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APPLICATION OF THE PROVISIONS OF THE AARHUS CONVENTION BY THE ADMINISTRATIVE COURTS OF UKRAINE

(ABSTRACT, KEY WORDS)

Problem statement. Despite numerous criticisms of scholars and practitioners concerning the norms of the Aarhus Convention are hardly applicable in Ukraine or the level of their implementation is quite low, the data of the Unified State Register of Judicial Decisions of Ukraine shows that some practice of application the norms of this convention has developed and continue to form. There is a need to analyze the court decisions in order to elucidate the features of the application of the Aarhus Convention's norms, which is the purpose of this publication. The **purpose** of the article is to identify the contexts in which the said convention applies, to identify certain trends in the application of its norms, to highlight controversial issues in its application. **Methods.** The main method used in the study is the method of content analysis of court decisions. The current array of cases, where one or another of these conventions was applied, has been analyzed. It is also analyzed cases where the court did not apply its norms, but it was used in substantiating the legal position of the party in the case. **Results.** Because of the analysis, a number of contexts in which the Aarhus Convention (informational context, applicant's affiliation context, educational context) is used. The emphasis is placed on the uncertainty of the possibility of applying the Aarhus Convention in land disputes. Some tendencies, which have a negative character (in particular, narrowing the interpretation of certain norms of the Aarhus Convention) are observed. The emphasis was placed on the fact that the problematic issues related to the incorrect application of the norms of the Aarhus Convention took place not only in domestic judicial and administrative practice but also in the practice of the EU member states and a number of other countries-parties to the convention. This is explained by some novelty of the approaches introduced by the convention. It is concluded that the domestic practice of the application of the Aarhus Convention is characterized by completely different poles, from the failure to recognize that the conclusions of the environmental expertise could contain environmental information, to the interpretation of information on the provision, withdrawal (redemption) of land as an environmental information with the dissemination of the norms of the Aarhus Convention. **Conclusions.** It is emphasized that uncertainty arises about the possibility of applying the norms of the Aarhus Convention in land disputes. In our opinion, this possibility should directly depend on the coincidence, or at least the consistency of purpose and the purpose of the specific law and the purpose of the Aarhus Convention, the norms of which justify the protection of this right. In the event of their nonconsistency, the application of the said Convention to justify the protection of the right is possible. It is emphasized that in a number of decisions one can observe the tendency to erroneous narrowing interpretation of the rule of law in law enforcement (in particular, regarding sources of environmental information). This, in turn, can lead to violations of the rights referred to in these regulatory acts, in particular, the right to environmental information and access to justice in environmental matters.

Key words: *Aarhus Convention; judicial practice; administrative courts; environmental information; narrowing interpretation*

Problem statement

An important milestone in improving domestic environmental and administrative legislation was the ratification of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter referred to as the Aarhus Convention) [1], which is a unique instrument for protecting human rights and the environment [2, p.5]. As T.V. Hrushkevych notes on this subject "access to judicial institutions will be open to the ordinary citizen, provided that a favorable regulatory field is created

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and concerted actions are taken by the responsible state bodies, the lawyers, the public concerned as well as changes in the world outlook of the population" [3, p.68–69].

Therefore, without exaggeration, it can be stated that, according to Rannikko Pertti, the active and proper application by the courts of the provisions of the said Convention will positively affect not only the protection of the environmental rights and interests of individual applicants, but also generally be able to increase the level of public environmental and legal awareness, since these processes are interconnected and experience mutual influence [4, p.59]. Fair decisions of the Aarhus Convention Compliance Committee, studied by A. Andrusevych and S. Kern for the period 2004–2014 [5], contribute to this. Despite numerous criticisms of scholars and practitioners concerning the fact that the provisions of the Aarhus Convention are hardly applicable in Ukraine or the level of their implementation is quite low, the data of the Unified State Register of Court Decisions of Ukraine shows that some practice of application the provisions of this Convention has developed and continue to form. An analysis of the decisions listed in the Unified State Register of Court Decisions of Ukraine allows us to highlight a number of legal positions developed by the courts when considering specific cases. It seems that they could serve as a definite guideline when applying the provisions of the Aarhus Convention [1]. There is a need to analyze the court decisions in order to elucidate the features of the application of the Aarhus Convention's provisions, which is the purpose of this publication. The novelty of the research article lies in determining the contexts in which the said Convention is applied by domestic courts, stating controversial points in the application of the Aarhus Convention by the courts of Ukraine and providing practical recommendations on this matter. The assignment of the publication is to identify the contexts in which the said Convention applies, to identify certain trends in the application of its provisions, to highlight controversial issues in its application.

The various categories of cases can be distinguished, during the consideration of which the courts resorted to the application of the provisions of this Convention. In particular, 1) appeals against the refusal to provide environmental information; 2) cases regarding appeal of decisions of public hearings held in violation of the established procedure; 3) disputes about the obligation to apply certain environmental protection measures; 4) other cases regarding the appeal of decisions, actions or inaction of authorities, where the provisions of the Aarhus Convention are applied in support of the applicant's right to claim (applicant's affiliation).

Cases on the provision of environmental information

As mentioned above, a number of cases relate to appeals against the refusal to provide public environmental information. While providing wide public access to environmental information, the Convention at the same time establishes the possibility of refusing to provide it under certain conditions. Consequently, it is not surprising that such a rule requires its interpretation considering the specific circumstances of a particular case. Therefore, according to Clause 3 of Article 4 of the Aarhus Convention, a request for environmental information may be refused, in particular, if the request is manifestly unreasonable or formulated in too general manner [1]. In one of the cases regarding appealing against the decision to refuse to provide public environmental information, the company – defendant argued that the request was unreasonable and too general, since the applicant did not indicate the purpose of information obtaining and did not add any documents that would confirm his journalistic profession, although the request stated this [6]. But the court took the applicant’s side for the following reasons: a) the provision of the Aarhus Convention on the unreasonableness of the request should be interpreted in the light of Article 19 of the Law of Ukraine "On Access to Public Information" [7], according to which the requestor has the right to apply to the information provider with a request for information, regardless of whether this information concerns him/her personally or not, without explaining the reason for submitting the request; b) if the request indicates specific documents that should be provided and containing the requested information, the request cannot be considered "too general"; c) since neither the Aarhus Convention nor other legislation stipulates the necessity to provide public information exclusively to journalists, and generally does not establish any requirements for the profession of requestor, the requestor’s failure to provide the documents in confirmation of his/her profession cannot be grounds for refusal to provide information [6].

Cases of invalidating decisions of public hearings

A separate array consists of cases regarding the invalidation of decisions of public hearings as a result of violation of the procedure for their holding.

Courts have developed the following approach-

es on this matter: a) the publication of a message about the time, place, date of a public hearing, even accompanied by certain illustrations (allocation scheme of industrial waste landfill, etc.) cannot be considered as appropriate preparation for public hearings; b) informational events are necessary (presentations, public display, television programs, etc.); c) in the light of the practice of the European Court of Human Rights (in particular, the case of Grimkovskaya v. Ukraine), a violation of the public's right to participate in the decision-making process on environmental issues is a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms [8]; d) discrimination on a territorial basis is unacceptable; e) public participation in decision-making should be active, free, unbiased; employees and other persons who are in any connection with the enterprises through which public hearings are held cannot be considered as impartial public; (e) the significance of public hearings lies in their application at the stage "when there is every opportunity to consider various options and when public participation can be effective"; f) the setting of public hearings during working hours limits the right of the public to participate in decision-making; g) informational events held by the organizers of public hearings should be aimed at providing real public information. In general, the courts used a similar approach to the one used in considering cases on invalidating decisions of the general meeting of participants in joint-stock companies. So, if the public did not have enough information to properly prepare for public hearings (and not just formally take part in them), the hearings cannot be considered as such that they have achieved their goal, and therefore, their decision should be invalidated.

As a rule, in cases where the court applied the Aarhus Convention, the environmentally relevant claims of the applicants were satisfied. However, if we talk about the "negative" result of the application of the said Convention, it's worth recalling the somewhat unexpected conclusion of the court that the act of verifying compliance with environmental legislation does not apply to information about the state of the environment and environmental information in general [9]. In addition, it should be noted that the courts mainly analyze the provisions of the charters of public environmental organizations (taking into account not only the purpose of the activity, but also the territorial aspect), when determining their right to claim in environmental cases, although the Aarhus Convention explicitly prohibits discrimination on a territorial basis (in particular, the place of registration) and introduces automatic recognition of legitimate interest of any non-governmental environmental public organization, the activity of which corresponds to the national legislation [1].

Analyzing the court cases in which the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was applied in one way or another, there are at least three areas of its application: 1) cases where the provisions of the Aarhus Convention are used to justify the provision or non-provision of environmental information (informational context), including cases relating to requests and cases of violation of public hearings procedure; 2) cases where the provisions of the Aarhus Convention are used to justify the right to claim (applicant's affiliation context); 3) cases where the provisions of the Aarhus Convention are used to justify the need for environmental education (educational context).

Speaking about the problematic aspects of the Aarhus Convention application by domestic administrative courts, it should be stated first that such controversial problems arise not only in our country. Thus, comments from the public were caused by administrative practice, in particular, of France, Great Britain, Spain, Lithuania, Poland, the EU, Georgia, and a number of other states- parties to the Convention [5, p.5]. By analyzing the practice of the Aarhus Convention Compliance Committee, it is noticed a lot of common and similar problematic issues. It should be agreed that this Convention introduces a number of approaches that are fully consistent with the specifics of environmental human rights, but are special and somewhat different from the approaches applied to the protection of other rights. That is why, for example, in the practice of applying the Aarhus Convention (both in Ukraine and abroad), the subject of law enforcement can encounter attempts to limit the number of applicants or resort to an unjustified narrowing of the scope of valuation concepts. It is hardly worth linking with prejudice or interest, rather, on the contrary, such approaches are used by subjects of law enforcement, since they are typical for other categories of cases (for example, cases of protecting property rights, corporate disputes, etc.). But this is the complexity of the situation, because environmental rights have a distinctive specificity in comparison with other human rights [10, p.6]. Therefore, it should be agreed that there is a need for environmental education and the study of the provisions of the said Convention not only by ordinary

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citizens, but also, in particular, by judges [11, p.63].

Narrowing Interpretation

One of the serious problems arising in domestic proceedings in connection with the application (or rather non-application) of the provisions of the Aarhus Convention is the unjustified narrowing of the concept of "environmental information". So, in one of the cases, the defendant's position (the State Environmental Protection Department of one of the regions!) was based on the statement that the conclusion of the State Environmental Ecology Expertise is not environmental information [5]. Although the provisions of this law have lost force, however, we are interested in the very perception by the subjects of law enforcement of the norms of evaluative concepts of the law, because the tendency to unjustifiably narrow their content may lead to errors in the application of the provisions of any law in the future. And in this case, the paradox of such interpretation is especially pronounced – if the conclusion of the State Environmental Ecology Expertise does not contain environmental information, then what information does it contain?

Surprisingly, this position was supported by both the first-instance courts and appeal courts. However, it is interesting that in the said ruling the court, at first agreeing that the findings of the State Environmental Ecology Expertise do not contain environmental information, draws the opposite conclusion after several paragraphs. In particular, the court, considering the applicant's claim of violation of the terms for the provision of information, calls it environmental and even applies the provision of Clause 1 of Article 4 of the Aarhus Convention, emphasizing the obligation of state bodies to provide such information to the public. In the end, the claim was partially satisfied; the defendant was obliged to publish the conclusion of the State Environmental Ecology Expertise [12].

In contrast to the above case, in another case on the publication of the findings of the State Environmental Ecology Expertise, the court unequivocally emphasized that according to Clause 1 of Article 39 of the Law of Ukraine "On Environmental Review"[1] [13], the findings of the State Environmental Ecology Expertise should include an assessment of environmental acceptability and the possibility of decision-making on the subject of environmental review. Consequently, the court applied this provision in connection with the provision of Part 1 of Article 4 of the Aarhus Convention, according to which the state bodies of the Parties to the Convention are obliged to provide environmental information to the public, including copies of factual documents that contain such information [14]. In addition, as the court notes, according to Part 9 of Article 6 of this Convention, after the decision-making by the state body, the public should be duly informed of this decision in accordance with the appropriate procedures, therewith the public is provided with the text of the decision indicating the reasons and considerations taken as a basis of this decision. The court also found a violation of Clause 3 of the Action Plan for the implementation of decision of the Parties to the Aarhus Convention III/6f [15], according to which the Ministry of Ecology and Natural Resources is obliged to publish the findings of the State Environmental Ecology Expertise on the website and in a separate section of the "Ekotyzhden" (EcoWeek) print publication. The court noted that in violation of this provision, the publication of the findings of the State Environmental Ecology Expertise in full was not carried out [14].

In another case, the court "sees no reason to satisfy the claim on the basis of the requirements of the Aarhus Convention" "given the absence of a legislatively detailed procedure for prior approval by the public of decisions of district councils on the approval of an application for subsoil use and the fact that there is no evidence in the case that this procedure will lead to environmentally hazardous activities." The case concerned the extraction of sand and, according to the prosecutor, who actually filed the lawsuit, public hearings were not held [16].

Aarhus Convention application in land disputes

Another noteworthy issue that arose during the application of the Aarhus Convention is whether its provisions relate to land relations. So, during hearing of the case No. 2/255/18/2013, the court stated that the applicant did not provide any evidence of a violation or contest of his rights at the time of appeal to the court for these claims (the subject of the claim was the invalidation of city council's decision on the sale of non-agricultural land for the construction and further operation of an enterprise specialized in turning waste into energy). The claim, according to the applicant, was based on, in particular, "a violation by the city council of the current legislation regarding the procedure for familiarizing the territorial community with a draft decision related to a socially important problem" [17]. Concerning the possibility of applying the provisions of the Aarhus Convention (to which the defendant

[1] This Law became invalid.

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referred), the court noted: "mentioned legal provisions declare possible ways of solving socially important issues by the public and regulate the procedure for their implementation and thus study the opinion of the population. However, there is no provision of current legislation, which would oblige the city council to hold public hearings on the land sale. It is the Land Code [18] that regulates the legal relations arising in connection with the grant of ownership of the land plot" [17]. The decision was upheld by the courts of appeal and cassation [19, 20], however, the court did not clarify the possibility of applying the provisions of the Aarhus Convention in such situation.

In other cases, it is expressly stated in the decision that "according to Article 4 of the Aarhus Convention, citizens have the right to receive information on the provision, withdrawal (redemption) of land on their own initiative by submitting a request" [21]. In particular, this position is widely reflected in the rulings of the Odessa District Administrative Court, the practice of which is a significant part of court decisions where the norms of the Aarhus Convention were applied [21–25]. So, the subject of the claim in these cases was the appeal of the inaction of the village council, the court noted that "information on the provision, withdrawal (redemption) of land plots by its nature can also be considered as environmental information, in respect of which a compulsory obligation of state bodies has been established" [21]. The court also emphasized the "lack of obligation formalization" namely to provide information on the provision, withdrawal (redemption) of land plots. Therefore, to strengthen the legal argument of its decision, the court applied Article 4 of the Aarhus Convention [1, 21].

Indeed, in disputes over the right of land ownership, there can be two different aspects related to the essence and the purpose of this right (the classification of environmental rights by N.R. Kobetska is based on this difference [10, p.6]). First, land ownership is inherently a right to natural resources. However, if the applicant disputes the acquisition of ownership right to the land plot on which the construction of an environmentally hazardous facility is planned, he/she intends to protect not his/her right to natural resources, but his/her right to a healthy environment. Therefore, although claims may indirectly relate to land ownership, in fact, we are talking about a claim on the protection of the environment, to which the provisions of the Aarhus Convention directly apply.

However, with regard to those cases where it is a question of protecting the applicant's right to acquire natural resources ownership, the application of the provisions of the Aarhus Convention still seems positive, although not indisputable. In this case, the measure of the legality of the application or non-application of the Aarhus Convention's provisions is whether the use of such a right by the applicant does not contradict the interests of environmental protection. So, when it comes to the use of land for gardening or trucking, such a contradiction does not arise. Another thing is if you intend to use the land plot for environmentally hazardous production. The application of the provisions of the Aarhus Convention contrary to its purpose does not appear to be legal and permissible. The purpose of the Convention is clearly outlined in its preamble and relates specifically to the protection of the environment and not the acquisition of natural resources ownership.

Among the trends that can be considered extremely positive, the recent legal ruling of the Supreme Court in the case of the dolphinarium activity prohibition should be noted [26]. In this case, the Supreme Court noted "the protection of the violated constitutional right to a safe environment belongs to everyone and can be realized both personally and through the participation of a public representative" [26]. Given the binding effect of legal rulings of the Supreme Court, we hope that this case will be an important milestone in bringing domestic legislation and its application to the requirements of the Aarhus Convention[2].

Conclusions

Thus wise, it is concluded that the domestic practice of the application of the Aarhus Convention is characterized by completely different poles, from the failure to recognize that the conclusions of the environmental expertise could contain environmental information, to the interpretation of information on the provision, withdrawal (redemption) of land as an environmental information with the dissemination of the provisions of the Aarhus Convention.

1. The very fact that the provisions of the Aarhus Convention are directly applied by domestic courts and are reflected in their decisions can be considered a positive one. The existence of a search system and the placement of these decisions in the Unified State Register of Court Decisions of Ukraine will contribute to the wider application of the provisions of this Convention by

[2] Author's alterations to the original.

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domestic courts.

2. The courts of Ukraine apply the Aarhus Convention in various contexts: in cases where the provisions of the Aarhus Convention are used to justify the provision or non-provision of environmental information (informational context), including cases relating to requests and cases of violation of public hearings procedure; in cases where the provisions of the Aarhus Convention are used to justify the right to claim (applicant's affiliation context); in cases where the provisions of the Aarhus Convention are used to justify the need for environmental education (educational context).

3. Speaking about the problematic aspects, it seems that the possibility of applying the provisions of the Aarhus Convention in land disputes is somewhat indefinite.

In our opinion, this possibility should directly depend on the coincidence, or at least, the consistency of the goal and the purpose of the specific law and the purpose of the Aarhus Convention, the provisions of which justify the protection of this right. If they are consistent, the application of the said Convention to justify the protection of the right is possible.

4. Among the negative features, one can name a tendency widespread in domestic law enforcement, according to which the absence of a clearly established law procedure (and, as a rule, a subordinate regulatory legal act) can negate the mechanism for protecting human rights, even if it is introduced by a regulatory legal act of higher legal force, containing direct action provisions.

5. In addition, as the analysis of judicial practice shows, in a number of decisions it can be observed a tendency to erroneous narrowing interpretation of the legal provision in law enforcement (in particular, regarding sources of environmental information). This, in turn, can lead to violations of the rights referred to in these regulatory acts, in particular, the right to environmental information and access to justice in environmental matters.

6. Finally, the Supreme Court in its legal conclusions noted that the protection of the violated constitutional right to a safe environment belongs to everyone and can be realized both personally and through the participation of a public representative. Therefore, we should expect positive changes in the application of the Aarhus Convention by Ukrainian courts[3].

Competing interests

The author of the article reports about the absence of any conflict of interest.

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