



COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

**TRANSPARENCY AND ICAO'S
AVIATION OFFSETTING
SCHEME:
TWO SEPARATE CONCEPTS?**

By Aoife O'Leary

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EXECUTIVE SUMMARY

The International Civil Aviation Organisation (ICAO), the UN specialised body for aviation, is developing a scheme to reduce the climate impact of aviation emissions, the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA). From 2021, participating countries will (voluntarily at first) offset any growth in CO₂ aviation emissions above the level those emissions have reached in 2020. This paper does not consider the climate implications of the scheme but rather focuses on whether the governance structure under which the scheme is being developed – especially its transparency and opportunities for public participation – meets an appropriate standard, given the importance of the scheme being developed (aviation emissions are a growing cause of climate change). If the public cannot access information on why and how the final agreement was reached, nor present information relevant to that agreement, the scheme risks being seen as illegitimate.

The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”) is the most well-developed articulation of good governance in environmental policy making. It is an international treaty that grants the public rights of access to information, participation in decision-making and access to justice in environmental matters. In addition to the rights granted to individuals under the Aarhus Convention, the Convention requires that countries promote the same rights when they engage in international environmental decision-making. In using the Aarhus Convention as

the standard against which CORSIA is measured, this paper seeks to answer to three questions:

1. Has the development of CORSIA been in accordance with the Aarhus Convention?
2. Must the EU release CORSIA documents publicly?
3. Will the EU comply with the Aarhus Convention in enacting CORSIA into EU law?

Question 1: Has CORSIA Been Developed in Accordance with the Aarhus Convention?

ICAO is the UN specialised agency for aviation and has been considering the environmental impact of aviation for decades. It has now decided to implement CORSIA, the offsetting scheme for emissions which will begin in 2021. The work to develop the scheme is being developed in the ICAO Committee for Aviation Environmental Protection (CAEP). CAEP meetings are closed to the public and only members of CAEP are allowed access to CAEP documents. Indeed, attendance and access to documents is so strictly controlled that not even all ICAO Member States can attend or access documents.

The EU (and all other Aarhus Convention Parties) have a duty to promote the rights granted under the Convention in international forums for environmental decisions (Aarhus Convention Article 3(7)). As CAEP meetings are not open to the public and documents are confidential, it is not clear whether any Aarhus Parties

have started a dialogue within CAEP to realign it with the Aarhus Convention standards of transparency and public participation. Regardless, even if such a dialogue has started, it has not succeeded and therefore much more work needs to be done to comply with the obligation to promote the Aarhus Convention at ICAO. This can be contrasted with the standards of transparency and public participation at the UNFCCC where public participation is much more extensive and transparency is the default position rather than the exception.

Question 2: Must the EU Release CORSIA Documents Publicly?

The EU has been heavily involved in the negotiations around CORSIA in ICAO. As such the EU will have access to the expert evidence and other documents that informed the development of CORSIA. Under the Aarhus Convention, any member of the public can request to access documents that contain environmental information, as any documents relating to CORSIA do.

There are a number of exemptions to public disclosure that the EU could rely on to prevent the disclosure of documents relating to CORSIA: international relations, commercial interests or protection of information from third parties, but none is particularly convincing and for each exemption there are substantial reasons why it does not apply. Therefore, on balance, it seems that the reasons for the release of CORSIA would outweigh any exemptions from disclosure that the EU might wish to rely on.

Question 3: Will the EU Comply with the Aarhus Convention in Enacting CORSIA into EU Law?

CORSIA will probably be implemented into EU law through an amendment of the Emission Trading System (ETS) Directive. Indeed, the latest agreement on the scope of aviation in the ETS states that the EU ETS will be modified in light of CORSIA when finally agreed.

The EU has not always applied the principles of the Aarhus Convention to the letter in its own ETS. When updating the ETS registry system in 2011, it reduced the amount of public information relating to offsets in the ETS system. This change meant it was no longer possible to tell which entity had used which type of offsets. This is alarming as a precedent for CORSIA as it will be a scheme entirely based on offsets.

The Aarhus Convention provides for a limited right to participate in decision-making with the exact rights granted depending on the type of decision being made. When enacting CORSIA into EU law there is an obligation to “strive to promote public participation” under the Convention. The EU has a good record of enabling public participation and that record should be followed in bringing CORSIA into EU law. However, if the access to information rules are not complied with, and the EU does not disclose CORSIA documents, the public will not have access to the expert evidence that went into developing CORSIA. This would result in the possibility of meaningful public participation being substantially reduced.

Conclusion

CORSIA has not been developed transparently. Access to documents and public participation have not been allowed in the ICAO committee in which CORSIA is being developed. The EU should release all documents in their possession relating to CORSIA. The EU also has a mixed track record when it comes to complying with the Aarhus Convention. The practice with regard to the EU ETS has been patchy, especially concerning information around the use of offsets. Tackling climate change requires economic and social changes so great that good governance, and especially transparency and public participation, are absolutely essential. This paper highlights the significant failings on behalf of ICAO and the EU with regard to the governance arrangements under which CORSIA is being developed. The result is that there is a high risk of CORSIA being seen as illegitimate. This is not a risk either ICAO or the EU should take.

CONTENTS

1	INTRODUCTION	1
1.1	The Importance of Aviation Emissions	1
1.2	Transparency and Public Participation as Principles of Good Governance	3
1.3	The Aarhus Convention.....	6
1.3.1	Pillar 1: Access to Documents Under EU Law	8
1.3.2	Pillar 2: Public Participation Under EU Law	10
1.3.3	Obligation to Promote the Aarhus Convention at International Forums	13
2	QUESTION 1: HAS CORSIA BEEN DEVELOPED IN ACCORDANCE WITH THE AARHUS CONVENTION?	14
2.1	Transparency at ICAO.....	14
2.2	Obligation to Promote Aarhus at ICAO	20
2.3	Transparency at the UNFCCC	22
2.4	Conclusion on Question 1	25
3	QUESTION 2: MUST THE EU DISCLOSE CORSIA DOCUMENTS?	25
3.1	CORSIA as Environmental Information	26
3.2	Exemption for International Relations	28
3.3	Exemption for Commercial Interests.....	31
3.4	Protection of Information From Third Parties.....	33
3.5	The Specific Case of Legislative Documents.....	34
3.6	Positive Obligation to Release Documents.....	34
3.7	Conclusion on Question 2	35
4	QUESTION 3: WILL THE EU COMPLY WITH THE AARHUS CONVENTION IN ENACTING CORSIA INTO EU LAW?	36
4.1	Access to Documents Under the EU ETS.....	37
4.1.1	Access to Document Provisions in the EU ETS	37
4.1.2	Reduction in Offset Information	39
4.1.3	Ville de Lyon v. Caisse des Dépôts et Consignations	41
4.1.4	Saint-Gobain Glass Deutschland v. Commission	43
4.2	Public Participation in the EU ETS.....	45
4.3	Conclusion on Question 3	49
5	CONCLUSION	50

1 INTRODUCTION¹

The International Civil Aviation Organisation (ICAO) is developing an offsetting scheme for aviation emissions called the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Under this scheme countries will offset any growth in CO₂ emissions above 2020 emissions levels. The scheme is voluntary until 2027 and is expected to run until 2035. Good governance requires that the development of any policy be transparent and provide ample opportunity for public comment and stakeholder input. This paper will consider whether the development of CORSIA has so far complied with the Aarhus Convention,² the most well developed articulation of transparency and public participation in environmental decision-making. This paper will then consider whether the EU must publicly disclose any CORSIA documents they hold in accordance with the Aarhus Convention and finally whether the implementation of CORSIA into EU law will be in compliance with the Aarhus Convention.

1.1 The Importance of Aviation Emissions

Aviation is responsible for approximately 5% of man-made radiative forcing.³ Projections show those emissions growing by up to 300% by 2050.⁴ Little has been

¹ The author would like to acknowledge the generous support of Carbon Market Watch in the production of this study and the invaluable comments by Kelsey Perlman, Aki Kachi, Michael Burger and Jessica Wentz on this paper. All errors and omissions remain the author's own.

² United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Jun. 25, 1998, 2161 U.N.T.S. 447 (the "Aarhus Convention").

³ David Lee et al., *Aviation and global climate change in the 21st century*, Volume 43, Issues 22–23, July 2009, 3520–3537.

⁴ ICAO Environment Section, *Global Aviation CO₂ Emissions Projections to 2050*, GIACC/4 IP/1, 2010.

done to date to mitigate those emissions. Article 2.2 of the 1997 Kyoto Protocol tasked Annex 1 Parties (developed countries) to pursue a limitation or reduction of greenhouse gas emissions from aviation through ICAO. ICAO is a specialised agency of the United Nations with a current mission to “achieve the sustainable growth of the global civil aviation system.” In 2013 ICAO members decided to begin developing a global market-based measure for international aviation emissions, which has now become CORSIA. This paper will not discuss the environmental impact of CORSIA, except to point out the reasons for concern around offset and biofuel standards.

CORSIA will require airlines to purchase offsets. Offsets are credits which represent a reduction in emissions somewhere in the world, which when purchased “offset” the emission of the airline. There have been many studies of the offset market, and some have concluded that many offsets do not represent real, verifiable emission reductions.⁵ Airlines will be able to reduce the amount of offsets they are required to purchase by using biofuels. Serious concerns about climate integrity are also raised with at least some uses of biofuels as they can be more climate intensive than the fossil fuels they replace.⁶ Therefore any decisions in ICAO on offset and biofuel standards are fundamental to the climate integrity of CORSIA. There are also ethical, social, land-use and other concerns associated with the use of biofuels and

⁵ See, for example: Öko-Institut, *How additional is the Clean Development Mechanism? Analysis of the application of current tools and proposed alternatives*, March 2016, and The World Rainforest Movement, *REDD: A Collection of Conflicts, Contradictions and Lies*, February 2015.

⁶ See, for example: The Renewable Fuels Institute, *The Gallagher Review of the indirect effects of biofuels production*, July 2008.

offsets.⁷ Ensuring transparency and public participation in the design of the scheme will allow the public to be assured that all of the concerns about the potential for negative impacts of offsets and biofuels have been considered and an appropriate solution reached. Without transparency or public participation, any decisions made by ICAO could be seen as illegitimate. These decisions should be made in full public view and civil society must be allowed to provide expert input to shape those decisions.

1.2 Transparency and Public Participation as Principles of Good Governance

Transparency and public participation are hallmarks of good governance that apply universally and environmental governance is no exception. The 1998 Aarhus Convention is a formal multilateral agreement between countries in Europe and Central Asia, aimed at ensuring that environmental decision-making is carried out in accordance with these principles of good governance. The Aarhus Convention grants citizens the right to easy access to information on the environment. Public authorities can refuse to release information only for limited reasons.⁸ The public must be informed of projects, programmes and other activities that affect the environment and must be given a role to inform those decisions.⁹ The public has the right to judicial or administrative recourse if a party violates the Convention or fails

⁷ See *supra* note 5 and 6.

⁸ Aarhus Convention, Article 4.

⁹ Aarhus Convention, Article 6.

to adhere to environmental law.¹⁰

The Almaty Guidelines on promoting the Aarhus Convention in International Forums specifically acknowledge the importance of adhering to these principles to ensure the legitimacy of environmental decision-making, stating: “[a]ccess to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels and essential for [policy] sustainability... Providing international access opportunities in environmental matters, and establishing and strengthening procedures that enable the taking of these opportunities, generally improves the quality of decision-making and the implementation of decisions.”¹¹ The Aarhus Convention is the most well-developed articulation of what transparency and public participation in environmental governance entails and will be the basis of analysing whether good governance principles have been complied with during the development of CORSIA.

The importance of transparency and public participation have also been recognised in numerous international environmental agreements including the 1992 Rio Declaration on the Environment and Development¹² and the Rio+20 ‘Future We Want’¹³ outcome document. The EU itself attaches a high enough importance to the principles of transparency and public participation that the concepts are included as

¹⁰ Aarhus Convention, Article 9.

¹¹ Almaty Guidelines on the implementation of Article 3(7) – Promotion of the Aarhus Convention in international environmental decision-making, Article 11.

¹² The RIO Declaration on the Environment and Development, A/CONF.151/26 (Vol. I).

¹³ The Future We Want, A/RES/66/288.

foundational values in Article 1 of the Treaty on European Union¹⁴ which gives every citizen the “right to participate in the democratic life of the Union” and commits the Union to making decisions “as openly as possible”. The constitutional nature of the EU’s commitment to transparent decision-making is further elaborated by Article 15 of the Treaty on the Functioning of the EU¹⁵, which guarantees a right of access to information held by the Union and its institutions, bodies, offices and agencies and that those entities must function in a transparent manner. This is echoed in the EU Charter of Fundamental Rights¹⁶ which frames transparency not as a duty on EU institutions but rather as a right for Union citizens to enjoy. Indeed, the EU has been a champion of transparency and public participation, and the Aarhus Convention in particular, from the outset of international climate negotiations.

However, while the EU is a champion of transparency on paper, in practice the EU often shows a strong bias towards confidentiality.¹⁷ There are serious concerns about the EU’s approach to embedding the principle of transparency within the Union’s internal legal framework and also in its participation in international bodies. This paper will explore whether this bias exists in ICAO and in the processes by which the EU will enact CORSIA into EU law, and whether that bias would affect the disclosure of CORSIA related documents by the EU.

¹⁴ Treaty on European Union, OJ C 326, 26.10.2012, p.1-46.

¹⁵ Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

¹⁶ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012 p.391-407.

¹⁷ ClientEarth, *EU Climate & Energy Governance Health Check Looking back to 2020 and forward towards 2030*, November 2014.

1.3 The Aarhus Convention

The Aarhus Convention comprises three pillars or main principles:

- Access to information¹⁸
- Public participation in decision-making¹⁹
- Access to justice²⁰

Importantly the Aarhus Convention also requires parties to promote the three pillars of the Convention in international environmental decision making: *“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.”*²¹

The Convention imposes the same obligations on EU Member States as it does on the EU itself. This paper will focus on the EU obligations pertaining to access to information and public participation (i.e. not on access to justice²²).

Under all three pillars, parties to the Convention have reporting requirements and the Aarhus Convention Compliance Committee (the “Committee”) reviews party performance based on these reports and on reports from members of the public.²³ The Committee carries out fact-finding investigations and attempts to

¹⁸ Aarhus Convention, Article 4.

¹⁹ Aarhus Convention, Article 6.

²⁰ Aarhus Convention, Article 9.

²¹ Aarhus Convention, Article 3(7).

²² The EU has been found to be in violation of the access to justice pillar by preventing the public from challenging the EU institutions' environmental decisions in court, see: Findings and recommendations of the Aarhus Convention Compliance Committee concerning compliance by the European Union with the Aarhus Convention, ACCC/C/2008/32(EU), Mar. 17, 2017.

²³ Article 15 of the Aarhus Convention requires the Meeting of the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the

facilitate forward-looking compliance rather than be a redress body for specific violations.²⁴ It is unique in international environmental law as it allows members of the public to communicate their concerns about a country's compliance directly to the Committee, further emphasizing the importance the Aarhus Convention puts on public participation. However, the Committee cannot issue binding decisions, but rather may make recommendations either to the Meetings of the Parties, or, in certain circumstances, directly to individual Parties. The Committee therefore interprets what is required by the Convention and whether the parties have met this standard. Part of this process is the issuance of guidance documents and recommendations for compliance.

While the Aarhus Convention is a European-centric document, concerns over transparency and public participation in environmental decision-making are by no means confined to Europe. International agreements on the environment often include transparency and public participation as important principles. Further, looking at human rights jurisprudence in the Americas and Africa indicates that transparency is not only a European concern.²⁵ The United Nations Environment Program's 2010 Bali Guidelines for National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters draw

Convention". See also the Guide to the Aarhus Convention Compliance Committee, third draft, prepared for discussion in open session at the 56th meeting of the Compliance Committee, Geneva, February 2017.

²⁴ *Id.*

²⁵ Ebbesson, Chapter 3, Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public, in Bianchi and Peters, *Transparency in International Law*, Cambridge University Press, 2013, p. 68.

significantly on the Aarhus Convention but are designed to promote effective implementation of principle 10 of the Rio Declaration (setting out access to information, public participation and access to justice as rights).²⁶ In addition, the Aarhus Convention itself contains an obligation on all parties to the Convention to promote its principles in international forums in environmental decision-making (Article 3(7)). Therefore, assessing the performance of ICAO against the Convention is not to impose European rules on world-wide processes but rather to apply the most well-developed articulation of transparency and public participation in environmental matters to international agencies that themselves state they operate on a principle of transparency, as ICAO does.²⁷

1.3.1 Pillar 1: Access to Documents Under EU Law

The Aarhus Convention is part of the EU legal order and binds the EU institutions, agencies, bodies and Member States.²⁸ However, the Convention was not adopted wholesale into the EU legal order, rather there are a series of regulations that apply the different parts of the Convention to the EU. For the purposes of this paper the important Regulations with regard to access to documents are:

- Regulation 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies, which sets out how the provisions of the Convention apply to EU institutions (the “EU Aarhus

²⁶ UNEP, *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, November 2011.

²⁷ ICAO, *Rules of Procedure for Standing Committees of the Council*, Doc 8146-C/930/5.

²⁸ 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, OJ L 124/1.

Regulation"). With regard to access to information it mainly refers to Regulation 1049/2001.

- Regulation 1049/2001 predated the EU bringing the Aarhus Convention into the EU legal order. The Regulation sets out the rules surrounding public access to all European Parliament, Council and Commission documents, not just documents relating to the environment (the "EU Access to Documents Regulation"). This was amended somewhat by the EU Aarhus Regulation but discrepancies still exist between this regulation and the Aarhus Convention that result in a somewhat less strict EU standard of disclosure than that in the Aarhus Convention itself (these discrepancies are detailed throughout this paper as relevant).
- The Aarhus Convention has also been implemented in the Member States via two Directives. One on access to documents (Directive 2004/3/EC) and the other on public participation (Directive 2004/35/EC). This paper will mainly focus on the Regulations which apply the Aarhus Convention to the EU bodies as opposed to the EU Member States but in general the same obligations apply to Member States as the EU.

The details of the requirements on access to documents set out in these overlapping Regulations are set out as relevant in the paper, but are particularly central to help answer the second question on whether the EU must release any CORSIA documents it has.

1.3.2 Pillar 2: Public Participation Under EU Law

The Aarhus Convention provides a limited right to participate in decision-making. The right to participate depends on the type of activity so that there are different rules for plans, programmes, policies and executive regulations or other generally applicable legally binding rules. This section will set out the different participation rights in the Convention and then consider their application to the implementation of CORSIA in the EU.

Articles 7 and 8 of the Aarhus Convention set out the standard of public participation for the types of activities that CORSIA might fall under:

- Parties to the Convention *“shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment.”*
- Parties *“shall endeavour”* to provide public participation in the preparation of policies relating to the environment.
- Parties are to *“strive to promote”* public participation in the preparation by public authorities of *“executive regulations and other generally applicable legally binding rules”* that may have a significant effect on the environment. However, the definition of ‘public authority’ in Article 2(2) excludes when these entities are acting in a legislative capacity.

No definition of plans, programmes, policies, executive regulations or other legally binding rules are provided in the Convention. Therefore, it is difficult to

exactly define where a positive obligation to allow for public participation begins and where it ends. However, the Maastricht Recommendations,²⁹ drawn up by the parties, speak to this question and point out that while no definition of plans and programmes was provided under the Convention, a broad interpretation should be applied “covering any type of strategic decision”:

- (a) Which is regulated by legislative, regulatory or administrative provisions;
- (b) Which is subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government;
- (c) Which provides an organized and coordinated system that:
 - (i) Sets, often in a binding way, the framework for certain categories of specific activities;
 - (ii) Is usually not sufficient for any individual activity to be undertaken without an individual permitting decision.³⁰

The EU Aarhus Regulation defines plans and programmes relating to the environment as being ‘required under legislative, regulatory or administrative provisions’. It would seem that CORSIA, and specifically the rules that will be developed to implement it, fit within this description or the description of ‘policies’, which the Recommendations suggest should encompass: “any strategic decision other than a plan or programme”:

- (a) Which is subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure;*
- (b) Which may or may not be regulated by legislative, regulatory or administrative provisions;*

²⁹ United Nations Economic Commission for Europe, *Maastricht Recommendations on Public Participation in Decision-making*, December 2015.

³⁰ *Id.*, paragraph 154.

- (c) Which does not set in a binding way the framework for certain categories of specific activities (for example, development projects);
- (d) Which is not sufficient for a specific activity to be undertaken without an individual permitting decision.

Finally, CORSIA could be said to come under the definition of executive regulations and laws. There is no definition of executive regulations and laws under the Maastricht Recommendations. Nor do they refer to the exemption for entities acting in a legislative capacity but rather seem to imply that all legislative decisions are subject to the rules on public participation:

If national law or administrative practice does not provide for public participation in the preparation of all executive regulations and laws across the board, it is recommended to put in place a mechanism or criteria for evaluating whether a proposed executive regulation or law may have a significant effect on the environment, and thus be within the scope of article 8 of the Convention.³¹

It could be argued that CORSIA comes under any of the different types of activities mentioned in Article 7 and 8 of the Aarhus Convention as described here. However, the provisional agreement on the latest amendment on the aviation sector's role in the EU ETS³² states the intention of the EU is for CORSIA to become binding in the EU via an amendment to the ETS Directive. Therefore, CORSIA seems to come under the definition of executive regulations and laws. However, in enacting CORSIA into legislation, the EU would be acting in a legislative capacity and so excluded from the obligation to "strive to promote" public participation by the provisions of the Aarhus Convention.

³¹ *Id.*, paragraph 184.

³² European Council, Extending current aviation rules in the EU emissions trading system - provisional deal reached, Oct. 18, 2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/10/18-aviation-rules-under-ets/>.

What is meant by 'participation' is also not defined in the Aarhus Convention. However, Articles 6 to 9 of the Convention give various indications of what it means, i.e. the possibility to make comments, submit information, analysis and opinion on a project, plan, programme, policy or executive regulation. The Maastricht Recommendations note that to participate effectively, certain types of information must be provided to the public, including "the constraints lawmakers are under or requirements the lawmakers must meet in the draft rules (e.g. international law obligations)." Question three will look at whether this standard will be met when CORSIA will be enacted into EU law.

1.3.3 Obligation to Promote the Aarhus Convention at International Forums

The Aarhus Convention requires parties to "*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.*"³³ There is no complete definition of what promotion of the Convention entails but the Almaty Guidelines set out a wide interpretation of the obligation and state in relevant part:

13. *There may be a need to adapt and structure international processes and mechanisms in order to ensure meaningful and equitable international access. ...*
20. *Environmental information contained in all official documents developed and produced within each international forum should be made available to the public through the Internet, or through other appropriate means, in a timely manner, subject to the relevant rules of each individual forum and with due regard for paragraph 25. ...*

³³ Aarhus Convention, Article 3(7).

25. *Requests for environmental information should be permitted to be refused only on the basis of specific grounds for refusal, taking into account the relevant provisions of the Convention, including the requirement that grounds for refusal should be interpreted in a restrictive way, taking into account the public interest in disclosure. ...*

29. *Participation of the public concerned in the meetings of international forums, including their subsidiary bodies and other groups established by the forums to contribute to the decision-making, in matters relating to the environment should be allowed at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation according to transparent and clearly stated standards that are made available, if possible, in advance...³⁴*

The Almaty Guidelines specifically acknowledge the potential need for international forums to amend their standard operations if necessary to ensure access to information rights are provided. They also importantly recommend a default standard of all documents being released publicly and exceptions to disclosure to be interpreted restrictively. Further the public should be able to attend and participate in all meetings as standard, with restrictions only on a reasonable basis and stated publicly.

2 QUESTION 1: HAS CORSIA BEEN DEVELOPED IN ACCORDANCE WITH THE AARHUS CONVENTION?

2.1 Transparency at ICAO

All of the 39 signatories and 47 parties to the Aarhus Convention (most European and Central Asian countries) are also members of ICAO (except for the EU which is a party to the Aarhus Convention but an observer, rather than member of ICAO). Therefore, the overlap in ICAO between ICAO members and parties to the

³⁴ Almaty Guidelines, *supra* note 11.

Aarhus Convention goes beyond just EU member states. This paper will mainly focus on the application of the Aarhus Convention to the EU but all Aarhus Convention obligations apply equally to all parties to the Convention, including the individual EU Member States.

The three most important decision-making bodies at ICAO with regard to climate are the ICAO Assembly, Council and CAEP (along with its subcommittees). The ICAO Assembly (composed of all the member states) meets only once every three years. While this is the ultimate decision-making authority, most of the actual work is done by the Council (36 member states) and the Assembly has lost importance over time.³⁵ Originally the Assembly met annually but in 1956 it was changed to once every three years.³⁶ Commentators have pointed out that this:

Has progressively dissuaded active participation of Member States other than those fortunate enough to have Council representation. Although Member States do attend ICAO's triennial Assembly sessions, they do so in a rather passive manner. The tremendous backlog of massive working papers makes it impossible for delegates to really grasp what the Assembly is supposed to consider in a short two-week session.³⁷

In regards to climate initiatives at ICAO, the “more disengaged and the less informed the majority of member states are on this issue, the stronger their inclination to reject collaborative action and block global proposals. Participation is a key element in the development of a global MBM [Market Based Measure] scheme to address GHG emissions

³⁵ Milde, *International Air Law and ICAO*, Eleven: The Hague, 2012, p. 138.

³⁶ See Protocol Relating to the Amendments of Articles 48(a), 49(e), and 61 of the Convention on International Civil Aviation, 12 December 1956, ICAO DOC 7300.

³⁷ Piera, *Greenhouse Gas Emissions from International Aviation: Legal and Policy Challenges*, 2015, p. 172.

from international aviation.”³⁸ This lack of real engagement due to the triennial nature of the Assembly is compounded on climate matters by the lack of transparency and lack of open participation in the committees developing CORSIA. Given this lack of engagement in climate issues from most ICAO member states, ICAO should consider ways to increase the participation of all of its member states in developing climate policies.

Most of the development of CORSIA is done in the Committee on Aviation Environmental Protection (CAEP). CAEP is a technical committee, composed of experts.³⁹ It has 24 members and 17 observers.⁴⁰ CAEP is governed by “CAEP Directives” approved by the Council.⁴¹ These Directives are not publicly available.⁴² The ICAO rules of procedure for committees are freely available and set out a transparent default position with regard to access to documents and public participation:

Meetings of each Committee, except the Committee on Unlawful Interference, should normally be open to the public. In general, meetings should only be held in closed session if discussion involves the following:

- a) the level of aviation security in specified States or in general;*
- b) current or future provisions concerning aviation security;*
- c) salaries or allowances of an individual member of staff or of a category of staff;*

³⁸ *Id.*, p. 174.

³⁹ ICAO, Committee on Environmental Protection, <https://www.icao.int/ENVIRONMENTAL-PROTECTION/Pages/CAEP.aspx> (last visited Oct. 23, 2017).

⁴⁰ *Id.*

⁴¹ Jane Hupe, *Committee on Environment Protection*, https://www.icao.int/Meetings/EnvironmentalWorkshops/Documents/2015-Warsaw/1_2_Committee-on-Aviation-Environmental-Protection-CAEP.pdf (last visited Oct. 23, 2017).

⁴² They are not listed on ICAO's document site (<https://www.icao.int/isbn/Lists/Publications/AllItems.aspx>) nor could the author find a copy from any other publicly available source. The author also contacted ICAO requesting copies but has not heard back at the time of publication.

- d) selection of candidates for posts in the Secretariat;*
 - e) disputes between Contracting States; and*
 - f) issues where representatives' personal security could be endangered if their statements were made public.*
2. Normally, only documents relating to meetings concerning the subjects listed under a) to f) above should be marked "Restricted."⁴³

This standard of transparency and public access is also standard for other UN agencies such as the UNFCCC.⁴⁴ However, no CAEP meetings are open to the public and none of the documents submitted by Parties or developed by the ICAO Secretariat for those meetings, are publicly available. It is not clear what is driving this diversion from the default ICAO position of committee transparency as there is no publicly available document setting out why the standard committee rules do not apply to CAEP. To access the CAEP portal (where the CAEP documents can be accessed) members of CAEP are asked to sign up to a set of rules. These rules include a statement of unlimited personal and professional liability in the event of disclosure, even if inadvertent or by accident,⁴⁵ though the full set of rules is not publicly available. Non-members cannot sign up or access the documents at all. The membership of CAEP is severely restricted. Not even all ICAO members can attend CAEP meetings or access CAEP documents.

⁴³ ICAO, *supra* note 27.

⁴⁴ See: United Nations Framework Convention on Climate Change Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, FCCC/CP/1996/2; and UNFCCC, Documentation <http://unfccc.int/documentation/items/2643.php> (last visited Oct. 23, 2017).

⁴⁵ European Parliament, Directorate General for Internal Policies, Decision-making processes of ICAO and IMO in respect of environmental regulations, IP/A/ENVI/2016-13, September 2016.

Without access to the CAEP Directives and other documents where decisions to depart from the standard rules of procedure for standing committees are set out, reliance must be placed on commentary as to the reasons for the lack of transparency. A research paper drawn up by the Environmental Protection Committee of the European Parliament states that:

The position of the Secretariat (and others) is that because CAEP is a consultative body that tries to prepare policy making decisions taken at later stage in process, public reporting of discussions between members of technical groups risks politicisation of the process and thereby impairs the functioning of the system. Experts are nominated, not formally working in the capacity of a state official. The working principal is that discussions are kept within the group to maintain independence and expert detachment, rather than risk a public shouting match. If media reported attributions, this would be seen as threatening the functioning of the group. The same concern regarding independence of experts was expressed in regard to the idea of streaming sessions live, and also that doing this for CAEP would merely drive decision-making backdoor (“where political agreements are made anyway”). For some, this idea of total public transparency would make member states more accountable by ensuring that public rhetoric was matched by private conduct. Concerns are expressed, however, of the danger of material not being seen in context: “If you just see one paper, you don’t see the reaction to it from other member states.”⁴⁶

There are other risks created by CAEP being closed. Seeing none of the CAEP papers at all can mean that it is not clear whether all options and expert analysis was properly considered before final recommendations are made. Second, the lack of access to CAEP documents and meetings only serves to amplify the general disassociation between most ICAO members and the work ICAO does that is created by ICAO's decision-making structure. Excluding most ICAO members from even accessing the expert evidence that goes into developing recommendations cannot

⁴⁶ *Id.*, p.37.

contribute to the legitimacy of those decisions nor encourage members to support those decisions.

The opportunities for public participation are also very limited. Only one environmental NGO can participate in CAEP⁴⁷ - the International Coalition for Sustainable Aviation - which includes six different environmental NGO members. However, six separate industry bodies are allowed representation at CAEP⁴⁸ (the Airport Council International, the Civil Air Navigation Services Organisation, the International Air Transport Association, the International Business Aviation Council, the International Coordinating Council of Aerospace Industries Associations and the international Federation of Airline Pilots' Associations). It has been calculated that 63% of the attendance at CAEP/8 (the 8th triennial cycle of CAEP meetings) were from industry (rather than member states or civil society).⁴⁹

In general, no individual can attend CAEP unless officially nominated by a Member or Observer which means that even among CAEP Members and Observers, only certain nominated individuals can attend CAEP meetings.⁵⁰ This does not meet the standard of good governance set out in the Aarhus Convention for international environmental decision-making forums. It can also be contrasted with the default

⁴⁷ ICAO, CAEP Members and Observers, <https://www.icao.int/environmental-protection/Pages/Caep.aspx#Members> (last visited Oct. 23, 2017).

⁴⁸ *Id.*

⁴⁹ Piera, *supra* note 34, p. 180 and fn 587.

⁵⁰ *Id.*

standard of transparency and open participation at the UNFCCC (see discussion of UNFCCC procedures below).

There is no publicly available policy on non-members being granted temporary access to meetings but it seems that ICAO does not look favourably on such requests. A delegation of Members of the European Parliament requested to attend CAEP as temporary observers in January 2016 but were refused access on the basis that CAEP is a technical, not political, committee.⁵¹ There is no publicly available set of rules for technical ICAO committees (as opposed to political ones) and just one standard set of committee rules (as extracted above). Further, as noted by the President of the European Parliament in response to the refusal to allow the parliamentary delegation to attend ICAO, "it is difficult to draw the line between technical and political meetings. Technical discussions and decisions can easily pursue political objectives."⁵² CAEP is the forum where the draft rules on biofuel and offset quality are being developed and these are contentious issues, it is difficult to see how they could be regarded as solely technical decisions. Leaving such issues to be decided behind closed doors risks those decisions being seen as illegitimate.

2.2 Obligation to Promote Aarhus at ICAO

As seen, practice at ICAO during the development of CORSIA has not been in accordance with the principles of the Aarhus Convention. CAEP documents and

⁵¹ Letter from Martin Schulz, President of the European Parliament to Jean-Claude Juncker, President of the European Commission, re ENVI committee mission to ICAO/CAEP10 meetings in Montreal, 29 January 2016.

⁵² *Id.*

meetings are not public and therefore it is impossible to know to what extent parties to the Aarhus Convention are promoting the principles of the Convention within CAEP. But it can be said that if the parties to the Aarhus Convention are promoting its principles within ICAO, they clearly have not succeeded.

In considering whether the EU has fulfilled its obligation to promote the Aarhus Convention at ICAO, it is illustrative to look at the EU's own practice at ICAO. For example, the EU has a permanent representative located in Montreal at the ICAO headquarters, tasked with improving coordination between EU Member States and the EU in ICAO interactions, including the development of common EU positions for ICAO meetings.⁵³ However, these positions are not publicly available online. This can be contrasted with the final EU common positions for the UNFCCC agreed before the various COP (Conference of the Parties) negotiating rounds including leading to the Paris Agreement, which are all publicly available.⁵⁴ The EU should release its common position on the use of biofuels and offsets in CORSIA as these will be fundamental to the environmental impact of CORSIA. The proactive release of these common positions is important for compliance with the Aarhus Convention provisions on access to documents but also to enable public participation in decision-making. Without understanding the EU's position, EU

⁵³ The European Commission, The European Union at ICAO, https://ec.europa.eu/transport/modes/air/international_aviation/european_community_icao_en (last visited Oct. 23, 2017).

⁵⁴ See for example the Briefing Note EU position for COP 21 climate change conference, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572787/EPRS_BRI\(2015\)572787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572787/EPRS_BRI(2015)572787_EN.pdf) (last visited Oct. 23, 2017).

citizens may not have enough information to determine if their views are adequately represented.

2.3 Transparency at the UNFCCC

In considering whether CORSIA is being developed in accordance with the Aarhus Convention, it is also illustrative to look at other international carbon markets. The final section of this paper focuses on the EU ETS and its compliance with the Aarhus Convention but this section considers transparency at the UNFCCC.

UNFCCC documents are available to the general public online, including meeting agendas and submissions by parties to meetings with the submission portal being a completely publicly accessible site, though permission (via an account) is required to upload documents.⁵⁵ The UNFCCC was the subject of several considerations at Aarhus Convention Conferences (bringing together the Aarhus Convention Compliance Committee, parties to the Convention and concerned civil society). These were especially important in the run up to the Paris Agreement.⁵⁶ In particular, France, due to its status as COP 21 host, explained a number of procedures it had put in place to ensure the COP ran in accordance with Aarhus

⁵⁵ UNFCCC, Documentation <http://unfccc.int/documentation/items/2643.php> (last visited Oct. 23, 2017). It can be noted that while anyone can make a submission, submissions are generally restricted to a small group of participants as can be seen on the submissions page: UNFCCC, Letters from Stakeholders to the Executive Committee, <http://cdm.unfccc.int/stakeholder/submissions/index.html> (last visited Oct. 23, 2017).

⁵⁶ UNECE, Aarhus Week in Geneva, <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/news/envppaarhusaarhusweek.html> (last visited Oct. 23, 2017).

principles. These included, for example, ensuring any draft texts were available online and the development of a mobile app that was updated daily.⁵⁷

UNFCCC meetings of the treaty bodies, including bodies of limited composition, are accessible to accredited observers, who may make interventions at meetings, subject to the approval of the chairperson. Rule 6 of the UNFCCC Draft Rules of Procedure⁵⁸ allows for the inclusion of an unlimited number of observers, who can participate, though not vote, unless an objection is raised by one third of members (these rules are in draft form as they have not been officially adopted yet due to a lack of agreement on voting procedures but are used in practice). Almost 100 intergovernmental organisations and 1600 NGOs are accredited to the UNFCCC.⁵⁹ Some subsidiary bodies, have their own rules of procedure, an example where the rules for emissions reduction units are developed is the Executive Board of the Clean Development Mechanism (“CDM”). The CDM Executive Board sets a default of transparency for all documents with limited exceptions and allows unlimited attendance for observers⁶⁰ with all executive board meetings webcast and recorded, with recordings freely available online.⁶¹

⁵⁷ *Id.*

⁵⁸ United Nations Framework Convention on Climate Change Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, FCCC/CP/1996/2.

⁵⁹ See Miquel Munoz Cabre, ‘Issue-linkages to Climate Change Measured through NGO Participation in the UNFCCC’, *Global Environmental Politics* 11 (2011), 10-22, 10.

⁶⁰ UNFCCC, Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, held at Montreal from 28 November to 10 December 2005 – Addendum: Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at its First Session, FCCC/KP/CMP/2005/8/Add.1, 30 March 2006, annex 1: Rules of Procedure of the Executive Board of the Clean Development Mechanism, rules 26 and 27.

⁶¹ See: The CDM Executive Board, <http://cdm.unfccc.int/EB/index.html> (last visited Oct. 23, 2017).

However, some developing states are concerned about the influence of industrial emitters under Article 6 negotiations (on cooperative approaches to enhance ambition and promote sustainable development and environmental integrity in the implementation of nationally determined contributions under the Paris Agreement).⁶² The rule is that observers are allowed into the discussions if no UNFCCC Party objects. However, recently in Marrakesh at the twenty-second session of the Conference of the Parties (“COP 22”), Venezuela, Ecuador and others objected to business associations carrying out lobbying activity as observers, resulting in all observers being removed.⁶³ A discussion followed about what to do about observers e.g. carry out a conflict of interest exercise and only allow those with no conflict of interest to participate, or devise another rule. No final resolution has been reached. It is not clear whether there will be any provision for public participation on Article 6 negotiations in the next meeting but all documents are still available to the public and accessible by all observers.

Therefore, it seems that in general the UNFCCC has a much more transparent way of working than ICAO. The UNFCCC has a default of transparency and open participation, whereas ICAO blocks access to CAEP meetings as a default position on the basis that these meetings are ‘technical’. In general, with the exception of the Article 6 negotiations, it appears that the UNFCCC could be said to be in compliance

⁶² UNFCCC, Subsidiary Body for Implementation, *Arrangements for intergovernmental meetings*, Forty-sixth session, Bonn, 8–18 May 2017, Agenda item 15, May 17, 2017.

⁶³ *Id.*

with the Aarhus Convention pillars on access to documents and public participation, while ICAO is not.

2.4 Conclusion on Question 1

Question 1 asked whether CORSIA is being developed in accordance with the Aarhus Convention and the answer is no. ICAO's standard rules of procedure set a default of transparency with a limited number of exemptions. However, ICAO has chosen not to apply those rules to the committees where CORSIA is being developed. There is no provision made for access to documents for non-members and no provision for non-members to attend CAEP meetings. All Parties to the Aarhus Convention are under an obligation to promote the principles of the Aarhus Convention in international environmental decision-making forums. However, as there is no public access to documents, it is impossible to know whether or to what extent this is being done. Certainly, it can be said that if Parties to the Aarhus Convention are promoting the Aarhus principles within ICAO, they have not yet succeeded and more work remains to be done. Without appropriate changes to ensure transparency, the work at ICAO risks being seen as illegitimate. Due to the size of the climate challenge, this is not a risk that ICAO, or the EU should take.

3 QUESTION 2: MUST THE EU DISCLOSE CORSIA DOCUMENTS?

The first pillar of the Aarhus Convention requires that parties to the Aarhus Convention ensure public access to information on the environment. This is

accomplished through a series of detailed rules on what must be provided to the public and what exemptions can be imposed. This section of the paper will first assess whether CORSIA comes under the type of information requiring mandatory disclosure under the Aarhus Convention and then whether one or more of the exemptions from mandatory disclosure applies.

3.1 CORSIA as Environmental Information

In 2016 ICAO Members agreed a series of guiding principles that would inform the development of CORSIA in an Assembly Resolution.⁶⁴ Since then, ICAO has been developing the detail of how CORSIA will operate. These details will form Standards and Recommended Practices (“SARPs”) which are the rules that ICAO Member States implement to give force to ICAO agreements. SARPs are not binding on ICAO Members and each country can notify ICAO of any differences between the SARPs and the country’s implementation rules. CORSIA is currently being developed into SARPs but none of the work to do so is public (as discussed above). The EU has been heavily involved in the negotiations surrounding CORSIA and the development of the SARPs. As such the EU will have copies of the draft SARPs, along with the expert evidence and other supporting documents used to develop CORSIA. The final draft SARPs (those to be adopted by ICAO members) and the expert evidence that went into the development of CORSIA should be released publicly.

⁶⁴ See: ICAO, Assembly Resolution 39-3 at https://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf (last visited Oct. 23, 2017).

The EU Aarhus Regulation provides the right to access a wide range of environmental information including "*any information in written, visual, aural, electronic or any other form on: ... (ii) Factors, such as substances, energy, noise radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment...; (iii) Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements*".⁶⁵ Information pertaining to CORSIA certainly falls within this description - CO₂ is an emission into the environment and an aircraft CO₂ offsetting scheme is an environmental measure. Therefore, documents relating to CORSIA fall within the scope of the EU Aarhus Regulation's access to documents provisions. This is in contrast to the provisions on public participation where it is not clear which type of activity CORSIA falls under.

However, while this means that CORSIA documents should be disclosed publicly, there are several exemptions that could be used by the EU (or other Parties to the Aarhus Convention) to refuse to do so. The following sections will discuss the different exemptions to disclosure the EU could attempt to apply. For an exemption from disclosure of documents to be applicable, it needs to be invoked by the non-disclosing party. The use of any of these exemptions must be weighed against the requirement in both the Aarhus Convention and the EU implementing Regulation that exemptions from access to information are interpreted narrowly. The CJEU has held that "*Regulation 1049/2001 [on access to documents] is designed to confer on the*

⁶⁵ EU Aarhus Regulation, Article 2.1(d).

public as wide a right of access as possible to documents of the institutions."⁶⁶ The standard of offsets and biofuels decided in CORSIA is too important to be decided behind closed doors; the exemptions from disclosure should be interpreted restrictively.

3.2 Exemption for International Relations

If the EU receives a request for access to CORSIA documents, the EU could claim that the exemption from disclosure of documents that would harm international relations would apply. The EU Access to Documents Regulation Article 4(1)(a), third indent and Article 4(1), first indent provide that *"the Institutions shall refuse access to a document where disclosure would undermine the protection of a) the public interest as regards: - international relations"*. It could be foreseen that releasing CORSIA documents publicly could negatively impact on the conduct of the EU's international relations.

Yet, ICAO denied access to several members of the European Parliament to attend ICAO meetings where CORSIA was being developed on the grounds that CAEP is a technical, not political committee: *"the participation of MEPs in a CAEP meeting is not appropriate. [...] Bringing political advisors can signal that the work is not technical, thereby irrevocably politicizing the process."*⁶⁷

Therefore, it seems that ICAO regards the work of CAEP as purely technical – not political – suggesting that releasing information from CAEP should not impact on international relations. Therefore, to the extent that the EU could simply release

⁶⁶ Case C-139/07P, *Commission v Technische Glaswerke Ilmenau*, [2010] I-05885, paragraph 51.

⁶⁷ Letter from Martin Schulz, *supra* note 48.

CORSIA documents as designed and discussed in CAEP – i.e. before any political issues enter into the question, the international relations exemption should not bar their release.

The international relations exemption was considered in the case of *t'Veld v Commission*⁶⁸ where deference was given to the right to refuse disclosure of documents of the *negotiating parties*. However, this deference applies only to negotiating positions and would leave the EU free to disclose any CORSIA documents that do not state party negotiating positions and indeed are purely technical, not political, documents. Further there is no differentiation in the EU Access to Documents Regulation or the Aarhus Convention for agreements under negotiation, compared to finally decided policies; the fact that a policy is not finally decided is immaterial for the purposes of access to documents. Certainly at least, ICAO and the EU should release the final draft of CORSIA sent for adoption to the ICAO member states and also the expert evidence that went into its design.

In addition, *t'Veld* did not relate to the Aarhus Convention but rather only to the EU Access to Documents Regulation as environmental information was not at issue. This is important as the EU transparency obligations provide for “automatic” grounds for refusal i.e. “the institutions *shall* refuse access...”, whereas the Aarhus Convention states that “a request for environmental information *may* be refused if...” (emphasis added). The detrimental impact of this important discrepancy in the rules

⁶⁸ Case T-301/10, *Sophie in 't Veld v European Commission*, Mar. 19, 2013.

on the release of information is immediately apparent in *t'Veld* as the CJEU ruled that the exemption must automatically apply and the Court's role is limited to "*verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.*"⁶⁹

Another pertinent discrepancy between the EU rules and the Aarhus Convention is the restriction on the use of the exemption for international relations where the information requested relates to emissions.⁷⁰ However, this restriction does not exist in the EU legislation, but does apply to the EU Member States through the Directive that applies the Aarhus Convention to the EU Member States: "Member States may not, by virtue of ... [the international relations exemption] ..., provide for a request to be refused where the request relates to information on emissions into the environment."⁷¹

Therefore, it would seem difficult for the EU to refuse to release documents relating to CORSIA on the basis of international relations to the extent that the documents solely relate to work done in CAEP as ICAO itself sees that as a purely technical committee. Secondly, on the basis of the *t'Veld* case, once CORSIA is in draft form without party positions contained therein, the deference to negotiating positions would not apply. The discrepancies between the EU Access to Documents

⁶⁹ *Id.*, para. 109.

⁷⁰ Aarhus Convention Article 4(4).

⁷¹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, OJ L 41, 14.2.2003, p. 26–32, Article 4.

Regulation and the Aarhus Convention lean in favour of disclosure. When the requirement to read exemptions restrictively is taken into account, the balance definitely lies in disclosure.

3.3 Exemption for Commercial Interests

The EU Access to Documents Regulation sets out an exemption for the commercial interests of a natural or legal person in Article 4(2). It could be invoked if the Commission thought that, for example, the commercial interests of airlines, offset owners or biofuel producers would be jeopardised by the release of CORSIA. However, the EU Aarhus Regulation places a restriction on this exemption: “an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.”⁷² CORSIA is a scheme to regulate airline emissions and therefore this restriction to the exemption for commercial interests must apply.

The exemption for commercial interests also differs between the Aarhus Convention and the EU Access to Documents Regulation. In the EU Regulation the interest protected is broad: “commercial interests of a natural or legal person, including intellectual property”, whereas in the Aarhus Convention (and in the Directive applying the Convention to EU Member States) it is only the “confidentiality of commercial and industrial information” which is protected. In releasing CORSIA documents the EU would not be jeopardising the confidentiality

⁷² EU Aarhus Regulation Article 6(1).

of commercial and industrial information but could potentially jeopardise “commercial interests”. However, in this context it is important to look at the information that must be public in order for a credible carbon market to develop:

- Emissions (i.e., how much pollution did each entity in the market emit);
- Emissions unit tracking (i.e., are all relevant emissions transparently and accurately tracked);
- Any use of outside units (i.e., in many markets entities can use a certain amount of offsets or units generated in other markets to meet their emissions obligations).

Robust registries allow third parties to validate how an entity's obligation was determined and met to reduce the risk of fraud and double-counting, and improve confidence in the market-based measure. The credibility of every major market-based compliance instrument is built on these core principles. They are critical to the effective functioning of the U.S. Acid Rain Trading Program, the Kyoto Protocol, the EU ETS, and the California Cap and Trade System.⁷³ Therefore in determining whether commercial interests have been harmed, the amount of information that must be released to ensure the robust functioning of carbon markets must be taken into account as a restriction on using the commercial interests exemption.

⁷³ The International Coalition for Sustainable Aviation, *Trust but Verify Aviation's Climate Deal: CORSIA Registries and Transparency*, available at: <https://www.transportenvironment.org/sites/te/files/publications/ICSA%20Registries%20Paper-FINAL.pdf> (last visited Oct. 23, 2017).

3.4 Protection of Information From Third Parties

The EU Access to Documents Regulation mandates the Commission consult any third party which has transferred the document to the EU institution about whether one of the exemptions in the Regulation applies, *“unless it is clear that the document shall or shall not be disclosed.”* Therefore, the EU would need to consult ICAO on whether or not CORSIA should be disclosed. However, the final decision whether to disclose lies with the institution to which the request for access was made, i.e. ICAO would not have the final say over release, it can only give the EU an opinion on disclosure.

Here again, there is an important distinction to be drawn between the text of the Aarhus Convention and the EU Regulation. The Aarhus Convention distinguishes between information that is voluntarily given and information given because of a legal obligation. Under the Convention, it is only when information is voluntarily given that a third party may refuse that the information be disclosed. This could be relevant where the EU receives CORSIA documents as part of the ICAO process of adoption as this would not be ‘voluntary’ but rather part of the mandatory process of implementation.

Therefore, while ICAO can advise the EU not to release CORSIA documents publicly, ICAO cannot block the release and ultimately it is for the EU to make the decision to disclose.

3.5 The Specific Case of Legislative Documents

Legislative documents are given special status under the Access to Documents Regulation. Article 12(2) requires greater transparency in the legislative process: *“In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9 [the Articles providing for exemptions to disclosure], be made directly accessible.”* Therefore, the EU should interpret the exemptions from disclosure more narrowly when a legislative process is concerned. While SARPs are not in themselves binding, and participation in CORSIA will be voluntary until 2027, the EU has indicated it will amend the ETS to implement CORSIA into EU law which will require a full legislative process.⁷⁴

3.6 Positive Obligation to Release Documents

While much of the focus under the Aarhus Convention is on the obligations to disclose documents as requested by citizens, there are also positive obligations in the Convention to actively release documents. Article 5(3) of the Convention requires parties to:

Take measures within the framework of [their] 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

⁷⁴ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community in view of the implementation of a single global market-based measure to international aviation emissions Brussels, 3.2.2017 SWD(2017) 31 final, https://ec.europa.eu/clima/sites/clima/files/swd_2017_31_en.pdf, p. 8.

environmental issues; and (c) other significant international documents on environmental issues, as appropriate.

This obligation is also contained in the EU Aarhus Regulation which requires that “Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public.” This tilts the balance even further in favour of releasing CORSIA documents as the EU would have a positive obligation to release CORSIA documents, regardless of whether a formal access to documents request was made.

3.7 Conclusion on Question 2

Question two asked whether the EU must release CORSIA documents publicly. The answer is yes. CORSIA and the expert evidence that went into CORSIA's design come under the access to documents subject matter of the Aarhus Convention and the implementing EU Regulations requiring disclosure. In addition, the EU has a positive obligation to release documents under the Aarhus Convention. Of the exemptions that could apply to prevent the disclosure of CORSIA documents - international relations, commercial interests or protection of information from third parties - none is particularly convincing and each has substantial reasons for why the exemption does not apply.

All exemptions from access to documents should be read ‘restrictively’ according to the CJEU. Indeed, the specific exemptions for international relations

and commercial interests are to be limited when the information requested relates to emissions (as CORSIA does). In addition, the restriction for commercial information is much more limited than that contained in the EU Aarhus Regulation. The exemptions under the EU Regulations mandate the non-disclosure of information where an exemption is invoked, whereas under the Convention itself that is just a factor to be considered (i.e. 'shall' refuse disclosure verses 'may' refuse disclosure). In addition, there are positive obligations on the EU to release information when it relates to legislation, emissions or environmental programmes. Therefore, on balance, the reasons for the release of CORSIA would outweigh any exemptions from disclosure that the EU might wish to rely on.

4 QUESTION 3: WILL THE EU COMPLY WITH THE AARHUS CONVENTION IN ENACTING CORSIA INTO EU LAW?

ICAO has no enforcement powers of its own, therefore CORSIA will need to be enacted into the legal regimes of the participating countries. The European Commission's Impact Assessment to the latest aviation ETS legislative proposal notes that CORSIA must be enshrined in domestic legislation "by countries and regions participating"⁷⁵ and that it intends to do so via an amendment to the ETS in Europe.⁷⁶ Therefore, this section will consider whether the current rules on

⁷⁵ Commission, *supra* note 70.

⁷⁶ Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, COM(2017) 54 final.

transparency in the EU ETS and on public participation in EU decision-making, comply with the Aarhus Convention.

4.1 Access to Documents Under the EU ETS

The EU ETS has suffered from several deficiencies in transparency. This section will highlight one deficiency with regard to offset projects and then analyse two cases on access to documents under the EU ETS. The lack of information around offsets is particularly worrying as CORSIA is an offsetting scheme. While the two court cases raise separate concerns about how non-compliance is dealt with by the EU courts once raised.

4.1.1 Access to Document Provisions in the EU ETS

Directive 2003/87/EC established a scheme for greenhouse gas emission allowance trading (the "ETS Directive"). Recital 13 of that Directive states expansively that "in order to ensure transparency, the public should have access to information relating to the allocation of allowances and to the results of monitoring of emissions, subject only to restrictions provided for in Directive 2003/4/EC" which applies the Aarhus Convention to the Member States (the "Member State Aarhus Directive").

However, that expansive statement in the recitals did not follow through to the operative articles of the Directive. Rather than making everything transparent by default, with limited exceptions, the ETS Directive makes everything confidential by default with only the specified information listed in Article 17 publicly available:

- Decisions relating to the allocation of allowances;
- Information on project activities in which a Member State participates or authorises private or public entities to participate (these activities are offset projects under the Kyoto Protocol or UNFCCC) and;
- The reports of emissions required under the greenhouse gas emissions permit and held by the competent authority.

The ETS Directive is then complemented by a Regulation establishing a registry system to track the allocation of allowances and compliance by participating entities. The current Regulation containing the detailed information on the registry system is Regulation 389/2013 (the "Current Registry Regulation"). This Regulation states in Article 109 that only the types of information listed in Annex XIV of that Regulation shall be available to the public. In addition, Article 110 of the Current Registry Regulation states plainly that certain information is considered confidential (except as otherwise required by law).

There is only one mention in the Current Registry Regulation of the right to access environmental information: in Recital 28 it states that "specific reports should be made public on a regular basis to ensure that the public has access to information held within the integrated system of registries". However, there is no definition of what information "specific reports" should contain and that term does not appear again in the Current Registry Regulation. Presumably Recital 28 is referring to the

information as set out in Article 109 and 110 (along with the relevant Annexes), though it is not clear.

4.1.2 Reduction in Offset Information

The 2013 Regulation replaced an older Regulation, 2216/2004 (the “Old Registry Regulation”) and when this changeover came about, the Commission reduced the amount of publicly available information. While both regulations are substantially similar with regard to public access to information, there is one material change. The Old Registry Regulation stated in Annex XVI, Articles 5 and 6 that information regarding projects pursuant to Article 6 of the Kyoto Protocol (international offset projects) were to be made publicly available, but this is not stated in the New Registry Regulation. The Commission stopped releasing a breakdown of offset use per individual installation when the New Registry Regulation came into force.⁷⁷

NGOs campaigned to have the Commission release this information again.⁷⁸ Initially the Commission refused to release any information relating to offset volumes but later relented to release information showing the volume of offsets from each UNFCCC project into the ETS as a whole, but a breakdown of those volumes into individual installations has not been provided since 2012.⁷⁹ The Commission

⁷⁷ European Commission, MEMO/11/495, Brussels, 8 July 2011, Questions & Answers on Emissions Trading: new registry rules, [http://europa.eu/rapid/press-release MEMO-11-495_en.htm](http://europa.eu/rapid/press-release_MEMO-11-495_en.htm) (last visited Oct. 23, 2017).

⁷⁸ Sandbag and Carbon Market Watch, Briefing: Fresh concerns over the transparency of the EU emissions trading scheme (ETS) https://sandbag.org.uk/wp-content/uploads/2016/11/Sandbag_2011-05_ETS_transparency.pdf (last visited Oct. 23, 2017), p.1.

⁷⁹ See original draft proposal to establish a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and

justified this reduction in available information by referencing concerns over security.⁸⁰ However, as the campaigners pointed out at the time, reducing the availability of this information meant that it was easier for companies to hide the costs of compliance with the scheme and buy offsets that might be of dubious quality without any public scrutiny.⁸¹

This sets a worrying precedent for CORSIA as it is an offsetting scheme where the quality of the offsets to be included in the scheme are to be discussed in CAEP, behind closed doors. It is possible that the final standard of offsets that is agreed in ICAO will be different to the standard set by the EU for inclusion in the ETS.⁸² Indeed, the EU has agreed to exclude international credits entirely from the ETS from 2020, therefore it would seem that maximum scrutiny will be required for any international credits used under CORSIA by EU airlines or for flights departing from the EU. Without this information the public would not be able to understand the impact of CORSIA for their region, i.e. European citizens will want to understand the climate impact of CORSIA for European flights.

It seems that no case was taken under the Aarhus Convention or equivalent EU Regulations to challenge this reduction in available information on international offsets. However, if such a case had been taken there are exemptions the EU could

of the Council and repealing Commission Regulation (EU) No 920/2010 ETS and the ETS, http://ec.europa.eu/clima/documentation/ets/docs/registries/regulation_amendments_en.pdf (last visited Oct. 23, 2017).

⁸⁰ Sandbag and Carbon Market Watch, *supra* note 74.

⁸¹ *Id.*

⁸² To see the quantitative and qualitative restrictions the EU places on international credits within the EU ETS system go to the European Commission, Use of International Credits https://ec.europa.eu/clima/policies/ets/credits_en (last visited Oct. 23, 2017).

rely on. There is an exemption from disclosure in the Convention and the EU Regulation for 'public security'. This exemption is to be interpreted restrictively under the EU Regulation, and under the Aarhus Convention when the information requested relates to emissions into the environment, there is held to be an overriding interest in disclosure. The EU could also refuse to disclose the information based on the exemption for commercial interests (the details of this exemption have been discussed above). Where the Commission released the information for several years without adverse impact, then it would seem that the balance would lie in favour of releasing the information. However, if the Commission could demonstrate an adverse impact to either public security or commercial interests, then the release could legitimately be refused. While this specific reduction in information released was not challenged there have been other access to information cases relating to the ETS, the first of which dealt with a request for information like that removed from the public as above.

4.1.3 Ville de Lyon v. Caisse des Dépôts et Consignations

In *Ville de Lyon v. Caisse des dépôts et consignations*⁸³ the French city of Lyon requested that the trading data of the names of holders transferring and acquiring accounts of emission allowances or Kyoto units involved in certain transactions, and the date and time of those transactions, be released publicly. Ville de Lyon claimed that the ETS Directive (to the extent that it kept this information confidential) was

⁸³ Case C-524/09 *Ville de Lyon v Caisse des dépôts et consignations*, Dec. 22, 2010.

not in compliance with the Member State Aarhus Directive and the Aarhus Convention itself so that the information should be released.

The Court of Justice of the EU (CJEU) noted that Article 17 of the ETS Directive lists certain categories of information that are to be made available to the public (as listed above). The Court noted that the information requested by Ville de Lyon did not fall within the categories of information in Article 17 but rather fell under the scope of Article 19 of the Directive. Article 19 applies to data relating to transferred allowances which is to be kept by Member States in their national registries and which are subject to rules provided by the Old Registry Regulation. However, Article 19 does not refer to any of the EU Regulations that implement the Aarhus Convention. This case concerned the Directives applying the Aarhus Convention to the EU Member States as opposed to those that apply the Aarhus Convention to the EU institutions themselves. However, for the purpose of analysis of this case, there is no material difference between the Directives applying the Aarhus Convention to the Member States and those applying the Convention to the EU institutions (though there are important discrepancies highlighted in the section on whether the EU must publicly disclose CORSIA).

The Court held that in listing specific types of information to be publicly available in Article 17, and since Article 19 does not refer to the Member State Aarhus Directive, the EU legislature "*did not intend to make requests concerning trading data such as that at issue ... subject to the general provisions of Directive 2003/4 [applying*

the Aarhus Convention to the Member States] but that, on the contrary, it sought to introduce, in respect of that data, a specific, exhaustive scheme for public reporting and confidentiality of that data." The Court held that as the legislature had provided for some information to be public, the legislature must have meant for the rest of the information under the ETS Directive to be confidential. This was a presumption that the legislature had taken the Aarhus Convention into account in drafting the legislation and therefore there was no need for the Court to consider the ETS Directive in light of the Aarhus Convention or the equivalent EU rules. Therefore, the Court held that the information requested was confidential. However, the line of reasoning in this case was not followed in a later case relating to disclosure of ETS information.

4.1.4 Saint-Gobain Glass Deutschland v. Commission⁸⁴

In July 2017, the CJEU handed down a judgment in a case on access to information under the EU ETS which was much more favourable to information disclosure. The glass-maker Saint-Gobain requested information on how free allowances were distributed under the ETS. Saint-Gobain contended that the ETS Directive was not in compliance with the EU Access to Documents Regulation to the extent that this information was kept confidential. The request was initially refused by the Commission and by the General Court. However, upon appeal to the CJEU, the information was released.

⁸⁴ Case C-60/15 P - *Saint-Gobain Glass Deutschland v Commission*, Jul. 13, 2017.

The Commission's basis for refusing to release the information was the first subparagraph of Article 4(3) of Regulation No 1049/2001 which states "*access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*"

The main substance of the CJEU's decision was that the information in question related to an administrative procedure rather than a 'decision-making process' and therefore the relied-upon exemption to disclosure was not valid. This was especially so as the information in question was environmental and therefore the exception from disclosure was to be interpreted restrictively as required by the Aarhus Convention. The CJEU found that the disclosure of the information would not seriously undermine the Commission's decision-making process and the documents should be released. Interestingly, the *Ville de Lyon* judgment was not even referenced by the CJEU in ruling on Saint-Gobain's request. This move away from the troubling *Ville de Lyon* formula is to be welcomed. In *Ville de Lyon* the Court allowed the refusal of access to documents to escape scrutiny as the legislation referenced the Member State Aarhus Directive. A reference to the Aarhus Convention or any of the implementing legislation should not allow legislation to escape scrutiny, rather the Court should ensure every access to documents case receives full scrutiny of its compliance with the Aarhus Convention, regardless of

the intention of the legislature. The approach taken in *Saint-Gobain*, i.e., first ascertaining whether the information requested falls under the Aarhus Convention and then whether there are any applicable exemptions to disclosure, will ensure a much stronger basis for assessing transparency. Such an approach will make it much more difficult for the EU institutions to evade Aarhus Convention obligations without Court scrutiny.

Incorporating CORSIA into EU law via an amendment to the ETS will presumably provide for the same standard of access to documents as currently exists in the ETS. This obviously cannot be guaranteed but it would be difficult for the European Commission to justify reducing the environmental integrity of a scheme for aviation (the ETS brings more emissions reductions than CORSIA⁸⁵) and also reducing the transparency of that measure at the same time. As analysed here, that standard has not always lived up to the provisions of the Aarhus Convention and the treatment of offsets under the ETS is an especially worrying precedent for CORSIA, an offsetting scheme. But with the *Saint-Gobain* ruling, it can be hoped that the CJEU will ensure closer scrutiny of any deviations from the Aarhus Convention in future.

4.2 Public Participation in the EU ETS

In addition to whether CORSIA will have the same access to documents regulations as the ETS, the provisions on public participation can be considered to

⁸⁵ CE Delft, *A Comparison Between CORSIA and the EU ETS*, December 2016

https://www.transportenvironment.org/sites/te/files/publications/2016_12_CE_Delft_ETS_CORSIA_final.pdf

understand the standard of public participation that could be expected in the enacting of CORSIA into EU law.

Public participation is required as part of the fundamentals of EU law. Article 11 TFEU states, 'the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent' and Protocol No. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty stipulates that 'before proposing legislative acts, the Commission shall consult widely'. However, the EU Aarhus Regulation only applies the Aarhus Convention provisions on public participation to EU plans and programmes. There is no specific provision for public participation in the ETS Directive but the legislative procedure laid out in the Treaties requires the Commission to publish a public proposal which is openly debated in the European Parliament. There are also rules on impact assessments being required for specific projects that affect the environment and the European Citizens' Initiative that allows citizens to petition for legislation. In practice, the EU generally does engage in public participation for legislative files and there are EU policy documents flushing out what that public participation should entail. The most important of these policy documents is the May 2015 Communication, 'Better Regulation for Better Results'⁸⁶ and the associated Commission Staff Working Document, the 'Better Regulation

⁸⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better regulation for better results - An EU agenda*, COM(2015) 215 final.

Guidelines'⁸⁷. These Guidelines mandate a public consultation of at least 8 weeks for every legislative file.

The Commission ran a consultation on the aviation ETS in 2016 which partially concerned CORSIA (or at least the details of CORSIA known at that time) as the consultation questioned how the ETS should be amended in light of a potential global deal for aviation emissions. However, there are conflicting results of this consultation provided by the Commission. On the legislative webpage, it is stated that 85 citizens and organisations responded and these responses are provided online but under the title 'Results of the Consultation and Next Steps', the Commission has simply written 'n/a'.⁸⁸ Meanwhile, in the Impact Assessment accompanying the latest legislative proposal on the aviation ETS,⁸⁹ it is stated that there were 108 responses to the same consultation and a full summary of all the responses is provided. In addition, the Commission ran a more specific feedback process when the draft proposal was published, where four citizens responded. The responses have been summarised and presented to the European Parliament and Council.⁹⁰ The Commission summary of feedback does not state that the citizen comments have had any impact or were even taken into account, rather they are simply summarised. This falls below the standard envisaged in the Maastricht

⁸⁷ Commission Staff Working Document, *Better Regulation Guidelines*, SWD(2015) 111 final.

⁸⁸ See: European Commission, *Consultation on market-based measures to reduce the climate change impact from international aviation*, https://ec.europa.eu/clima/consultations/articles/0029_en (last visited Oct. 23, 2017).

⁸⁹ Commission, *supra* note 70.

⁹⁰ See Summary of stakeholder feedback on Aviation Emissions Trading System Proposal, May 5, 2017, https://ec.europa.eu/clima/sites/clima/files/docs/pages/summary20170505_en.pdf.

Recommendations for dealing with public participation, as while the Recommendations don't mandate a particular approach to dealing with public participation, they do state that, *"a useful way to demonstrate that the results of the public participation have been taken into account as far as possible is by providing a statement attached to each draft summarizing the points in the draft where the results of the public participation have had an impact, and what that impact has been."*⁹¹

However, while the initial stages of legislation are generally transparent and allow opportunities for public participation. The final stage of agreeing EU legislation, the trilogue, is closed. Trilogues are where the European Parliament and the Council send representatives to reach a final decision on draft legislation, with the assistance of the Commission. The EU Ombudsman (an independent body that holds the EU administration to account) recently carried out an investigation and found that trilogues were not sufficiently transparent and issued a list of recommendations to ensure they become so.⁹²

On the whole, the second pillar of the Aarhus Convention on public participation seems to have been complied with in the development of the ETS, indeed, there do not seem to be any complaints about a lack of public participation in the ETS. As discussed in the introduction, it is not clear which standard of public participation under the Aarhus Convention would be required for the enactment of CORSIA into EU law. However, it is probable that CORSIA is a 'policy' for the

⁹¹ United Nations Economic Commission for Europe, *supra* note, paragraph 181

⁹² Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, June 12, 2016.

purposes of the Convention which would require the EU to “strive to promote” public participation as CORSIA is enacted into EU law.

Finally, it is to be noted that, if the public are not provided with the necessary information to fully understand the expert advice and policy that went into developing CORSIA then it cannot be said that the public really has been given a full and meaningful chance to participate. Therefore, whether the EU publicly release all the documents that went into deciding the final form of CORSIA will be fundamental.

4.3 Conclusion on Question 3

Question three inquired as to whether CORSIA would be implemented into EU rules in accordance with the Aarhus Convention. The answer is uncertain. CORSIA is likely to be implemented into the EU via an amendment to the ETS Directive, therefore the compliance of the ETS with the Aarhus Convention was analysed. It was found that while the provisions on public participation were on the whole in line with the Aarhus Convention, access to documents under the ETS has not always lived up to the Aarhus provisions. In particular, the lack of information around international offsets under the ETS is worrying. If the public is not provided with appropriate access to documents so that they can understand the expert evidence that went into developing CORSIA, then the ability of the public to meaningfully participate in the legislative process adopting CORSIA into EU law will be severely limited. Finally, it is important to note that the EU is not in

compliance with the third pillar of the Aarhus Convention: access to justice. Thus, even if the EU complies to the letter with the first two pillars, the EU cannot be said to be in compliance with the Aarhus Convention.

5 CONCLUSION

Transparency and public participation are hallmarks of good governance. Compliance with the principle of transparency requires as a minimum that the technical and expert evidence used by policy makers to frame the scope of the policy challenge, and the range of potential solutions, is made public. It is only when this information is available that the public can meaningfully participate in environmental decision-making. This paper assessed whether the processes to develop CORSIA complied with this principle, especially as detailed in the Aarhus Convention. It then went on to consider whether the EU must release any documents it possesses in relation to CORSIA if requested to do so. Finally, it considered whether the Aarhus Convention principles would be complied with when CORSIA will be implemented into EU law. Taking all of the analysis into account the three questions posed in this paper can be answered as follows:

1. Has CORSIA Been Developed in Accordance with the Aarhus Convention?

Answer: No.

ICAO has not allowed the public either access to documents or attendance at meetings. Parties to the Aarhus Convention have a duty to promote the Aarhus

Convention in forums where international environmental decisions are made and it is not clear whether the EU is complying with this obligation as the relevant forums in ICAO are not public.

2. Must the EU Release CORSIA Documents Publicly?

Answer: Yes

The documents used to develop CORSIA such as expert evidence and draft SARPs are related to emissions into the environment and therefore come under the scope of the Aarhus Convention access to documents rules. There are a few potential reasons for exemption from disclosure the EU could attempt to rely on to refuse the disclosure of CORSIA related documents but none of the exemptions are robust enough to prevent disclosure.

3. Will the EU Comply with the Aarhus Convention in Incorporating CORSIA into EU Law?

Answer: Uncertain.

CORSIA will be enacted into EU law via an amendment to the ETS Directive. The EU has not always practiced the most open policy with regard to access to documents under the ETS. EU has broadly in compliance with the second Aarhus pillar on public participation in enacting legislation. However, if the public are not provided with adequate access to documents to understand the expert evidence that went into the development of CORSIA, then the ability of the public to meaningfully participate in its enactment into law will be curtailed.

CORSIA has not been developed transparently. Neither access to documents nor public participation have been allowed in the ICAO meeting group in which CORSIA is being developed. The EU has a mixed track record when it comes to complying with the Aarhus Convention in relation to the ETS. Finally, if the EU received a request to release the CORSIA documents in their possession, they must do so. Tackling climate change will require economic and social changes so great that good governance, and especially transparency and public participation are absolutely essential. This paper highlights the significant failings on behalf of ICAO and the EU with regard to aviation climate policy, resulting in a high risk of that policy being seen as illegitimate. This is not a risk either ICAO or the EU should take.