

Public Information and Participation Requirements

Aarhus Convention and EU implementing legislation
Public Participation Good Practice Examples and
Guidance

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Ljubljana, 29.05.2017

Benefits of public participation?

Reasons for ineffective public participation

Principles of public participation: assumptions

The concept of public participation is built on two principal assumptions:

- ✘ People have the right to participate in the development of principal decisions that will influence their lives;
- ✘ Due to the active involvement of interested groups of the population, the quality of political and administrative decisions can be increased.

Establishing interaction with the public — is the task of public authorities and communal services structures that plan one or another type of decision.

- Conduct public participation early in decisions on activities with a possible significant environmental impact
- Give notice to the public concerned
- Establish reasonable time frames for phases of public participation
- Provide all relevant information to the public concerned
- Provide opportunities for the public to make comments
- Take due account of the outcome
- Inform the public of the final decision with reasons

- Establish a transparent and fair framework for public participation in plans and programs relating to the environment
- Identify participating public
- Conduct public participation early in development of plans and programs relating to the environment
- Give necessary information to the public
- Establish reasonable time frames for public participation
- Take due account of the outcome

Aarhus Convention: Identifying whether a decision is an article 6 or 7 decision (project or plan/program?)



- ❑ The “Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions”.
- ❑ The issue must be determined on a contextual basis, taking into account the legal effects of the particular decision.
- ❑ It has also held that in determining whether a particular decision is an article 6 or 7 decision, its label under the domestic law of the Party is not decisive; rather, it will depend on the legal functions and effects of the decision

For example, in communication ACCC/C/2006/16 (Lithuania), the Compliance Committee had to determine the legal nature of decisions called “detailed plans” in Lithuanian law. Under Lithuanian law, such decisions: have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention

Public Participation: Links of article 6 of the Aarhus convention with the EIA Directive

- ❑ While the term EIA is used in the Convention, the test as to whether the Convention applies to a particular decision-making procedure is not whether that procedure is required to include EIA, or is considered as “environmental decision-making” under national law, but whether the decision-making itself may have a potentially significant impact on the environment.
- ❑ In a number of countries activities may require special environmental permits before starting operation. Such permits will also require public participation under article 6.
- ❑ Conditions for activities covered by article 6 usually takes the form of such environmental permits and requires public participation under article 6, paragraph 10.

A party may decide on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes

- The national law would have to provide a legal basis for decisions not to apply article 6 to activities serving national defence purposes.
- Determinations could not be made categorically, but would have to be made on a case-by-case basis.
- A determination has to be made that the application of the exemption in the particular case would have an adverse effect on national defence.
- The mere fact that a particular activity falls into a national defence category would not be enough to avoid the application of article.

Public Participation: Informing the public concerned

The public concerned shall be informed, either by public notice or individually as appropriate, **early in an environmental decisionmaking procedure**, and in an adequate, timely and effective manner

Method of informing: public notice and individual notice

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that “journalists’ articles commenting on a project in the press or on television programs ... in general, do not per se constitute a public notice for the purpose of public participation, as required under article 6, paragraph 2, of the Convention”.

In its findings on communication ACCC/C/2009/43 (Armenia), the Compliance Committee observed that “sometimes, it may be necessary to have repeated notifications so as to ensure that the public concerned has been notified”.

Public Participation: Informing the public concerned

Means of notification in Poland

- ❑ Placing the information on the Internet homepage of the authority (via a so-called “Public Information Bulletin”).
- ❑ Publishing the information in the customary way at the seat of the authority (usually by placing the information on the notice board).
- ❑ Posting notices in the vicinity of the proposed project.
- ❑ In the case of proposed plans, programmes, policies, etc., by publication in a newspaper of applicable geographical circulation.
- ❑ Where the seat of the competent authority is located in a community other than the community relevant to the subject of the notification, by publication in the local press or in a manner commonly used in the locality or localities relevant to the subject of the notification.

In addition, the Administrative Procedure Code requires those having a legal interest in the decision-making (usually immediate neighbours) to be notified by individual notice (usually by registered letter).

Public Participation: “adequate, timely and effective manner”

In its findings on communication [ACCC/C/2006/16 \(Lithuania\)](#), the Compliance Committee held that:

The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate.

Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies.

The Compliance Committee affirmed the above view in its findings on communication [ACCC/C/2007/22 \(France\)](#)

Public Participation: “adequate, timely and effective manner”

In its findings on communication [ACCC/C/2006/16 \(Lithuania\)](#), the Compliance Committee found that: It has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighborhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.

With regard to communication [ACCC/C/2009/37 \(Belarus\)](#), the Compliance Committee,considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable time frame, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity

The notification should include information about

- (a) The proposed activity and the application on which a decision will be taken
- (b) The nature of possible decisions or the draft decision
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided
 - (i) *The commencement of the procedure*
 - (ii) *The opportunities for the public to participate*
 - (iii) *The time and venue of any envisaged public hearing*
 - (iv) *An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;*
 - (v) *An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions;*
 - (vi) *An indication of what environmental information relevant to the proposed activity is available;*
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

Public Participation: early and the EIA procedure

In its findings on communication [ACCC/C/2008/24 \(Spain\)](#), the Compliance Committee held that “entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention”.

In complex decision-making, public participation, to be effective, should take place at each stage where a (primary or secondary) decision by a public authority may potentially have a significant effect on the environment.

The requirement for “early public participation” applies not only to the entire chain of decision-making procedures but also to each of the decisions in that chain. In its findings on communication [ACCC/C/2006/16 \(Lithuania\)](#), the Compliance Committee made it clear that: “Within each and every such procedure where public participation is required it should be provided early in the procedure when all options are open and effective public participation can take place.” However, it is not necessary to revisit every option at every stage of decision-making.

Public Participation: early when all options are open

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Public Participation: and the EIA procedure

As of 2009, 16 EU member States provide for scoping as a separate procedural stage with mandatory public participation and 9 EU member States provided for mandatory public participation in screening. The above approaches have not, however, to date been made explicit requirements in EU law.

In its findings on communication ACCC/C/2004/4 (Hungary) the Compliance Committee noted that “the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region”.

Public Participation: Access to EIA in its entirety

The question of confidentiality of information in the context of EIA procedures has been raised in several communications and has also been addressed in a number of national implementation reports by the Parties ... If a competent authority is considering whether it may refuse to disclose environmental information, the possible grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by the disclosure. In particular, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility of exempting parts of them being an exemption to the rule.

Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation

Public Participation: Public Hearings

In most ECE countries, public hearings may be held within the EIA procedure and other decision-making processes. The hearings should be held a sufficient period of time after the date of notification in order to allow the public to study the materials and other information relevant to the proposed activity, and to prepare opinions, suggestions, comments, alternatives or questions. Public hearings usually bring members of the public together with the public authority responsible for decision-making and the applicant or proponent of the proposed activity. Experts and other authorities may also be involved in the hearing. Such a meeting is an opportunity for the public to submit, in writing or orally, the comments, information, analyses or opinions that they consider relevant to the proposed activity. In many countries the law requires that a record of the hearing be prepared. The record should provide the minutes of the proceedings and include the list of participants, as well as a list of all comments and suggestions submitted. In some countries the record of hearing must be signed by its participants in order to prove that the facts and views expressed have been recorded correctly.

Public Participation: taking the outcome in due account

“Take into account” means that you *review* the different arguments brought forward in the consultation from the technical point of view, if necessary *discuss* them with the participants, *evaluate* them in a traceable way, and then let them become part of the considerations on the drafting of your policy, your plan, your program, or your legal instrument. Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. **ACCC/C/2008/29 (Poland)**: The requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed. However, the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was rejected on substantive grounds.

Informing the Public: promptly when a decision has been taken

In its findings on communication [ACCC/C/2006/16](#) (Lithuania), the Compliance Committee held: The public shall be informed “promptly” and “in accordance with the appropriate procedures”. The Convention does not specify here, as opposed to article 6, paragraph 2, any further requirements regarding informing the public about taking the decision thus leaving to the Parties some discretion in designing “the appropriate procedures” in their national legal frameworks”.

The Committee added that: Whether informing the public 15 days after the adoption of the decision can be considered to be prompt depends on the specific circumstances (e.g. the kind of the decision, the type and size of the activity in question) and the relevant provisions of the domestic legal system (e.g. the relevant appeal procedures and their timing).

The Committee concluded that: “Whatever time period for informing the public about the decision is granted by domestic legislation, it should be ‘reasonable’ and in particular bearing in mind the relevant time frames for initiating review procedures under article 9, paragraph 2”.

Informing the Public: making the decision accessible to the public

The Convention requires the text of a reasoned decision to be made accessible to the public along with the reasons and considerations on which it is based.

While the full text of the decision must be made accessible to the public, due to length considerations, the full text does not necessarily have to be included in the notice informing the public that the decision has been taken. However, that notice must indicate where the full text of the decision can be accessed by the public.

Informing the Public: making the decision accessible to the public

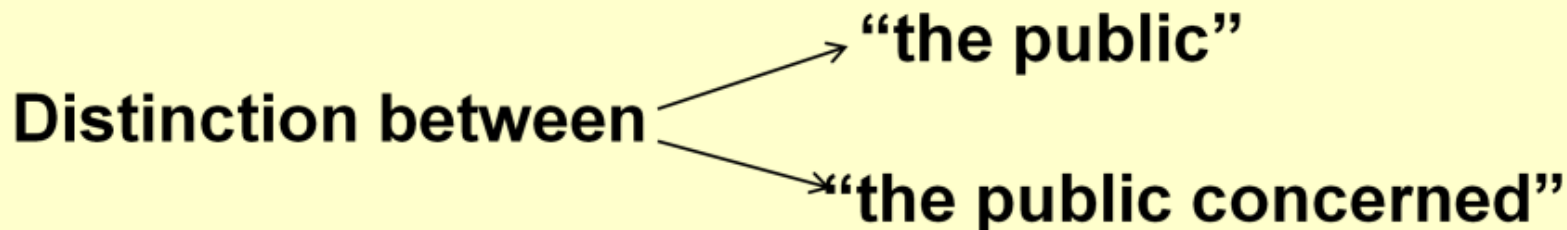
In its findings on communication [ACCC/C/2006/16 \(Lithuania\)](#), the Compliance Committee held that:

The Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based. ...

Similarly, the Convention does not set any precise requirements as to documenting “the reasons and considerations on which the decision is based” except for the requirement to provide evidence of taking due account of “the outcome of public participation” as required under article 6, paragraph 8.

In that case, the Committee also noted that:

The manner in which the public is informed and the requirements for documenting the reasons and considerations on which the decision is based should be designed bearing in mind the relevant time frames and other requirements for initiating review procedures under article 9, paragraph 2, of the Convention



Practical implications :

- Article 6 gives ‘the public concerned’ the right to access environmental information and to participate actively in the administrative procedure evaluating the project;
- Article 11 guarantees, under conditions, such persons access to the courts

(C-263/08, Djurgarden, §40)

Article 1(2) of Directive 2011/92 draws a distinction between ‘the public concerned’ and ‘the public’ in order to differentiate between those who have a direct interest in whether or not an environmental project goes ahead and those who are not thus affected by the project.

It gives NGOs a “special supervisory role”

(Advocate General Sharpston on C-263/08, Djurgarden, §50)

56. In the light of the purpose of Article 3(1) of Directive 2003/35, which is to add definitions to those appearing in Article 1(2) of Directive 85/337, and in particular to indicate, for the purposes of the latter directive, what is to be meant by ‘the public concerned’ and, whereas, at the same time, Directive 2003/35 accords new rights to that public, it cannot be concluded from Ireland’s failure to reproduce those definitions in its legislation expressly that Ireland has not fulfilled its obligation to transpose the provisions in question.

57. The scope of the new definition of ‘the public concerned’ thus introduced by Directive 2003/35 can be assessed (...) only with regard to all of the rights which that directive accords to ‘the public concerned’, since those two aspects are indissociable”.

Information requirements:

■ Before the granting of an authorization

■ to the public

- about the decision following screening (Art. 4(4))
- about the project in general (Art. 6(2) / 6(1))

■ to the public concerned (Art. 6(3))

- to ensure effective participation (Art. 6(4); 6(6) / 6(2))
- to adopt a better decision (Art. 8)

■ to the public of foreign MS (transboundary EIA, Art. 7)

■ Information on the decision

- to the public & the public of foreign MS if necessary (Art. 9)

■ Access to a review procedure (Art. 11)

Setting Reasonable timeframes:

■ Article 6(6) EIA Directive:

“Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article”.

Timing is left to the MS to decide, as long as it is “**early in the procedure**” and as it ensures early and effective public participation

Article 8

The results of consultations and the information gathered must be taken into consideration in the development consent procedure.

- requires the competent authority to consider seriously the substance of all comments received;
- include the substance of the major comments in the motivation of the final decision;
- procedural violation that may invalidate the decision

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Article 9 EIA

When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public about its content, the main reasons on which it is based and a description of the main measures to avoid adverse effects.

Under Article 9 of the EIA Directive the public is to be informed once the decision to grant or refuse development consent has been taken. **The purpose of issuing this information is not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines.**

The levying of an **administrative fee** is not in itself incompatible with the purpose of the EIA Directive. (...)

Article 6(3) allows Member States to place certain conditions on participation by members of the public concerned by the project.

Thus, under that provision, the Member States may determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted.

A fee cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it.

C-216/05, *Commission v. Ireland*, paragraphs 37- 38, 42-45