

25 Years Since the Adoption of the Aarhus Convention

Elena Emilia Ștefan

Associate Profesor, PhD, „Nicolae Titulescu” University, Romania
stefanelena@univnt.ro

ABSTRACT: According to internationally agreed rules, the public is one of the key actors to be involved in the adoption of environmental legislation. At the same time, by means of their laws, States guarantee citizens access to information of public interest. This year marks the 25th anniversary of the adoption of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The purpose of this paper is to analyze whether the content of the Convention is still relevant in the current global context. The topic has relevance in the present times and has practical applicability, being a topic of general interest not only to the public authorities but also to the general public. In order to achieve the proposed objective, the analysis is interdisciplinary, the chosen topic being at the confluence of several disciplines: administrative law, environmental law, and public international law. The structure of the paper is divided into three sections: section I presents the reflection of the Aarhus Convention into the national law, section II analyzes the European framework applicable to the public participation in environmental decision-making, and section III highlights the relevance of the Aarhus Convention in the present times - a case study.

KEYWORDS: Administrative Code, Constitution, Aarhus Convention, public authorities, public interest

1. Introduction

The participation of citizens in the law-making process is commonplace in a democratic society. The administrative law doctrine states that “the public interest has priority over the private interest, starting from the idea that, in the rule of law, the interests of the State are those of the community and must therefore take priority over those of the individual” (Ștefan 2023, 33). The revised Romanian Constitution enshrines guarantee rights for citizens in relation to the public authorities: the right to defence, free access to justice, the right to petition, and the right of the person injured by a public authority.

In 2023, it was the 25th anniversary of the signing, in Denmark, of the Aarhus Convention of June 25, 1998, on access to information, public participation in decision-making and access to justice in environmental matters (published in the OJEU L124 of May 15, 2005). The Aarhus Convention was ratified by Romania through Law no. 86 of May 10, 2000 (published in the Official Gazette no. 224 of May 22, 2000). This situation made us curious to document the subject because the environmental information is information of public interest. The aim of the study is to find out as much as possible about the Aarhus Convention in the current context.

2. Reflection of the Aarhus Convention in the national law - some highlights

According to the Constitution, the Aarhus Convention has been part of national law since its ratification. In this regard, we indicate: Article 11- *international law and domestic law* [para. (1) - the Romanian State undertakes to fulfil in good faith its obligations under the treaties to which it is a party, and para. (2) - treaties ratified by the Parliament, according to the law, are part of the domestic law] and Article 20 - *international human rights treaties* [para. (1) – the constitutional provisions on citizens’ rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and the pacts and other international treaties to which Romania is a party]. Therefore, the public authorities are obliged to observe the Aarhus Convention and to fulfil the obligations undertaken. In fact, “it is the States who participate in the international relations, but not just anyhow, but as legally equal subjects of international law” (Popescu 2023, 9).

At the same time, “in order to fulfil the obligations undertaken by ratifying the Convention and to transpose Directive 2003/4/EC into the national law – such directive implementing Pillar I of the Convention -

Government Decision no. 878/2005 on public access to environmental information was adopted, which establishes the general legal framework for access by any person to environmental information held by or intended for the public authorities, regulating the conditions, the basic terms, and the modalities for exercising this right” (Niță 2022, 136).

The environmental protection legislation also includes the Government Emergency Ordinance no. 195/2005 on environmental protection (published in the Official Gazette no. 1196 of 30 December 2005). According to Article 5 *“the State recognizes the right of every person to a healthy and ecologically balanced environment, guaranteeing to this end:*

- a) *access to environmental information, subject to the conditions of confidentiality laid down by the legislation in force;*
- b) *the right of association in environmental organizations;*
- c) *the right to be consulted in decision-making on the development of environmental policy and legislation;*
- d) *the right to approach, directly or through environmental protection organizations, the administrative and/or judicial authorities, as appropriate, in environmental matters, regardless of whether damage has been caused or not;*
- e) *the right to compensation for the damage suffered”.*

At the same time, the Constitution regulates free access to justice (Article 21) and the right of a person injured by a public authority (Article 52). The regulatory framework is completed by the Administrative Litigation Law no. 554/2004 (published in the Official Gazette no.1154 of December 2004). The Constitution also regulates in Article 31 - the right to information, supplemented by Law no. 544/2001 on free access to information of public interest (published in the Official Gazette no. 663 of October 23, 2001). We refer to the provisions of Article 31 of the Constitution - the right to information: para. (1) *“The right of a person to have access to any information of public interest cannot be restricted”* and para. (2) *“The public authorities, each according to their powers, must make sure that citizens are properly informed about public affairs and matters of personal interest”.*

3. The European framework for public participation in environmental decision-making

In this section we will highlight the most important pieces of legislation adopted at international level on the subject under analysis, starting from the fact that

2024 will mark the 20th anniversary since the adoption of the *Polluter Pays Directive* (Directive 2004/35/EC of the European Parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage). Since 2004, the regulatory framework at international level has been enriched, with a growing interest of citizens to get involved in environmental protection.

The Council Decision 2005/370/EC of February 17, 2005 (published in the OJEU L124 of 17 May 2005) adopted the Aarhus Convention at European Community level, ratified at European level by Council Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community bodies and institutions (published in the OJEU 264 of June, 25, 2006). Subsequently, on 6 October 2021 Regulation (EC) No. 1367/2006 (...) was amended by Regulation (EU) No. 2021/1676 of the European Parliament and of the Council (published in the OJEU L 356 of October 8, 2021).

The objectives of the Aarhus Convention are: “*in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with (...) this Convention*”. The Preamble of the Aarhus Convention recognizes that “*adequate protection of the environment is essential for human well-being and the enjoyment of fundamental human rights, including the right to life itself*” (Article 1).

Drawing a parallel with administrative law, we found it interesting how the Convention relates to the notion of *public authority*, which we interpret as having a broader meaning in the European normative act. Within the meaning of the Convention, the notion of public authority means:

- a) “Government at national, regional or other level;
- b) Natural or legal persons performing public administrative functions under the national law, including specific tasks, activities or services related to the environment;
- c) Any natural or legal person having public responsibilities or functions or providing public services in relation to the environment or the control of a body or person falling within subparagraphs (a) or (b) of this Article;
- d) Regional economic integration institutions or organizations (...)” (Article 2(2)).

In administrative law, the notion of public authority is defined by the Administrative Code (Government Emergency Ordinance no. 57/2019, published in the Official Gazette no. 555 of July 2019) in Article 5(k) as follows: “a State body or body of the administrative-territorial unit acting under public authority for the satisfaction of a public interest”. At the same time, the Constitution contains a Title called *Public authorities* (Title III).

At European level, there is legislation on access to information of public interest: “the legal framework applicable to applications for public access to documents concerning the European institutions consists of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents” (published in the OJ L 145, May 31, 2001) (Ștefan 2023, 65).

4. The topicality of the Aarhus Convention - case study

According to the doctrine: „Regulations have general applicability” (Fuerea 2010, 141). Regarding the monitoring of compliance with the Convention, the Convention Compliance Committee has made a series of Recommendations to Romania (Decision VII/8o on Romania’s compliance with its obligations under the Aarhus Convention, adopted by the Meeting of the Parties in Geneva on October 18-20, 2021). From this perspective, not only is it mandatory for our country to comply with the provisions of the ratified Convention, but it is also highly topical in the context of external monitoring.

The recommendations are: “1. *Take practical legislative, regulatory, and administrative measures to ensure that public officials:*

- a) respond to requests from the public as soon as possible, but no later than one month, and in case of refusal, specify reasons for the refusal;
- b) *implement the Convention correctly (...);*
- c) *interpret the grounds for refusing access to environmental information in a restrictive manner, taking into account the public interest served by making environmental information available (...)*” (Idem).

Other recommendations are: “(...) 5. *Make appropriate commitments and arrangements to ensure that activities (...) are carried out with the broad participation of the authorities and the public concerned*” (Idem). Following this Compliance Decision, the Romanian State has adopted a series of measures through the Strategy on the implementation of the provisions of Decision VI/8h on Romania’s compliance with the requirements of the Aarhus Convention (2021).

At the same time, one of the legal instruments available to citizens to prevent their participation in environmental measures is the Ombudsman, to whom they can address a complaint. The Constitutional Court of Romania is also the public authority called upon to ensure that the Constitution is observed. “The essential role of the Constitutional Court is to guarantee the supremacy of the Constitution” (Barbu & al. 2021, 17). According to Article 59 of the Constitution, the Ombudsman exercises their powers *ex officio* or at the request of persons whose rights and freedoms have been infringed, within the limits of the law. With regard to his role, the Institution of the Ombudsman aims to protect the rights and freedoms of citizens in their relations with the public authorities (Law no. 35/1997).

In accordance with European legislation, our country has implemented the deposit-return system. We refer to Government Decision no. 1074/2021 on the establishment of the deposit-return system for non-reusable primary packaging - DRS (published in the Official Gazette no. 1120 of November 21, 2021). Originally, the DRS was supposed to enter into force on the 1st of October 2022, but the executive postponed it by one year, setting the date for the 30th of November 2023. The legislative act has been subject to public debate, as shown by public information (<http://www.mmediu.ro/articol/mmmap-supune-dezbaterii-publice-proiectul-de-hg-pentru-stabilirea-sistemului-de-garantie-returnare-pentru-ambalaje-primare-nereutilizabile/3799>). We therefore consider that the central public authority has fulfilled its obligations by adopting this legislation in full compliance with the requirements of the Aarhus Convention.

5. Conclusions

Following the analysis, some conclusions can be drawn as follows.

The Aarhus Convention is extremely topical today, even though 25 years have passed since its adoption by the signatory States. It was ratified by our country in 2000 and is part of the national law. The issue of public participation in decision-making and access to justice in environmental matters is one of the most important. Access to justice in environmental matters is guaranteed by Constitution and environmental information is information of public interest.

According to the doctrine: “human coexistence feels more and more acutely the need for security, clarity and order in the relations within itself” (Popa 2008, 63). In our country, legal levers are created to support the citizens

and protect their rights and freedoms in their relations with the public authorities, such as the Institution of the Ombudsman. At the same time, one of the recent pieces of legislation through which the executive has fulfilled its obligations deriving from the Convention is the implementation of the deposit-return system for non-reusable primary packaging, a piece of legislation that was the subject of many consultations with the public and private sectors and was in the decision-making transparency stage for a long time.

In conclusion, we believe that the Aarhus Convention, ratified by our country, is totally relevant in the present time, as society is becoming increasingly interested in involving citizens in the environmental decisions of public authorities, especially in the light of climate change, a situation that calls for general responsibility.

References

- Barbu, S.-G. Muraru, A. Bărbăţeanu, V. 2021. *Elemente de contencios constituțional (Contentious Constitutional Elements)*, Bucharest: C. H. Beck Publishing House.
- Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, published in the OJEU L124 of 17 May 2005, pp. 201-203. Accessed on 10 November 2023. <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32005D0370&from=EN>
- Decision VII/8o on compliance by Romania with its obligations under the Aarhus Convention, 18-20 October 2021. Accessed on 13 November 2023. https://unece.org/sites/default/files/2022-01/Decision_VII.8o_fre.pdf
- Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Accessed on 10 November 2023. <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004L0035-20130718&from=EN>
- Fuerea, A. 2010. *Manualul Uniunii Europene (The European Union Handbook)* 6th edition, revised and supplemented. Bucharest: Universul Juridic Publishing House.
- Law no. 35/1997 on the organisation and functioning of the Institution of the Ombudsman, published in the Official Gazette no. 48 of 20 March 1997, as further amended and supplemented.
- Law no. 544/2001 on free access to information of public interest, published in the Official Gazette no. 663 of 23 October 2001, as further amended and supplemented.
- Law no. 554/2004 of the contentious administrative, published in Official Gazette no. 1154 of 7 December 2004, as further amended and supplemented.
- Law no. 86/2000 on the ratification of the Aarhus Convention, published in the Official Gazette no. 224 of 22 May 2000.

- Niță, A. J. 2022. "Romania's non-compliance with the Requirements of the Aarhus Convention, as seen from the perspective of Decision no. VI/ 8h/2017 of the Convention Compliance Committee and the measures taken by the responsible national authorities with respect to the Committee's Recommendations." In *Universul Juridic.ro Magazine* 10:136. Accessed on 14 November 2023. <https://revista.universuljuridic.ro/neconformarea-romaniei-cu-cerintele-conventiei-de-la-aarhus-observata-prin-prisma-deciziei-nr-vi8h2017-comitetului-de-conformare-al-conventiei-si-masurile-intreprinse-de-autoritatilor-nationale/>
- Popa, N. 2008. *Teoria generală a dreptului, (General Theory of Law)*. Bucharest: C.H. Beck Publishing House.
- Popescu, R.-M. 2023. *Drept internațional public (International Public Law)* Bucharest: Universul Juridic Publishing House.
- Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, published in the OJ L 145 of 31 May 2001.
- Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community bodies and institutions, as amended by Regulation (EU) No. 2021/1676 of the European Parliament and of the Council. Accessed on 20.02.2023. <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32021R1767&from=EN>
- Ștefan, E.E. 2023. "Public interest - essential concept of administrative law", In RAIS Conference Proceedings, August 3-4:65 Accessed on 14 November 2023. <https://rais.education/wp-content/uploads/2023/09/0299.pdf>
- Ștefan, E.E. 2023. *Drept administrativ. Partea a I-a. (Administrative Law, Part I)*, 4th edition, revised and updated. Bucharest: Universul Juridic Publishing House.
- Strategy on the implementation of the provisions of Decision VI/8h on Romania's compliance with the requirements of the Aarhus Convention in 2021. Accessed on 15 November 2023. <http://mmediu.ro/app/webroot/uploads/files/Strategie%20actualizata%202021.pdf>
- The Constitution of Romania.
- The Government of Romania, Government Emergency Ordinance no. 1074/2021 on the establishment of the deposit-guarantee system for non-reusable primary packaging, published in the Official Gazette no. 1120 of 21 November 2021, as further amended and supplemented. Accessed on 15 November 2023. <http://www.mmediu.ro/articol/mmmap-supune-dezbaterii-publice-proiectul-de-hg-pentru-stabilirea-sistemului-de-garantie-returnare-pentru-ambalaje-primare-nereutilizabile/3799>
- The Government of Romania, Government Emergency Ordinance no. 195/2005 on the environmental protection, published in the Official Gazette no. 1196 of 30 Dec. 2005.
- The Government of Romania, Government Emergency Ordinance no. 57/2019 on the Administrative Code, published in the Official Gazette no. 555 of 5 July 2019, as further amended and supplemented.