national law relating to the environment” is interpreted broadly in practice (i.e. including law regarding other sectors that may impact the environment).  2 = Members of the public have access to administrative and/or judicial procedures to challenge acts or omissions which contravene provisions of national law relating to the environment though not all the three aspects highlighted above are present.  1 = Members of the public have access to administrative and/or judicial procedures to challenge acts or omissions which contravene provisions of national law relating to the environment, however:  The criteria laid down in national law for members of the public to have access are quite restrictive  AND  “acts” and “omissions” are interpreted quite restrictively in practice  AND  “national law relating to the environment” is interpreted quite restrictively in practice.  0 = In practice, access to such procedure(s) is not provided  If there are no criteria laid down in national law for members of the public to have access, article 9(3) is effectively a quasi *actio popularis.* In line with this, in several countries it opens the possibility of legal remedies in environmental cases to anyone, irrespective of whether he or she has any personal interest in the case.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:  Art. 9(3) refs:   * NGO participation in challenging administrative cases significant for the environment (ref.6) * general requirements for selecting those NGOs that might have standing before courts in environmental cases, such as period in existence, assets, size of the membership etc. (ref.7) * access to justice for foreign NGOs (ref.7) * interpreting national law “in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention” – as a way of overcoming the absence of an EU Directive on access to justice (ref.8) * “environmental case equals only EIA” (ref.3) * access to justice in the case of planning documents, especially spatial planning (e.g. Constitutional Court) (ref.7) * NGO participation in environmental criminal cases (ref.4, ref.5) * the role of ombudspersons in ensuring access to justice in environmental cases other than infringement of rights for access to information or participation (ref.8) * courts failing to deal with all parts of complaints (ref.1) * implementation of court decisions and selection of measures for such implementation in the context of “omissions” (ref.2) * interpreting national law “in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention” – as a way of overcoming the absence of an EU Directive on access to justice (ref.8) * any interpretation of the phrase “acts and omissions” (Art. 9(3)) to exclude “decisions” (contrast with the “any decision, act or omission” language of Art. 9(2)) * availability of data on the numbers and outcomes of legal remedies in environmental matters (ref.11, 12, 13, 14) * access to alternative dispute resolution, state supervision bodies in environmental and public participation matters (such as environmental, future generation, health etc. or general ombudsman, civil or administrative prosecutors, state auditors, environmental board etc.) (ref.11, ref.12)   **Please justify your score and explain the factors you considered.** |
| Art. 9.(4)  Indicator 1 | 1. Do procedures within the scope of article 9, paragraphs 1, 2 and 3, provide adequate and effective remedies, including injunctive relief as appropriate?   Article 9(4), first sentence provides:  “4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.  **Researcher’s score: 1 (in the minority of cases, legal remedies for procedures within the scope of article 9, paragraphs 1, 2 and 3 are adequate and effective, including injunctive relief as appropriate)**   |  |  | | --- | --- | | Very few applications for interim relief have been made in England and Wales following the introduction of new provisions in the CPR in 2013[[267]](#footnote-268).  In its response to the recent consultation on proposed amendments to the costs regime for environmental cases, 18 members of Wildlife & Countryside Link expressed their view that claimants are deterred from pursuing interim relief because they experience considerable uncertainty as to whether the court will order a cross-undertaking in damages and, if so, to what extent. These concerns are reinforced by information released by the MOJ under the EIRs in November 2015 relating to Aarhus cases in which injunctive relief was sought between April 2013 and May 2015:  Cases in which an injunction was sought 12 |  | | Cases in which an injunction was granted 8 |  | | Cases in which a cross-undertaking was  required 5 |  | | Cases in which it is unclear whether a  cross-undertaking was required 5 |  | | Cases in which a cross-undertaking was  given and the quantum of damages 2  (£3,000 and “not specified”) |  | |  |  |   A request to the Department of Justice in Northern Ireland under the EIRs 2004 confirmed that no applications for interim (injunctive) relief were made in Northern Ireland between 1st April 2013 and 31st December 2015[[268]](#footnote-269).  Until the possibility of a cross-undertaking in damages is dispensed with, it is likely that the number of applications for injunctive relief will remain low. | **Scoring guide**  3 = Legal remedies are adequate and effective, including injunctive relief wherever appropriate, for all procedures within the scope of article 9, paragraphs 1, 2 and 3.  2 = In the majority of cases, legal remedies for procedures within the scope of article 9, paragraphs 1, 2 and 3 are adequate and effective, including injunctive relief as appropriate.  2= Legal remedies are adequate and effective, including injunctive relief as appropriate, for most but not all procedures within the scope of article 9, paragraphs 1, 2 and 3.  1 = In the minority of cases, legal remedies for procedures within the scope of article 9, paragraphs 1, 2 and 3 are adequate and effective, including injunctive relief as appropriate  1= Legal remedies are adequate and effective, including injunctive relief as appropriate, for only a minority of procedures within the scope of article 9, paragraphs 1, 2 and 3.  0 = Legal remedies are not adequate and effective  Note that effectiveness and adequacy should be evaluated above the most direct features examined in the following indicators (fairness, equity, timeliness, and affordable). Injunctive relief may be an important proxy for this, but you can consider other features, too, such as adequate compensation or restitution, according to the Party’s legal framework or practice.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * factors in respect of injunctive relief, such as preventing pollution (ref.1, ref.3) * injunctive relief as an effective remedy in EIA and IPPC cases (ref.2) * bonds or any other financial burdens on those persons seeking injunctive relief (ref.4)   **Please justify your score and explain the factors you considered.** |
| Art. 9.(4)    Indicator 2 | 1. Are procedures within the scope of article 9, paragraphs 1, 2 and 3, fair and equitable?   Article 9(4), first sentence provides:  “4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”  **Researcher’s score: 1 (only a minority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are fair and equitable)**  I would have awarded the UK a score of “2” for this question – even in light of the difficulties arising from the very short deadline for lodging JR applications for planning cases and the imposition of the 35k costs cap on successful claimants (as discussed in the legislative indicators section). However, with reference to the factors listed in the corresponding criteria for this question I would also observe:   * There would appear to be no specialisation and/or training of judges in respect of environmental cases. In fact, the majority if judges in the Planning Court descend from the planning bar, which it is fair to say is predominantly utilized by defendants and commercial interests; * the courts will not investigate the facts at their own initiative – it is left to the parties and, in any event, a court would be reluctant to intervene in a JR that largely hinged on a factual dispute; and * There is no special form of legal aid available for environmental cases (moreover, environmental NGOs cannot apply for legal aid). | **Scoring guide**  3 = Access to justice for all or almost all procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is fair and equitable  2 = Access to justice for the majority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is fair and equitable.  1 = Only a minority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are fair and equitable.  0 = Few or no procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are fair and equitable.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * due notification of all parties and sending the findings to all of them (ref.1, ref.2) * specialisation and training of judges in respect of environmental cases (ref.5) * investigation of facts by the courts upon their own initiative is possible and practical or it is fully left to the parties (ref.6) * availability of specialised legal aid (ref.10) * the role of several kinds of experts in the procedure, and ways of ensuring their unbiased, professional contribution (ref.11) * interpretation of the “fairness” as between the claimant and respondent, appreciation that complainants concern points of public interest (ref.12) * opinions, beliefs and misbeliefs of legal/professional circles concerning access to justice for NGOs, such as that this is time consuming, expensive, biased, apt for abuse, or on the positive side, problem sensitivity, specific factual and professional viewpoints channelled into the procedures etc. (ref.14)   **Please justify your score and explain the factors you considered.** |
| Art. 9.(4)    Indicator 3 | 1. Are procedures within the scope of article 9, paragraphs 1, 2 and 3 timely?   Article 9(4), first sentence provides:  “4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”  **Researcher’s score: 3 (Access to justice for almost all procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is timely)**  Although there are no statistics covering the time taken for environmental cases to be concluded (the statistics included in the legislative indicator section cover all JRs), the introduction of tighter time limits in the Planning Court has alleviated previous problems of delay with regard to environmental cases. The situation isn’t perfect (as one practitioner remarks, it’s galling that while claimant solicitors can’t afford to be a day late in lodging a case, judges in the Planning Court frequently fail to meet their own deadlines …) but it is much better than several years ago, when cases in the High Court (in particular) could take in excess of a year to get to a substantive hearing. Judges also have the power to expedite any planning case in the interest of justice. | **Scoring guide**  3 = Access to justice for all or almost all procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is timely  2= Access to justice for the majority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is timely.  1 = Only a minority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are timely.  0 = Few or no procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are timely.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the average duration of court procedures, including further applications and remedies if available and the trends in respect thereof (ref.3, ref.9, ref. 13) * specialisation and training of judges in respect of environmental cases (ref.5) * investigation of facts by the courts upon their own initiative is possible and practical or it is fully left to the parties (ref.6) * opinions, beliefs and misbeliefs of legal/professional circles concerning access to justice for NGOs, such as that this is time consuming, expensive, biased, apt for abuse, or on the positive side, problem sensitivity, specific factual and professional viewpoints channelled into the procedures etc. (ref.14)   **Please justify your score and explain the factors you considered.** |
| Art. 9.(4)    Indicator 4 | 1. Are procedures within the scope of article 9, paragraphs 1, 2 and 3 not prohibitively expensive?   Article 9(4), first sentence provides:  “4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. “  **Researcher’s score: 2 (but the score would be 1 if current proposals are enacted in England, Wales and Northern Ireland)**  For a discussion on this issue, please see the answer to the corresponding question in the legislative indicator section). | **Scoring guide**  3 = Access to justice for all or almost all procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is not prohibitively expensive  2= Access to justice for the majority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 is not prohibitively expensive.  1= Only a minority of procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are not prohibitively expensive.  0 = Few or no procedures and/or cases within the scope of article 9, paragraphs 1, 2 and 3 are not prohibitively expensive.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the level of costs in connection with legal remedies, the practice of bearing the costs and levying of them, the application of the loser pays principle, the interpretation of the term prohibitively expensive (ref.3, ref.4, ref.7, ref.8, ref.10, ref.11, ref.12) * the average duration of court procedures, including further applications and remedies if available and the trends in respect thereof (ref.3, ref.9, ref. 13) * specialisation and training of judges in respect of environmental cases (ref.5) * availability of specialised legal aid (ref.10) * the role of several kinds of experts in the procedure, and ways of ensuring their unbiased, professional contribution (ref.11) * opinions, beliefs and misbeliefs of legal/professional circles concerning access to justice for NGOs, such as that this is time consuming, expensive, biased, apt for abuse, or on the positive side, problem sensitivity, specific factual and professional viewpoints channelled into the procedures etc. (ref.14)   **Please justify your score and explain the factors you considered.** |
| Art. 9(4)  Indicator 3 | 1. In practice, are decisions of review bodies under Article 9 given or recorded in writing and publicly accessible?   The second and third sentences of Art. 9(4) provide:  “Decisions under this article [i.e. Art. 9] shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”  **Researcher’s score: 3 (All decisions of such review bodies are given or recorded in writing and are publicly accessible, including inter alia interim decisions and decisions on costs, and all decisions include reasons)** | **Scoring Guide:**  3 = All decisions of such review bodies are given or recorded in writing and are publicly accessible, including *inter alia* interim decisions and decisions on costs, and all decisions include reasons.  2 = All decisions of such review bodies are given or recorded in writing and are publicly accessible, including *inter alia* interim decisions and decisions on costs, though reasons are not routinely included in the decisions.  2= The majority of decisions of such review bodies are given or recorded in writing, and are publicly accessible, including *inter alia* interim decisions and decisions on costs, and those decisions include reasons  1=The majority of decisions of such review bodies are given or recorded in writing, and are publicly accessible, including *inter alia* interim decisions and decisions on costs though reasons are not routinely included in the decisions.  1 = A minority of decisions of such review bodies are given or recorded in writing and are publicly accessible.  0 = Very few decisions of such review bodies are given or recorded in writing.  **Please justify your score and explain the factors you considered.** |
| Art. 9(5), first clause | 1. In practice, how would you rate efforts to ensure that information is provided to the public on access to administrative and judicial review procedures?   Art. 9(5) provides:  “5. In order to further the effectiveness of the provisions of this article [i.e. Art. 9], each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”  **Researcher’s score: 1 (Fair)**  In its 2014 Implementation Report[[269]](#footnote-270), the UK Government reports that it has engaged in “*extensive activity to provide information to the public on accessing administrative and judicial review procedures, and to remove any unnecessary financial and other barriers to access to justice or to consider how they could be removed*.”  However, in practice, the activities include the provision of information via electronic links as outlined in the section on legislative indicators above. Hence, sections of society that are not computer literate might find it difficult to access information about JR and public funding.  Access to lawyers who may be prepared to advise on environmental matters *pro bono* is possible via the Environmental Law Foundation, which works with a number of university law schools to run supervised clinics with help from ELF advisers[[270]](#footnote-271). However, ELF is not State-funded and the lawyers giving their time to advise members of the public are unpaid.  In general, it is fair to say that there are a handful of public interest law firms representing claimants in environmental JR. Some of these provide at least *pro bono* advice, but others charge from the outset. The relatively low number of lawyers practising environmental law and who may be willing to work on a CFA (no win no fee) basis may be explained by the fact that relatively few inquiries lead to cases with strong or reasonable grounds of success and the difficulty of obtaining public funding for environmental cases. I would also observe that some judges in the Planning Court appear unsympathetic to environmental cases. | **Scoring Guide:**  3 = Excellent  2 = Good  1 = Fair  0 = Poor  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing). Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * the user-friendliness of such information from the public’s perspective * the availability of information about lawyers, their expertise and experience, their costs, and their willingness (or otherwise) to act on a ‘no win, no fee’ basis (where applicable) * the effect of any restrictions on advertising by lawyers and law firms (e.g. what they can and cannot say) * availability of public interest environmental lawyers, and law clinics at universities (ref.1, ref.3) * environmental specialisation of judges and prosecutors (ref.2) * case studies available for the public on relevant issues (ref.3) * also see the factors listed at the bottom on p.205 of the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)   **Please justify your score and explain the factors you considered.** |
| Art. 9(5), second clause | 1. In practice, has the government considered the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice, and has it acted on those considerations?   Art. 9(5) provides:  “5. In order to further the effectiveness of the provisions of this article [i.e. Art. 9], each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”  **Researcher’s score: 0 –No evidence of consideration or action**  In fact, there is evidence that the Government has taken positive action to reduce the availability of appropriate assistance mechanisms (such as public funding) in recent years (please see the discussion in the section on legislative indicators above). | **Scoring Guide:**  3 = Yes, and appropriate and effective assistance mechanisms are in place  2 = Yes, the government has considered this and has taken some actions in this area, though some financial and other barriers to access to justice remain.  1 = Evidence that the government has considered this pursuant to Aarhus but it has taken no action or only rather limited action and significant financial and/or other barriers remain.  0 = No evidence of consideration or action |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 9 practice indicators?

Do you think that the practice indicators for Article 9(4) should be further sub-divided such that the issues of: (i) fairness and equity; (ii) timeliness; and (iii) not prohibitively expensive are considered separately for procedures/cases within (separately) each of Article 9(1), 9(2) and 9(3)? So there would be nine practice indicators to cover Article 9(4): fairness & equity in the context of (separately) Art. 9(1), 9(2), 9(3); timeliness in the context of (separately) Art. 9(1), 9(2), 9(3); prohibitive expense in the context of (separately) Art. 9(1), 9(2), 9(3)).

It is unclear where we should address the extent to which Parties provide a procedure enabling civil society to challenge both the procedural and substantive legality of decisions, acts and omissions in the legislative indicator section (I have covered it in the first legal indicator of 9(2). It is, however, specifically addressed in the practice indicator section.

## General pillar (including definitions)(cont.)

### National reporting and overall framework

Note for researchers: please assess this section last, after everything else, as it contains indicators relating to the overall framework implementing the Aarhus Convention.

| **Aarhus provision** | **Practice indicators** | **Guidance note** |
| --- | --- | --- |
| Article 10(2) | 1. Has the country/Party reported regularly on its implementation of the Aarhus Convention?[[271]](#footnote-272)   Article 10(2) provides:  “2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties […]”  **Researcher’s score: 1 (Reports on implementation have not been made for all ordinary Meetings of the Parties since the second session of the MOP in 2005 and they have typically been submitted late)**  The UK ratified the Convention in February 2005, which may explain why it did not submit a National Implementation Report (NIR) to the second Meeting of the Parties in Almaty in 2005. It submitted Reports to the third, fourth and fifth MoPs (see below), although these were all late (a shortfall repeatedly noted by NGO observers). A coalition of UK NGOs submitted separate reports and statements in 2008 and 2014 identifying a number of inaccuracies in the reports (some of these may arise because the UK (in common with other Parties) tends to update the previous NIR, which means that some of the information is out of date). The UK reports can be found on the links below, with the corresponding UK NGOs statements below them:  **2008 (Riga):**  UK NIR: <http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_GBR_e.pdf>  CAJE response to UK NIR : <http://www.unece.org/fileadmin/DAM/env/pp/mop3/cat_III/CAJE_response_UK_2008_NIR_rev.pdf>  **2011 (Chisinau):**  UK NIR : <http://www.unece.org/env/pp/reports_implementation_2011.html>  **2014 (Maastricht)**  UK NIR: <http://www.unece.org/env/pp/reports_trc_implementation_2014.html>  Statement by CAJE on UK NIR: <http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/MoP5_5a_Statement_by_FOE__RSPB_and_WWF-UK_01.pdf> | **Scoring Guide:**  3 = Report(s) on implementation have been made for each relevant ordinary Meeting of the Parties since the later of: (i) The entry into force of the Convention for the Party or (ii) The second session of the MOP in 2005; such report(s) have always been submitted on time, and for reports since 2007 have complied with the guidance prepared by the Compliance Committee in terms of process and content  2 = Report(s) on implementation have been made for each ordinary Meeting of the Parties since the later of: (i) The entry into force of the Convention for the Party or (ii) The second session of the MOP in 2005; such report(s) have typically been submitted on time, and for reports since 2007 have broadly complied with the guidance prepared by the Compliance Committee in terms of process and content, albeit with some weaknesses  1 = Report(s) on implementation have not been made for all ordinary Meetings of the Parties since the later of: (i) The entry into force of the Convention for the Party or (ii) The second session of the MOP in 2005; OR such report(s) have been made but they have typically been submitted late, and/or for reports since 2007 they have typically been deficient in terms of complying with the guidance prepared by the Compliance Committee re process and content  0 = Report(s) on implementation have not been made for any ordinary Meeting of the Parties since the later of: (i) The entry into force of the Convention for the Party or (ii) The second session of the MOP in 2005  Page 21 of the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) provides:  “With respect to reviewing implementation, article 10, paragraph 2, of the Convention requires the Parties at their meetings to keep under continuous review the implementation of the Convention on the basis of regular reporting by the Parties. The Meeting of the Parties, through decision I/8 adopted at its first session, agreed that each Party should prepare, for each ordinary meeting of the Parties, a report on the legislative, regulatory or other measures that it has taken to implement the provisions of the Convention, including their practical implementation, in accordance with the format annexed to that decision. At its fourth session (Chisinau, 29 June–1 July 2011), the Meeting of the Parties adopted a revised reporting format and requested Parties to use the revised format annexed to decision IV/4 in future reporting cycles. The Meeting of the Parties also invited Parties to follow the guidance on reporting requirements prepared by the Compliance Committee.”  The Compliance Committee’s [Guidance on Reporting Requirements (2007)](http://www.unece.org/fileadmin/DAM/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf) contains information about deadlines for submitting reports, amongst other things. |
| Art. 3(1) – access to information | 1. In practice, is there a clear, transparent and consistent framework to implement the access to information pillar of the convention?   Art. 3(1) provides:  “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”  **Researcher’s score: 2 (in practice, most major aspects of the framework for implementing the access to information pillar is very clear, transparent and consistent(though some minor aspects may be less clear or consistent)**  The procedure for setting out requests for information and the appeals procedures to follow where information is withheld by public bodies are set out clearly on the websites of the Information Commissioner and the Scottish Information Commissioner:  <https://ico.org.uk/>  The ICO website provides advice on how to frame requests and achieve the best results, how to ask for an internal review and how to submit a complaint to the ICO if the information is still withheld:  <https://ico.org.uk/for-the-public/official-information/>  <https://ico.org.uk/concerns/getting/>  <https://ico.org.uk/concerns/getting/y/other/y/refuse/y>  <https://ico.org.uk/media/report-a-concern/documents/1043094/how_we_deal_with_complaints_guidance_for_complainants.pdf>  Where a member of the public wishes to appeal to the Information Rights Tribunal, the ICO urges them to consider taking legal advice about the process. There are clear instructions on the Government’s website on the process of making an application to the Tribunal[[272]](#footnote-273), but in practice it would be somewhat daunting for a member of the public to pursue this route without legal assistance. Notwithstanding the above, the process is clear, transparent and consistent.  In Scotland, the Scottish Information Commissioner’s website provides background on the process:  <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.aspx>  <http://www.itspublicknowledge.info/YourRights/UnhappyWithResponse.aspx>  <http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>  <http://www.itspublicknowledge.info/YourRights/Unhappywithdecision.aspx>  <http://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session>  But again, it is difficult to see how members of the public would navigate the latter stages of this process without legal assistance. | **Scoring Guide:**  3= in practice, the entire framework for implementing the access to information pillar is very clear, transparent and consistent in all respects  2= in practice, most major aspects of the framework for implementing the access to information pillar is clear, transparent and consistent (though some minor aspects may be less clear or consistent).  1= in practice, the framework for implementing the access to information pillar is not very clear, transparent and not necessarily consistent.  0= in practice, the framework for implementing the access to information pillar is very unclear, not transparent, not consistent - or non-existent.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that Article 3.1 is frequently referred to as an overall benchmark of the enactment and implementation of the Convention. While its first part refers to the enactment of the provisions of the Convention into the national law, the second part of this paragraph clearly refers to the necessity of introducing and maintaining proper enforcement measures, such as how easy is to find the proper agencies/public authorities, how far their competences are clear.  Please justify your score and explain the factors you considered. |
| Art. 3(1) – public participation | 1. In practice, is there a clear, transparent and consistent framework to implement the public participation pillar of the convention?   Art. 3(1) provides:  “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”  **Researcher’s score: 2 - in practice, most major aspects of the framework for implementing the public participation pillar is clear, transparent and consistent (though some minor aspects may be less clear or consistent**  In general, the provisions of Articles 6, 7 and 8 of the Convention are well enacted. However, there are serious concerns in relation to some of the practice indicators, most notably in the areas of wildlife licensing, inadequate consultation periods for large and controversial infrastructure projects and the lack of a third party right of appeal (as discussed in detail in the sections above). | **Scoring Guide:**  3= in practice, the entire framework for implementing the public participation pillar is very clear, transparent and consistent in all respects  2= in practice, most major aspects of the framework for implementing the public participation pillar is clear, transparent and consistent (though some minor aspects may be less clear or consistent).  1= in practice, the framework for implementing the public participation pillar is not very clear, transparent and not necessarily consistent.  0= in practice, the framework for implementing the public participation pillar is very unclear, not transparent, not consistent - or non-existent.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that Article 3(1) is frequently referred to as an overall benchmark of the enactment and implementation of the Convention. While its first part refers to the enactment of the provisions of the Convention into the national law, the second part of this paragraph clearly refers to the necessity of introducing and maintaining proper enforcement measures, such as how easy is to find the proper agencies/public authorities, how far their competences are clear. The score shall be higher if there are specific institutions or departments at environmental authorities and at other relevant bodies that overlook, support etc. public participation.  Whilst all of these scenarios may not be relevant or may not yet have been tested in the context of the Party, please consider insofar as possible and where relevant, *inter alia*:   * institutions in place that foster the culture of participation (ref.1, ref.7) * attention to local level public participation (ref.1, ref.4) institutions, including interdepartmental working groups etc. established for research and development of public participation (ref.3) * institutional, organisational measures within the judiciary in order to support more effective public participation (ref.2) * developments of public participation infrastructure more generally than environmental matters (ref. 3) * in some instances there are problems even with the correct translation of the Convention into the relevant national language (ref.5) * are the responsibilities of certain branches of government in relation to public participation understood clearly enough? (ref.6)   Please justify your score and explain the factors you considered. |
| Art. 3(1) – access to justice | 1. In practice, is there a clear, transparent and consistent framework to implement the access to justice pillar of the convention?   Art. 3(1) provides:  “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.”  **Researcher’s score: 1 (1= in practice, the framework for implementing the access to justice pillar is not very clear, transparent and not necessarily consistent)**  While some aspects of the access to justice framework are clear and consistent, others are flawed and patchy. Attention is drawn to, *inter alia*, the following:   * While access to the courts is generally good as far as Judicial Review is concerned, standing for applicants in statutory review cases is less certain; * The introduction of a six-week deadline for lodging an application for JR in planning matters is making it difficult for community groups to utilise JR; * The introduction of a new costs regime for environmental cases has markedly improved the situation with regard to prohibitive expense. However, there are significant differences between the schemes applying in the devolved administrations of the UK and flaws in the existing regime (e.g. the 35k cross-cap); * Recent and proposed changes to the process of JR (as detailed above) and the costs regime for environmental cases will make the situation uncertain at best and, at worst, unworkable and non-compliant with the Convention and EU law; * New provisions relating to injunctive relief appear to have made very difference to the public’s ability to secure interim relief; * Public funding for environmental cases is theoretically available in all the devolved administrations of the UK but in practice is rarely secured; and * Information about the process of JR and public funding is restricted to computer based sources. | **Scoring Guide:**  3= in practice, the entire framework for implementing the access to justice pillar is very clear, transparent and consistent in all respects  2= in practice, most major aspects of the framework for implementing the access to justice pillar is clear, transparent and consistent (though some minor aspects may be less clear or consistent).  1= in practice, the framework for implementing the access to justice pillar is not very clear, transparent and not necessarily consistent.  0= in practice, the framework for implementing the access to justice pillar is very unclear, not transparent, not consistent - or non-existent.  The references cited below, together with relevant background material, can be found [here](https://drive.google.com/file/d/0B3A-dRNkr_7BVm9ZNkRhTVZPZXM/view?usp=sharing)  Note that Article 3.1 is frequently referred to as an overall benchmark of the enactment and implementation of the Convention. While its first part refers to the enactment of the provisions of the Convention into the national law, the second part of this paragraph clearly refers to the necessity of introducing and maintaining proper enforcement measures, and practical implementation measures, too, such as how easy it is to find the proper agencies/public authorities, to what extent their competences are clear, etc.  Please justify your score and explain the factors you considered. |

Do you have any comments, questions, or concerns regarding the intent, wording of the Article 10 and 3 (general pillar) practice indicators?

1. For the time being we have not dealt with the PRTR protocol or with the GMO amendment, since their status is different from the body text of the Convention and this would negatively influence the comparability of the scores. [↑](#footnote-ref-2)
2. See <http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf> [↑](#footnote-ref-3)
3. In EU terminology one might say “transpose” here (and throughout), but since the Aarhus region is much broader than the EU we have opted for the less EU-centric term “enact” (and the related terms “enacted” and “enactment”), which arguably has the benefit of being the correct term in English: see pp.63-4: <http://ec.europa.eu/translation/english/guidelines/documents/misused_english_terminology_eu_publications_en.pdf> [↑](#footnote-ref-4)
4. The exception is an indicator which tests whether Parties have provided for any exceptions from the right to obtain environmental information on request which are not envisaged by the Aarhus Convention. Here a presence (“0”) or absence (“3”) scoring system seemed most appropriate. [↑](#footnote-ref-5)
5. [Guidelines for Conformity Checking, Part II, Study Contract No 070307/2009/543947/FRA/A2 Conformity checking of measures of Member States to transpose Directives in the sector of Environment, Milieu Ltd, January 2009](https://drive.google.com/file/d/0Byc1SOzeg2lPRFM1WWF4NC03TUE4NXlDTk9oSmFNX2Z3b2VV/view?usp=sharing). [↑](#footnote-ref-6)
6. This is a key difference between the Aarhus Convention Index and the Environmental Democracy Index (EDI) – in the latter the practice indicators were not numerically scored, and the practice indicators did not impact the overall score for a country. As such, while EDI is a legal enactment index with an indication of practical implementation in certain areas, the idea here is that the ACI index scores will reflect practical experiences of environmental democracy rights on the ground. [↑](#footnote-ref-7)
7. A proper balance between environmental law in its narrower sense and the related fields of law that are not always called environmental but strongly affect the quality of the environment should be carefully maintained. Legal arrangements, institutional background and attitudes of the administrative personnel that determine the level and effectiveness of, say, public participation are often quite different in the two areas. While the ‘environmental’ branch of administration (narrowly understood) may be more supportive towards environmental democracy, other related fields of laws may show more resistance in this respect. Therefore, the results of testing the indicators may be either too positive or too negative if one or the other field of law is given a disproportionate representation in the samples examined by the country researchers. [↑](#footnote-ref-8)
8. <http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf> [↑](#footnote-ref-9)
9. <http://www.eufje.org/images/DocAarhus/Aarhus%20CC%20case-law.pdf> [↑](#footnote-ref-10)
10. [http://www.unece.org/env/pp/reports\_trc\_implementation\_2014.html](http://www.unece.org/env/pp/reports_trc_implementation_2014.html%20) [↑](#footnote-ref-11)
11. Accepting that sources must of course be treated with care. For example, the EU is itself a Party to the Aarhus Convention, and there are cases in which the jurisprudence of the EU courts has been alleged not to comply with the requirements of the Convention. As such, researchers should remain mindful throughout of the relationship between jurisprudence they cite in scoring indicators and the requirements of the Convention itself. [↑](#footnote-ref-12)
12. With the consent of such interviewees. [↑](#footnote-ref-13)
13. This part of the definition has been the subject of case law in England: See *Port of London Authority v The Information Commissioner* Appeal No. EA/2006/0083, *Network Rail Ltd v The Information Commissioner* Appeal Nos EA/2006/0061 and EA/2006/0062. In *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2011] JPL 455, the Upper Tribunal decided that water companies were not a body or person carrying out the functions of public administration under regulation 2(2)(c) and were not under the control of a person with public responsibilities within regulation 2(2)(d) either but this view was not upheld by the CJEU in *Fish Legal v Information Commissioner* Case C-279/12 (see later) [↑](#footnote-ref-14)
14. Regulation 2(1) [↑](#footnote-ref-15)
15. November 2012 [↑](#footnote-ref-16)
16. The Aarhus Convention: An implementation Guide 2013 indicates that privatisation should not take such bodies outside the definition of public authority: pages 35-37. The European Court of Justice has held that the Implementation Guide is to be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention but not of binding force and not of the normative effect of the provisions of the Aarhus Convention (Case C-182/10, Solvay and others v Region Wallonne [2012] 2 CMLR 19). [↑](#footnote-ref-17)
17. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26 (Environmental Information Directive) [↑](#footnote-ref-18)
18. ACCC/C/2008/24 (Spain) ECE/MP.PP/C.1/2009/8/Add.1, 8 February 2011, para 98 [↑](#footnote-ref-19)
19. *Lord Wilberforce in R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 [↑](#footnote-ref-20)
20. R (on the application of *An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change & NNB Generation Co Ltd* (Interested Party) [2014] EWCA Civ 1111 [↑](#footnote-ref-21)
21. CPR 25.12 [↑](#footnote-ref-22)
22. Note that the [Aarhus Convention Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) states, at p.46, that the definition provides “as broad coverage as possible”. [↑](#footnote-ref-23)
23. *Smartsource Drainage & Water Reports Ltd v Information Commissioner* [2010] UKUT 415 (AAC) [↑](#footnote-ref-24)
24. *The Aarhus Convention: An Implementation Guide* (2nd edn, 2014), p 46 [↑](#footnote-ref-25)
25. Case C-279/12 *Fish Legal, Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* [↑](#footnote-ref-26)
26. ACCC/C/2010/55 (United Kingdom) [↑](#footnote-ref-27)
27. (EA/2010/0182) 3 November 2011 [↑](#footnote-ref-28)
28. Note that the [Aarhus Convention Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) states, at p.50, that “The clear intention of the drafters [...] was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation”. [↑](#footnote-ref-29)
29. Decision here: <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1447/DECC%20(EA-2014-0103)%2024-12-14.pdf> [↑](#footnote-ref-30)
30. *Decision 056/2008: Mr Rob Edwards and the Scottish Ministers*; information about the transfer of giant pandas to Edinburgh zoo is environmental information: Decision 051/2009 Advocates for Animals and the Scottish Ministers; a loss adjuster’s report was environmental information because it related to the interaction of water with an infrastructure potentially causing flood damage and erosion to further built structures *Decision 096/2006: Mr George Waddell and South Lanarkshire Council*; information about the costs and financing of a road building project was environmental *information Decision 218/2007 Professor A D Hawkins and Transport Scotland*; a Local Plan and officers' observations on the comments/objections of Councillors and others on the Local Plan proposals (with supporting information such as maps), together with Councillors' requests for advice on these were also environmental information: *Decision 102/2009: Councillor David Alexander and Falkirk Council*. [↑](#footnote-ref-31)
31. See communication ACCC/C/2009/38: the communicant, Road Sense, claimed that Scottish Natural Heritage breached articles 1, 3 and 4 of Aarhus by failing to disclose a report relating to the site conditions of freshwater pearl mussels on the River Dee which had been subject to illegal fishing. The Committee considered that the refusal to disclose information on the breeding sites of pearl mussels was justified on the grounds that, while the communicant may not personally represent a threat to the pearl mussels, releasing the information would mean that the public in general (including those with ulterior motives) would be entitled to seek release of the information. In another Scottish case a communicant alleged failure to provide information regarding implementation of the renewable energy programme under the first pillar of Aarhus. In its findings, the Committee did not find any failure to comply with the first pillar: ACCC/C/2012/68. [↑](#footnote-ref-32)
32. [2013] JPL 56 [↑](#footnote-ref-33)
33. For the determination of the substantive issues in the case, see *R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport* [2014] EWHC 2759 (Admin) [↑](#footnote-ref-34)
34. [2015] EWCA Civ 203 [↑](#footnote-ref-35)
35. CPR 45.41-45.44 and Practice Direction 45 paragraph 5.1 [↑](#footnote-ref-36)
36. Pursuant to its powers under s.222 of the Local Government Act 1972 [↑](#footnote-ref-37)
37. Please note that Art. 3(1) is dealt with by way of indicators at the very end of this document, since it requires, in effect, an overall assessment. [↑](#footnote-ref-38)
38. The text of this para has been updated to reflect the amendment of the Principles in 2016 [↑](#footnote-ref-39)
39. Please note that Art. 3(1) is dealt with by way of indicators at the very end of this document, since it requires, in effect, an overall assessment. [↑](#footnote-ref-40)
40. These principles were updated in 2016: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf> [↑](#footnote-ref-41)
41. Please see pp.62-5 of the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) for a discussion of capacity building in the context of Art. 3(2) and 3(3). [↑](#footnote-ref-42)
42. That this first clause is a standalone obligation, such that the obligation to promote education and awareness raising is not limited to the matters following the word “especially”, is clear from p.64 of the [Aarhus Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf). [↑](#footnote-ref-43)
43. The text of this para has been updated to reflect the amendment of the Principles in 2016 [↑](#footnote-ref-44)
44. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26 (Environmental Information Directive) [↑](#footnote-ref-45)
45. T Blair*, A Journey* (London, Arrow, 2011) 516 [↑](#footnote-ref-46)
46. <https://ico.org.uk/> [↑](#footnote-ref-47)
47. *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606 [2012], 2 CMLR 169, [20] [↑](#footnote-ref-48)
48. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554104/foi_statistics_q2_2016_bulletin.pdf> [↑](#footnote-ref-49)
49. (8 March 2011) [↑](#footnote-ref-50)
50. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/554104/foi_statistics_q2_2016_bulletin.pdf> [↑](#footnote-ref-51)
51. Case C-71/10 *Office of Communications v Information Commissioner* [2011] ECR I-07205 [↑](#footnote-ref-52)
52. At p98 [↑](#footnote-ref-53)
53. ACCC/C/2005/15 (Romania), at [27] [↑](#footnote-ref-54)
54. <http://www.legislation.gov.uk/uksi/2004/3391/regulation/4/made> [↑](#footnote-ref-55)
55. Implementation Guide, p112 [↑](#footnote-ref-56)
56. <http://www.legislation.gov.uk/ukpga/2000/36/section/19> [↑](#footnote-ref-57)
57. <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/publication-schemes/> [↑](#footnote-ref-58)
58. See section 52: <http://www.legislation.gov.uk/ukpga/1995/25/section/52> [↑](#footnote-ref-59)
59. See <http://www.legislation.gov.uk/ukpga/2006/16/schedule/1> [↑](#footnote-ref-60)
60. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470454/defra-enforcement-policy-statement-2015.pdf> [↑](#footnote-ref-61)
61. <https://www.gov.uk/government/publications/regulators-code> [↑](#footnote-ref-62)
62. <http://www.legislation.gov.uk/ukpga/2015/20/contents/enacted> [↑](#footnote-ref-63)
63. The Implementation Guide also refers to establishing codes of conduct and the IS 14021 standard on self-declared environmental claims [↑](#footnote-ref-64)
64. See <http://apps.environment-agency.gov.uk/wiyby/default.aspx> [↑](#footnote-ref-65)
65. Cf. Page 112 of the [Aarhus Convention Implementation Guide (2014)](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf). [↑](#footnote-ref-66)
66. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17 (Public Participation Directive) [↑](#footnote-ref-67)
67. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 [↑](#footnote-ref-68)
68. Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L16/21 [↑](#footnote-ref-69)
69. Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30 [↑](#footnote-ref-70)
70. Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1 [↑](#footnote-ref-71)
71. In the Supreme Court’s dismissal of the appeals brought in respect of a challenge against the HS2 high speed rail link, Lord Carnwath observed, *obiter dicta*, that there is no reason to assume that Article 7 and the SEA Directive are intended to cover exactly the same ground, based on his reading of the non-binding Implementation Guide, but that this does not invalidate the Directive so far as it goes (*R (HS2 Action Alliance and others) v Secretary of State for Transport and others* [2014] UKSC 3, [2014] 1 WLR 324 [52]) [↑](#footnote-ref-72)
72. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1. The European Commission published a proposal for a new directive in October 2012 [↑](#footnote-ref-73)
73. Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17 [↑](#footnote-ref-74)
74. Information taken from Banner, C. (2015) *The Aarhus Convention – A Guide for UK Lawyers*. Chapter 2 – The Implementation of the Aarhus Convention in the UK by Brian Ruddie [↑](#footnote-ref-75)
75. SI 2008/2349 – see : <http://www.legislation.gov.uk/uksi/2008/2349/pdfs/uksi_20082349_en.pdf> [↑](#footnote-ref-76)
76. SI 2010/675 – see: <http://www.legislation.gov.uk/ukdsi/2010/9780111491423/contents> [↑](#footnote-ref-77)
77. See: <http://www.legislation.gov.uk/ukpga/1990/8/contents> [↑](#footnote-ref-78)
78. See: <http://www.legislation.gov.uk/ukpga/2004/5/contents> [↑](#footnote-ref-79)
79. See: <http://www.legislation.gov.uk/ukpga/2008/29/contents> [↑](#footnote-ref-80)
80. See: <http://www.legislation.gov.uk/uksi/2009/2263/contents/made> [↑](#footnote-ref-81)
81. See: <http://www.legislation.gov.uk/uksi/2010/2184/contents/made> [↑](#footnote-ref-82)
82. See: <http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf> [↑](#footnote-ref-83)
83. Available via: <http://www.unece.org/env/pp/reports_trc_implementation_2014.html> [↑](#footnote-ref-84)
84. Including town and country planning, trunk roads, land drainage, marine works, infrastructure projects, energy consents, agriculture, controlled activities (water), flooding, ports and harbours and forestry. A large-scale onshore electricity generating project, is subject to consent under the Electricity Act 1989, and procedures in the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000. An application for planning permission under the Town and Country Planning (Scotland) Act 1997 is subject to the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011. The 2011 Regulations consolidate, update, and replace Part II of the Environmental Impact Assessment (Scotland) Regulations 1999, with effect from 1st June 2011. Parts III and IV of the 1999 Regulations, concerning Roads and Bridges, and Land Drainage, remain in force. See the Review of Transposition of the Environmental Impact Assessment Directive in Scotland 2012 commissioned by the Scottish Government (<http://www.scotland.gov.uk/Resource/0042/00422499.pdf>) which concluded that the multi-regime approach caused no real difficulty in practice. [↑](#footnote-ref-85)
85. For example, paragraphs 5, 6, 11 and 12 of Schedule 1 to the Roads (Scotland) Act 1984 and paragraphs 2 and 3 of Schedule 8 to the Electricity Act 1989. Although not argued under the EIA Directive, arguments were made in *Sustainable Shetland v Scottish Ministers* 2013 CSOH 158 that a public local inquiry required to be held [↑](#footnote-ref-86)
86. Information about Scotland taken from Banner, C. (2015) *The Aarhus Convention – A Guide for UK Lawyers*. Chapter 3 – The Implementation of the Aarhus Convention in Scotland by Lorna Drummond QC [↑](#footnote-ref-87)
87. <http://www.legislation.gov.uk/uksi/2011/1824/pdfs/uksi_20111824_en.pdf> [↑](#footnote-ref-88)
88. <http://www.legislation.gov.uk/ukpga/2008/29/part/5/chapter/2> [↑](#footnote-ref-89)
89. <http://www.legislation.gov.uk/uksi/2009/2263/contents/made> [↑](#footnote-ref-90)
90. [2010] 1 P & CR 4 [↑](#footnote-ref-91)
91. <http://www.legislation.gov.uk/ukdsi/2010/9780111491423/contents> [↑](#footnote-ref-92)
92. Available at [www.opsi.gov.uk/si/si200735](http://www.opsi.gov.uk/si/si200735) [↑](#footnote-ref-93)
93. Cartagena Protocol on Biosafety to the Convention on Biological Diversity [↑](#footnote-ref-94)
94. Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1 [↑](#footnote-ref-95)
95. Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/ [↑](#footnote-ref-96)
96. <http://www.legislation.gov.uk/uksi/2002/2443/contents/made> [↑](#footnote-ref-97)
97. Case C-50/09, see paragraphs 97-101 of the judgment of the CJEU [↑](#footnote-ref-98)
98. [2011] EWCA Civ 3348 [↑](#footnote-ref-99)
99. [2010] EWHC 1070 [↑](#footnote-ref-100)
100. At paragraph 21 [↑](#footnote-ref-101)
101. [2010] EWCA Civ 534 [↑](#footnote-ref-102)
102. DC [2011] EWCA Civ 157 [↑](#footnote-ref-103)
103. [2011] EWCA Civ 157 paragraph 14 [↑](#footnote-ref-104)
104. EWHC 2083 (Admin) [↑](#footnote-ref-105)
105. [2011] EWCA Civ 863 [↑](#footnote-ref-106)
106. [2010] EWCA Civ 1180 [↑](#footnote-ref-107)
107. A full list of statutory consultees can be found here: <http://planningguidance.planningportal.gov.uk/blog/guidance/consultation-and-pre-decision-matters/table-2-statutory-consultees-on-applications-for-planning-permission-and-heritage-applications/> [↑](#footnote-ref-108)
108. Organisations identified in national policy and guidance can be found here: <http://planningguidance.planningportal.gov.uk/blog/guidance/consultation-and-pre-decision-matters/table-3-non-statutory-consultees-identified-in-national-planning-policy-or-guidance/> [↑](#footnote-ref-109)
109. See Table 1 of the Article 13 of the Development Management Procedure Order (as amended) for minimum requirements: <http://www.legislation.gov.uk/uksi/2010/2184/article/13/made> [↑](#footnote-ref-110)
110. See: <http://www.legislation.gov.uk/ukpga/2004/5/section/18> [↑](#footnote-ref-111)
111. In *R (on the Application of Halebank Parish Council) v Halton Borough Council [*2012] EWHC 1889 Gilbart J observed that the public participation requirement in Article 6 of the EIA Directive might not be met where the minimum consultation period under the DMPO 2010 had been complied with if in the circumstances of a particular case that period did not allow for an effective opportunity for participation – see §§61 – 63 [↑](#footnote-ref-112)
112. 2011 SCLR 686 [↑](#footnote-ref-113)
113. [2012] CSIH 19 [↑](#footnote-ref-114)
114. ACCC/C/2009/38 adopted on 25 February 2011 in communication by Road Sense (of which Mr Walton was chairman). Although the Committee had some concerns that the route finally selected and the dual carriageway nature of the Fastlink were not subject to formal consultation, it found that these aspects were ultimately subject to public participation through the statutory authorisation process following the publication of the draft schemes and orders under the environmental impact regulations. On appeal to the Supreme Court in Walton, Lord Reed observed that, although Aarhus was no longer being relied upon, the decisions of the Committee deserve respect on issues relating to standards of public participation (paragraph 100) [↑](#footnote-ref-115)
115. *Walton v Scottish Ministers* 2011 S.C.L.R. 686 paragraph 43; [2012] CSIH 19, at paragraph 22. This issue was not the subject of the further appeal to the Supreme Court in the case [↑](#footnote-ref-116)
116. [2010] EWCA Civ 523 [↑](#footnote-ref-117)
117. See the LB Camden publication - Planning Applications Putting forward your views to the Development Control Committee [↑](#footnote-ref-118)
118. In *R (Adlard) v Secretary of State* [2002] EWCA Civ 735 dismissed a challenge to the Secretary of State’s decision not to call in an application for a controversial new 30,000 seat stadium in Fulham and held that Article 6 of the European Convention on Human Rights was not breached by the absence in the statutory planning scheme for the provision of an oral hearing before permission was granted but made clear that exceptionally a local planning authority might be acting unfairly by denying an objector an oral hearing – see §§31 & 32 [↑](#footnote-ref-119)
119. Joined communications ACCC/C/2010/45 and ACCC/C/2011/61 (United Kingdom) [↑](#footnote-ref-120)
120. Findings adopted by the Compliance Committee on 28 June 2013, para 78 [↑](#footnote-ref-121)
121. *R (Barker) v Bromley London Borough Council* (Case C-290/03) [2006] QB 764 [↑](#footnote-ref-122)
122. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:197:0030:0037:EN:PDF> [↑](#footnote-ref-123)
123. <http://www.legislation.gov.uk/uksi/2004/1633/pdfs/uksi_20041633_en.pdf> [↑](#footnote-ref-124)
124. The Scottish Government hosts an SEA Database, which provides information about all SEA activity in Scotland, <http://www.scotland.gov.uk/Topics/Environment/environmental-assessment/sea/SEAG>. The Scottish Government has also produced a basic introduction to SEA explaining the purpose of the assessment process: [www.scotland.gov.uk/Topics/Environment/environmental-assessment/sea/guidance/SEAGuidance/basicguidance](http://www.scotland.gov.uk/Topics/Environment/environmental-assessment/sea/guidance/SEAGuidance/basicguidance) [↑](#footnote-ref-125)
125. *McGinty v Scottish Ministers* 2014 SC 81 at paragraph 19 and *Walton v Scottish Ministers* [2013] PTSR 51 at paragraph 30 where the Court did not consider the domestic law since it was common ground that the appellant could directly rely on the SEA Directive. Section 1(1) of the 2005 Act requires the responsible authority, during the preparation of a qualifying plan or programme, to secure the carrying out of an environmental assessment in relation to the plan or programme; and do so either before its adoption or submission to legislative procedure. Section 4 provides that any references to plans or programmes, includes reference to modification of plans or programmes. Section 5 includes within the definition of qualifying plans or programmes, a plan or programme which is required by legislative, regulatory or administrative provision and which, under paragraph (a)(ii) or (c) sets the framework for future development consent of projects [↑](#footnote-ref-126)
126. <http://www.legislation.gov.uk/uksi/2004/1633/pdfs/uksi_20041633_en.pdf> [↑](#footnote-ref-127)
127. <https://www.gov.uk/government/publications/consultation-principles-guidance> [↑](#footnote-ref-128)
128. [2007] NIQB 62 [↑](#footnote-ref-129)
129. Case C-474/10: 20th October 2011 [↑](#footnote-ref-130)
130. [2010] EWHC 2866 (Admin) [↑](#footnote-ref-131)
131. [2011] EWHC 606 (Admin) [↑](#footnote-ref-132)
132. The Aarhus Convention Compliance Committee reached the same conclusion and found there to be no breach of Article 7 concluding that there had been no modification of a plan or programme: ACCC/C/2009/38 at paragraph 87. The Committee subsequently made findings under Article 7 of Aarhus in relation to another communication about UK renewable energy policy. In its draft findings the Committee found that there was public participation in plans, programmes and policies in Scotland, but that the UK National Renewable Energy Plan was not subject to public participation in accordance with Article 7: ACCC/C/2012/68 [↑](#footnote-ref-133)
133. [2014] 1 WLR 324 (SC). [↑](#footnote-ref-134)
134. Per Lord Carnwath (with whom Lord Neuberger of Abbotsbury, Lord Mance, Lord Kerr of Tonaghmore, Lord Sumption and Lord Reed agreed) at paragraph 38. A number of other English cases have considered when a plan or programme is “required” or “set the framework for development consent”: see *Central Craigavon Ltd v Department for Environment* [2011] NICA 17 per Girvan LJ at §§34-43; *Cala Homes (South) Limited) v Secretary of State for Communities and Local Government and another* [2011] 1 P&CR 22 per Lindblom J at paragraphs 92-100; *R (Buckinghamshire County Council and others) v Secretary of State for Transport and another* [2014] 1 WLR 324 (SC); *R (HS2 Action Alliance Ltd. & others) v. Secretary of State for Transport* [2014] EWHC 2759 (Admin); A5 Alliance application for judicial review [2013] NIQB 30 [↑](#footnote-ref-135)
135. *Terre wallonne ASBL and Inter-Environnement Wallonie ASBL v Region wallonne* C-105/09 and C-110/09 [2010] ECR I-5611; *Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] 2 CMLR 909; Nomarchiaki case [2013] Env LR 453 [↑](#footnote-ref-136)
136. 2014 SC 81 [↑](#footnote-ref-137)
137. Paragraph 51. Although Article 6(5), under the principle of procedural autonomy, leaves the detailed arrangements to Member States to set the appropriate arrangements for information and consultation of the public, the principle of effectiveness under EU law requires that these procedures are not less favourable than those governing similar domestic situations (“the principle of equivalence”) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Legal Order (“the principle of effectiveness”) (see paragraph 45 of Inter-Environment Wallonie ASBL, *Terre wallonne ASBL v Region Wallonne* C-41/11. Mr McGinty had pointed to the fact that at the project level the domestic requirement was for publication in both a local and national paper unlike at the SEA level which only required publication of notice “circulating in the area” and that the procedures had made it excessively difficult for him and others to exercise his rights [↑](#footnote-ref-138)
138. EWHC 311, [2007] Env LR 29 [↑](#footnote-ref-139)
139. Available via this link : <http://www.unece.org/env/pp/reports_trc_implementation_2014.html> [↑](#footnote-ref-140)
140. Available via this link : <http://www.unece.org/env/pp/reports_trc_implementation_2014.html> [↑](#footnote-ref-141)
141. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf> [↑](#footnote-ref-142)
142. <https://www.gov.uk/guidance/legislative-process-taking-a-bill-through-parliament#preparation-of-the-bill> [↑](#footnote-ref-143)
143. See page 183 <http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf> [↑](#footnote-ref-144)
144. [↑](#footnote-ref-145)
145. See <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf> [↑](#footnote-ref-146)
146. A public body cannot dispense with consultation in reliance on urgency of its own making: *R v North East Devon Health Authority ex p Pow* unreported 4 August 1997 [↑](#footnote-ref-147)
147. *Coughlan; R v Brent LBC, ex p. Gunning* (1984) LGR 168; but note *Breckland v Boundary Commission* [2009] EWCA Civ 239 [43] where the statute required the consulter to ‘take such steps as they consider sufficient’ [↑](#footnote-ref-148)
148. *R v London Borough Of Lambeth Ex Parte N* [1996] ELR 299, *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 “the essence of consultation was the communication of a genuine invitation to give advice and a genuine receipt of that advice” [↑](#footnote-ref-149)
149. *R (Edwards) v Environment Agency* (No. 2) [2006] EWCA Civ 877*; R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); ex p East [1996] ELR 74, 88; ex p Baker [1995] 1 All ER73 at 88; *Evans v Lord Chancellor* [2011] EWHC 1146 [32] [↑](#footnote-ref-150)
150. *R (Sadar) v Watford BC* [2006] EWHC 1590 [↑](#footnote-ref-151)
151. *Vale of Glamorgan v Lord Chancellor*[2011] EWHC 1532 (Admin) [25] [↑](#footnote-ref-152)
152. *R v Camden ex p Cran* (1996) 94 LGR 8; *Wainwright v Richmond on Thames* CO/3605/2000 11 April 2001 [44] [↑](#footnote-ref-153)
153. *Breckland v Boundary Commission* [2009] EWCA Civ 239 [45] [↑](#footnote-ref-154)
154. *R (Legal Remedy UK) v Secretary of State for Health* [2007] EWHC 1252 (Admin); *Milton Keynes v Secretary of State for Communities and Local Government* [2011] EWHC 1060 (Admin) [↑](#footnote-ref-155)
155. *R (Sadar) v Watford BC* [2006] EWHC 1590 [↑](#footnote-ref-156)
156. *Nichol v Gateshead MBC* (1988) 87 LGR 435 [↑](#footnote-ref-157)
157. *R (Parents for Legal Action Ltd) v Northumberland* [2006] ELR 397, [2006] EWHC 1081 Admin [↑](#footnote-ref-158)
158. *Breckland v Boundary Commission* [2009] EWCA Civ 239 [49] [↑](#footnote-ref-159)
159. *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213; *R(Forest Heath DC) v Electoral Commission* [2010] PTSR 1227 [54]; *Vale of Glamorgan v Lord Chancellor*[2011] EWHC 1532 (Admin) [↑](#footnote-ref-160)
160. *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533; *R v Lambeth London Borough Council, ex p. N* [1996] ELR 299 [↑](#footnote-ref-161)
161. *R(Madden) v Bury MBC* [2002] EWHC (Admin) 1882 [↑](#footnote-ref-162)
162. *R (Capenhurst) v Leicester City Council* [2004] EWHC 2124 (Admin) [↑](#footnote-ref-163)
163. *R (Beale) v Camden* [2004] LGR 291 [↑](#footnote-ref-164)
164. *Ex p Bushell* [1981] AC 75 [↑](#footnote-ref-165)
165. *Ex p US Tobacco* [1992] QB 335, 370F-G; *Abbey Mines v Coal Authority* [2008] EWCA Civ 353; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296 [41] [↑](#footnote-ref-166)
166. *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877; *Electoral & Boundary Commission v Forest Heath* [2009] EWCA Civ 1296 [44] [↑](#footnote-ref-167)
167. *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) [↑](#footnote-ref-168)
168. *Breckland v Boundary Commission* [2009] EWCA Civ 239 [69] [↑](#footnote-ref-169)
169. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [↑](#footnote-ref-170)
170. *Bard v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) [↑](#footnote-ref-171)
171. *R v Secretary of State for the Home Department, ex p. Harry* [1998] 1 WLR 1737 at 1748 [↑](#footnote-ref-172)
172. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438; [↑](#footnote-ref-173)
173. *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877 [↑](#footnote-ref-174)
174. *Anglian Water v Environment Agency* [2003] EWHC 1506 [↑](#footnote-ref-175)
175. *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) [↑](#footnote-ref-176)
176. *R (Madden) v Bury Metropolitan Borough Council* [2002] EWHC 1882 (Admin); *Vale of Glamorgan v Lord Chancellor*[2011] EWHC 1532 (Admin) [↑](#footnote-ref-177)
177. *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) at [32] [↑](#footnote-ref-178)
178. *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin); *R v Shropshire HA ex p Duffus*[1990] 1 Med LR 119 at 223 [↑](#footnote-ref-179)
179. *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin); *R v Shropshire HA ex p Duffus* [1990] 1 Med LR 119 at 223 [↑](#footnote-ref-180)
180. *R (Carton) v Coventry City Council* (2001) 4 CCLR 41, 44C-E [↑](#footnote-ref-181)
181. *Miller v North Yorkshire County Council* [2009] EWHC 2172 (Admin) at [49]; *Bard v Secretary of State for Communities and Local Government [*2009] EWHC 308 (Admin) [96] [↑](#footnote-ref-182)
182. *R (Kides) v South Cambridgeshire DC* [2001[ EWHC Admin 839 [↑](#footnote-ref-183)
183. *R (Lowther) v Durham County Council* [2001] EWCA 781 at [98] per Pill LJ; *Trillium v Tower Hamlets* [2011] EWHC 146 (Admin); *Wainwright v Richmond on Thames* CO/3605/2000 11 April 2001 [64-67]: not enough to complain that the report could have said more if there were no material omissions [↑](#footnote-ref-184)
184. *R (Edwards) v Environment Agency (No. 2)* [2006] EWCA Civ 877 [103] [↑](#footnote-ref-185)
185. <http://www.publiclawproject.org.uk/data/resources/113/PLP_2006_Guide_Grounds_JR.pdf> [↑](#footnote-ref-186)
186. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs#VII> [↑](#footnote-ref-187)
187. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#rule45.41> [↑](#footnote-ref-188)
188. Please see the answer to question 11 on page 13: <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf> [↑](#footnote-ref-189)
189. See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> [↑](#footnote-ref-190)
190. See *Commission v UK* (Case C-530/11) paragraphs 64-70 and *Edwards and Pallikaropoulos* (Case C-260/11) paragraphs 27 and 28 [↑](#footnote-ref-191)
191. Please see the answer to question 13 in WCL’s response to the consultation on proposed changes to the costs regime in environmental cases (pages 13-15) available here: <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf> [↑](#footnote-ref-192)
192. See: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf> [↑](#footnote-ref-193)
193. See <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims> [↑](#footnote-ref-194)
194. See <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/planning-court/> [↑](#footnote-ref-195)
195. See <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII> [↑](#footnote-ref-196)
196. See the Schedule to The Civil Proceedings Fees (Amendment) Order 2014 available at: <http://www.legislation.gov.uk/uksi/2014/874/schedule/made> [↑](#footnote-ref-197)
197. Supreme Court Fees (Amendment) Order 2011 (SI 1737 (L16) /2011) [↑](#footnote-ref-198)
198. Case C-530/11 – infraction proceedings brought against the UK as a result of a complaint lodged by a coalition of NGOs in 2005 [↑](#footnote-ref-199)
199. *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency (No. 2)* [2013] UKSC 78) [↑](#footnote-ref-200)
200. Similar schemes were introduced in Scotland and Northern Ireland shortly afterwards [↑](#footnote-ref-201)
201. See Practice Direction 45 (Fixed Costs) available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs#5.1> [↑](#footnote-ref-202)
202. Concerning Communication C33. See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> [↑](#footnote-ref-203)
203. *R (on the application of Edwards and another) v Environment Agency and others* (No 2) [2013] UKSC 78, [2014] 1 WLR 55 [28] [↑](#footnote-ref-204)
204. See paragraphs 47-51 of the judgment [↑](#footnote-ref-205)
205. See paragraphs 40-48 of the judgment [↑](#footnote-ref-206)
206. *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539 [↑](#footnote-ref-207)
207. [2005] 1 WLR 2600 [↑](#footnote-ref-208)
208. 2006 SLT 170 [↑](#footnote-ref-209)
209. *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State* [2006] EWHC 2829, see paragraph 10 [↑](#footnote-ref-210)
210. It was accepted that the access to justice provisions in the EIA directive as amended had direct effect and therefore could be involved by the claimant. In other cases, it would be far less certain that a court would feel obliged to modify the *Corner House* principles. UK law has adopted a dualist approach to international public law, and provisions of Aarhus, though influential, cannot be directly relied upon in the UK Courts [↑](#footnote-ref-211)
211. *(1)* *Francis Roy Morgan (2) Catherine Margaret Baker (Appellants) v Hinton Organics (Wessex) Ltd (Respondent) & CAJE (Intervenor)* [2009] EWCA Civ 107 [↑](#footnote-ref-212)
212. *Alyson Austin & Ors v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928 [↑](#footnote-ref-213)
213. See <http://www.legislation.gov.uk/ukpga/2015/2/pdfs/ukpga_20150002_en.pdf> [↑](#footnote-ref-214)
214. Part 4 also inserts provisions into and the Tribunals, Courts and Enforcement Act 2007 in respect of the jurisdiction of the Upper Tribunal to hear JR applications [↑](#footnote-ref-215)
215. According to the Explanatory Notes to the Bill, the new presumption only applies where an intervener applies to the court for permission either to provide evidence or make submissions to the court. It does not apply where a person or body is invited by the court to intervene, because in such cases the intervener does not require the intervener to be granted permission [↑](#footnote-ref-216)
216. Section 87(4) CJCA 2015 [↑](#footnote-ref-217)
217. With the exception of environmental claims following the introduction of the Aarhus costs rules (CPR 45.53) in April 2013 [↑](#footnote-ref-218)
218. See <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims> [↑](#footnote-ref-219)
219. See <https://www.justice-ni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges> [↑](#footnote-ref-220)
220. See <http://www.wcl.org.uk/legal.asp> [↑](#footnote-ref-221)
221. See <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf> [↑](#footnote-ref-222)
222. See <http://www.legislation.gov.uk/ukpga/2015/2/part/4/enacted> [↑](#footnote-ref-223)
223. In correspondence with the Scottish Parliament’s Public Petitions Committee (regarding FoE’s petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid (http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx). In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most of these cases had a strong private interest. To the best of our knowledge, only one of these grants was in a public interest matter, and this was when the case was on appeal, at which point SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings. It is not clear on what basis this decision was made, but it may be cited as an example of legal aid being available for public interest cases [↑](#footnote-ref-224)
224. <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made> [↑](#footnote-ref-225)
225. <http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_to_Margaret_McCulloch_MSP_-_4_6_15_%28pdf%29.pdf> [↑](#footnote-ref-226)
226. <http://www.scottish.parliament.uk/S4_EqualOpportunitiesCommittee/General%20Documents/Letter_from_Mr_Wheelhouse_Petition_1372_%282%29.pdf> [↑](#footnote-ref-227)
227. See: <http://www.legislation.gov.uk/nisr/2013/81/regulation/1/made> [↑](#footnote-ref-228)
228. For further information see Banner, C. (2015). *The Aarhus Convention – A Guide for UK Lawyers*, Chapter 4 (The Aarhus Convention in Northern Ireland – A Tale of Two Polities) by William Orbinson QC, pages 76-77. Hart Publishing [↑](#footnote-ref-229)
229. Information for Northern Ireland provided by Roger Watts, C & J Black Solicitors, 13 Linenhall Street, Belfast, BT2 8AA as part of a submission made by CAJE to the UK’s first progress report on Decision V/9n [↑](#footnote-ref-230)
230. Provided under Regulation 3(3) of The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 [↑](#footnote-ref-231)
231. [2012] NIQB 97. This case occurred before the 2013 Regulations came into force [↑](#footnote-ref-232)
232. The 2013 Regulations do provide that where lawyers are providing representation free of charge in whole or part then the Court shall order that such part of the recoverable costs shall be paid to the Northern Ireland Lawyers *Pro Bono* Unit as it thinks just. The reference to ‘recoverable coats’ may be a reference to the £35,000 in regulation 3(2). This provision may assist the *Pro Bono* Unit but will not assist in cases where legal representation is not provided *pro-bono* [↑](#footnote-ref-233)
233. In 2012, Greenpeace challenged the Secretary of State for Energy and Climate Change’s designation of the National Policy Statement (NPS) for Nuclear Power Generation in the UK. The High Court refused Greenpeace permission to bring the case and ordered it to pay £8,000 legal costs. The Aarhus Convention Compliance Committee found the UK in breach of the Convention on the basis that the order for costs of £8,000 was “prohibitively expensive” and thus the UK was not in compliance with Article 9(4) of the Convention [↑](#footnote-ref-234)
234. Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 (Civil Legal Services), Part 1 (Services), s.19(1). Available at: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted> [↑](#footnote-ref-235)
235. See the Civil Legal Aid (Merits Criteria) Regulations 2013 available at: <http://www.legislation.gov.uk/uksi/2013/104/regulation/6/made> [↑](#footnote-ref-236)
236. See Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 available at: <http://www.legislation.gov.uk/uksi/2013/480/contents/made> [↑](#footnote-ref-237)
237. See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, paragraphs 136 and 142 available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf> [↑](#footnote-ref-238)
238. Decision here: <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1447/DECC%20(EA-2014-0103)%2024-12-14.pdf> [↑](#footnote-ref-239)
239. Castle, P., Day, M., and Hatton, C. (2004). *Environmental Justice – Report by the Environmental Justice Project*. page 32. Available at: <http://www.ukela.org/content/doclib/116.pdf> [↑](#footnote-ref-240)
240. Information taken from Banner, C. (2015). *The Aarhus Convention – A Guide for UK Lawyers*. See chapter 8 by James Maurici, Barrister. Hart Publishing [↑](#footnote-ref-241)
241. [2011] 1 P. & C.R. 5 [↑](#footnote-ref-242)
242. Section 288(1) Town and Country Planning Act 1990 states: “*If any person—(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds (i) that the order is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that order; or (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—(i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section*”. See: <http://www.legislation.gov.uk/ukpga/1990/8/section/288> [↑](#footnote-ref-243)
243. Case C-263/08. Paragraph 45 states: “. *. . the national rules thus established must, first, ensure, ‘wide access to justice’ and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are entitled to bring actions before the competent courts*”. [↑](#footnote-ref-244)
244. Case C-427/07. At paragraph 82, the ECJ held: “*. . . Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.”* [↑](#footnote-ref-245)
245. [2012] UKSC 44; [2013] P.T.S.R. 5 [↑](#footnote-ref-246)
246. *Sidebotham, Ex p.* (1880) 14 Ch. D. 458, *Arsenal Football Club Ltd v Smith* *(Valuation Officer)* [1979] A.C. 1 and *Lardner v Renfrewshire* DC 1997 S.C. 104 considered [↑](#footnote-ref-247)
247. See paragraphs 83-88, 103 and 151-156 of the judgment [↑](#footnote-ref-248)
248. *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46, [2012] 1 A.C. 868 considered (paras 90-97) [↑](#footnote-ref-249)
249. [2010] EWHC 2312 (Admin); [2011] 1 Costs L.R. 70 [↑](#footnote-ref-250)
250. Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [↑](#footnote-ref-251)
251. See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html>, paragraphs 121-125 [↑](#footnote-ref-252)
252. See, for example, *Lord Cooke in R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 paragraph 32 [↑](#footnote-ref-253)
253. *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paragraph 138 [↑](#footnote-ref-254)
254. Donson, F. and Lee, R. (1996). Environmental Protection: Public or Private Law. 1 *Judicial Review* 56 [↑](#footnote-ref-255)
255. Friends of the Earth Research Paper (2013) *Wednesbury* v proportionality: summary [↑](#footnote-ref-256)
256. See Pill, L.J. in *Hardy and Hansons PLC v Lax* [2005] [↑](#footnote-ref-257)
257. [2003] EWCA Civ 1408 [↑](#footnote-ref-258)
258. *Evans –v- Secretary of State for Communities and Local Government* [2013] EWCA Civ 115 [↑](#footnote-ref-259)
259. *R (on the application of (1) Derek Foster (2) Tom Langton (claimants) v Forest of Dean District Council (Defendant) & (1) Homes & Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin) [↑](#footnote-ref-260)
260. Case C-258/11 *Sweetman v. An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092, paragraph 44 [↑](#footnote-ref-261)
261. [2015] EWCA Civ 174, [79]–[80] [↑](#footnote-ref-262)
262. *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60 – see: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cdc395a6-8980-69d2-b500-ff0000d74aa7> [↑](#footnote-ref-263)
263. *Sustainable Shetland (Appellant) v The Scottish Ministers and another* (Respondents) (Scotland) [2015] UKSC 4. See <https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0216_Judgment.pdf> [↑](#footnote-ref-264)
264. Court of Appeal Judgment 18.3.15 [2015] EWCA Civ 227 [↑](#footnote-ref-265)
265. <http://www.bailii.org/ew/cases/EWHC/Admin/2015/3297.html> [↑](#footnote-ref-266)
266. <http://www.bailii.org/ew/cases/EWHC/Admin/2016/945.html#para151> [↑](#footnote-ref-267)
267. Please see the answer to question 13 in WCL’s response to the consultation on proposed changes to the costs regime in environmental cases (pages 13-15) available here: <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf> [↑](#footnote-ref-268)
268. See: <http://www.nienvironmentlink.org/cmsfiles/NIEL-response-DoJ-Costs-Protection-consultation.pdf> [↑](#footnote-ref-269)
269. Available via the UNECE website: <http://www.unece.org/env/pp/reports_trc_implementation_2014.html> [↑](#footnote-ref-270)
270. See <http://elflaw.org/elf-university-clinics/> [↑](#footnote-ref-271)
271. The indicator number is 7 because this is a continuation of the general pillar from the beginning of the document, placed here at the end of the document such that the ‘overall framework’ (Art. 3(1)) is assessed right at the end of the process. [↑](#footnote-ref-272)
272. See <https://www.gov.uk/guidance/information-rights-appeal-against-the-commissioners-decision> [↑](#footnote-ref-273)