

Economic Commission for Europe

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

Task Force on Access to Justice

Fifteenth meeting

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Item 3 of the provisional agenda

Access to justice in energy-related cases

Information paper N2

Analysis of energy-related cases for improving implementation of the Convention Scope and methodology draft outline

At its fourteenth meeting¹, the Task Force on Access to Justice noted a growing number of environmental cases brought by the members of the public in different countries to challenge energy-related decisions, acts and omissions by private persons and public authorities. The Task Force also noted that a regular analysis of such cases could help to address existing challenges and improve the procedures for public participation in decision-making and access to justice in this area. Furthermore, the Task Force agreed to discuss the scope and methodology for such analysis.

In order to facilitate such discussion, the Chair with the support of the secretariat prepared the current document, which outlines a possible scope and methodology for the analysis.

Delegates are invited to consult this document in advance of the meeting.

I. Objective of the analysis

1. The effective implementation of the Convention in the energy sector is particularly important due to the pressing needs for energy transformation in most countries, which require rapidly evolving decision-making in energy-related matters, especially in relation to renewable energy projects, programmes and policies. Additionally, there is a growing number of cases when members of the public challenge them.
2. At its seventh session (Geneva, 18-21 October 2021), the Meeting of the Parties requested the Task Force to promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention, with the focus on possibilities for members of the public to challenge acts or omissions that contravene permit requirements or laws relating to the environment, in particular, in relation to projects, plans and policies related to energy matters².
3. At the fourteenth meeting (Geneva, 27-28 April 2023), the Task Force considered the matter and encouraged Parties to take the necessary legislative, enforcement and other measures to ensure, in accordance with the Convention, compatibility between the provisions of national legislation implementing access to information, public participation and access to justice, which are relevant for energy sector³.
4. Furthermore, at this meeting, the Task Force noted that a regular analysis of cases brought by the members of the public to challenge energy-related decisions, acts and omissions by private persons and public authorities could help to address existing challenges and improve the procedures for public participation in

¹ See <https://unece.org/info/Environmental-Policy/Public-Participation/events/364935>

² See decision VII/3, para. 14 (a) (iii) available from <https://unece.org/environment/documents/2023/02/working-documents/decision-vii3-access-justice>.

³ See document ECE/MP.PP/WG.1/2022/3, para. 27, available from <https://unece.org/info/Environmental-Policy/Public-Participation/events/364935>

decision-making and access to justice in this area and was invited to discuss the scope and methodology for such analysis.

5. Any interested public authority, partner organization or stakeholder in Parties or in other interested member States can initiate and carry out the analysis. To support an effective analysis and the implementation of its outcomes, the initiating organization can adapt the current document to the national context and establish a multi-stakeholder steering committee with the involvement of relevant public authorities, non-governmental organizations, Aarhus Centres, academia, and other stakeholders.

6. The outcomes of the analysis can be used as needed by the Aarhus Convention Task Force on Public Participation in Decision-making, relevant partner organisations and other stakeholders. Furthermore, outcomes of the analysis can be referenced by Parties in their national implementation reports (for example, question XXX).

II. Scope of the analysis

8. The scope of the analysis will depend on the national context, including an energy-related regulatory framework. The scope should be clearly defined to ensure the necessary collection of information and data.

9. The analysis should cover cases brought by the members of the public challenging decisions, acts and omissions:

(a) subject to the provisions of article 6 and, where so provided for under national law and without prejudice to article 9 (3), of other relevant provisions of this Convention (article 9 (2) of the Convention);

(b) which contravene provisions of national law relating to the environment (article 9 (3) of the Convention).

10. The scope of the analysis should identify:

- (a) Types of cases;
- (b) Types of activities in energy sector;
- (c) Types of decisions, acts or omissions;
- (d) Provisions of relevant national law;
- (e) Appropriate time period.

Types of cases

11. The analysis can cover various types of cases related to dispute settlement before administrative and judicial review, complaints mechanisms of international financial institutions or alternative dispute resolution methods (e.g. mediation). Including more types of cases that can be covered by the analysis can provide a more objective understanding of existing challenges and deficiencies in the legal framework and practice and how to improve them. The analysis also can cover cases at different stages depending on their type, for example pre-trial, trial, judgement or appeal. The analysis can reveal the types of claims, preferred dispute settlement for such cases, challenges to review substantive or procedural legality or the reasons behind the success or failure of the alternative dispute resolution mechanisms.

Types of activities in energy sector

12. The analysis can cover the entire energy sector or only selected sub-sectors (renewables, or wind, solar, etc.) depending on the national context and needs. Types of activities in energy sector for the analysis can be defined in accordance with Annex I, paragraph 1, of the Convention as referred to in article 6 (1) (a). However, the analysis could also cover other activities in energy sector that raise public concerns and may have a significant effect on the environment. These activities can be identified in accordance with the national or international statistical classification of energy sources or economic activities⁴. The EU Taxonomy Compass⁵ could provide an example of how energy sectors are classified in the European Union.

⁴ See https://unstats.un.org/unsd/publication/seriesm/seriesm_4rev4e.pdf

⁵ See <https://ec.europa.eu/sustainable-finance-taxonomy/sectors/sector/4/view>

Provisions of relevant national law

13. Analysing the relevant provisions of national law may reveal which specific provisions are being used in most energy-related cases. The analysis could cover both procedural and substantive provisions of national law. For example, this can include provisions of national law that implement the Convention, for example article 6 (1) (a) and (b) and Annex 1, article 7, that are relevant to the studied energy sector(s), or provisions that violations can be challenged in accordance with article 9 (3) of the Convention.

Appropriate time period

14. The time period covered by the analysis should be sufficient to reveal the actual challenges and deficiencies in legal framework and practice. For example, energy-related cases from 2016, the year in which most countries submitted their first nationally determined contributions (NDCs) as required by the Paris Agreement, and onwards, could be considered for the first cycle of the analysis. Subsequently, the analysis can be conducted in a four-year cycle similar to the Aarhus Convention national implementation reports. Adopting this approach will help contextualize the survey for the analysis, give it a timeframe within which to operate, and contribute to the preparation of the Convention's national implementation reports.

III. Methodology of the analysis

15. The analysis should be undertaken in the following stages: (a) information and data collection; (b) mapping and reduction of information and data; (c) data and information visualization, and (d) conclusions drawing.

16. Digital technologies such as artificial intelligence, text mining and natural language processing tools, machine learning algorithms and other methods for information and data collection, mapping, visualization, and analytics, when available, can support the analysis.

Information and data collection

17. Information and data can be collected using the desk research, general or specifically designed for this analysis surveys among stakeholders and interviews with key legal professionals, such as judges, prosecutors, environmental lawyers, etc.

18. The relevant sources for information and data collection for the analysis can include:

- (a) Case law databases;
- (b) Statistical databases, e.g. for Sustainable Development Indicator 16.3.3 with disaggregated data;
- (c) Legal needs survey and interviews;
- (d) Other access to justice surveys conducted by public authorities and stakeholders.

Mapping and reduction information and data

19. Mapping and reduction of information and data refers to the identification and classification of information and data regarding individual cases on different categories within the scope of the analysis. For this analysis, the data can be mapped under the following categories:

- (a) Type of activity in energy sector;
- (b) Geographic area of activity;
- (c) Environmental impact;
- (d) Provisions of relevant national law;
- (e) Related provisions of the Convention;
- (f) Types of claims (e.g. substantive or procedural);

(g) Challenged decisions, acts and omissions at various stages of the complex decision-making procedure on energy-related matters (for example, new activity or its reconsideration or update of operating conditions; strategic environmental assessment or environmental impact assessment procedures);

(h) Affected stage of public participation procedure in energy-related decision-making (for example (i) early, adequate and effective notice; (ii) early public participation, when all options are open, and reasonable time frames; (iii) access to all relevant information; (iv) opportunity to comment and/or be heard; (v) due account to be taken of public participation; (vi) prompt notice of decision;

(i) Forum to settle the case (administrative review procedure, judicial review procedure, international financial institutions complaints mechanism, alternative dispute resolution methods);

(j) Type of cases depending on the forum (administrative review cases, judicial review cases (civil, administrative, criminal), alternative dispute resolution);

(k) Stage of dispute settlement: categorizing the cases based on the stage of dispute settlement (e.g. pre-trial, trial, judgement, appeal);

(l) Affected access to justice elements (e.g. standing, scope of review, costs, timeliness, remedies);

(m) Outcome of settlement (e.g. decision in favour of the public, decision in favour of the developer, decision in favour of public authority, settlement agreement, etc.);

(n) Geographic location of case settlement;

20. The categories used for mapping of information and data will depend on the research question and the specific context of the analysis.

Information and data visualization

21. Visualization can help the graphical representation of information and data. By using visual elements like charts, graphs, and maps, data visualization tools can provide an accessible way for the analysis to explore and understand trends, outliers, and patterns regarding public participation and access to justice in energy sector.

Conclusion Drawing

22. The analysis can reveal:

(a) Barriers to effective access to justice for members of the public;

(b) Indirectly, problematic issues in decision-making in the energy sector or sub-sectors, including regarding stages of decision-making or public participation procedures;

(d) Issues with the compatibility of legal provisions between the provisions of national legislation implementing public participation and access-to-justice provisions in accordance with the Convention;

(c) Geographic areas where the most disputes located and the reasons for that (e.g. concentration of energy-related activities or jurisdiction of the courts);

23. The outcomes of the analysis can help to identify the measures needed to improve the procedures for access to justice and, indirectly, public participation in decision-making, as well as to promote the energy-environment nexus, in particular by:

(a) Updating the legal framework;

(b) Developing guidance material;

(c) Implementing practical measures such as providing assistance to the public in exercising their rights in accordance with the Convention or improving environmental impact assessment of energy projects and strategic environmental assessment of plans, programmes and policies;

(d) Implementing enforcement measures;

(e) Providing capacity-building support to public officials, members of the public, developers and other stakeholders.

24. These measures can be tailored to address the specific problematic issues identified in the analysis and improve access to justice and indirectly, public participation in decision-making in the energy sector.