

Public Information and Participation Requirements

ECJ court rulings and Compliance Committee findings
Practical Guidance

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Public Participation, ECJ court rulings

Case C-416/10, *Najvyšší súd Slovenskej republiky* (request for a preliminary ruling)

By its **second question**, the referring court asks, in essence, whether Directive 96/61 must be interpreted as requiring that the public should have access, from the beginning of the authorisation procedure for a landfill site, to an urban planning decision on the location of that installation.

It is also uncertain whether the refusal to disclose that decision may be justified by reliance on commercial confidentiality which protects the information contained in that decision, or, failing that, rectified by access to that decision offered to the public concerned during the administrative procedure at second instance.

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75 First of all, it must be noted that it follows from the decision making the reference that the location at issue in the main proceedings is a landfill site receiving more than 10 tonnes of waste per day or with a total capacity exceeding 25 000 tonnes of waste. Therefore, it falls within the scope of Directive 96/61, as this results from Article 1, read in conjunction with point 5.4 of Annex I, thereof.

76 Article 15 of that directive provides for the participation of the public concerned in the procedure for the issuing of permits for new installations and specifies that that participation is to occur under the conditions set out in Annex V to that directive. That annex **requires that the public be informed, in particular, of details of the competent authorities from which relevant information can be obtained and an indication of the date and place where that information will be made available to the public.**

Public Participation, ECJ court rulings

78 Therefore, **the public concerned** by the authorisation procedure under Directive 96/61 **must, in principle, have access to all information relevant to that procedure.**

79 It follows from the decision making the reference and from the file submitted to the Court of Justice that **the urban planning decision on the location of the installation at issue in the main proceedings constitutes one of the measures on the basis of which the final decision whether or not to authorise that installation will be taken** and that it is to include information on the environmental impact of the project, on the conditions imposed on the operator to limit that impact, on the objections raised by the parties to the urban planning decision and on the reasons for the choices made by the competent authority to issue that urban planning decision. Moreover, the applicable national rules require that that decision be attached to the application for a permit addressed to the competent authority. It follows that that urban planning decision must be considered to include relevant information within the meaning of Annex V to Directive 96/61 and that the public concerned must therefore, in principle, be able to have access to it during the authorisation procedure for that installation.

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80 None the less, it follows from Article 15(4) of Directive 96/61 that the participation of the public concerned may be limited by the restrictions laid down in Article 3(2) and (3) of Directive 90/313.

At the time of the events in the main proceedings, Directive 90/313 had, however, been repealed and replaced by Directive 2003/4. In the light of the correlation table annexed to that directive, the obligation to align European Union legislation with the Aarhus Convention and the redrafting of Article 15 of Directive 96/61 made during its subsequent codification by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8), it must be held that Article 15(4) of Directive 96/61 must be construed as referring to the restrictions under Article 4(1), (2) and (4) of Directive 2003/4.

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81 Under point (d) of the first subparagraph of Article 4(2) of Directive 2003/4, Member States may provide for a request for information to be refused if disclosure of the information would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest.

82 However, taking account of, *inter alia*, the importance of the location of one or another of the activities referred to in Directive 96/61 and as results from paragraph 79 of this judgment, that cannot be the case with regard to a decision by which a public authority authorises, having regard to the applicable urban planning rules, the location of an installation which falls within the scope of that directive.

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.....

88 In that regard, it is important to note that Article 15 of Directive 96/61 requires the Member States to **ensure that the public concerned are given early and effective opportunities to participate in the procedure for issuing a permit**. That provision must be interpreted in the light of recital 23 in the preamble to that directive, according to which the public must have access, before any decision is taken, to information relating to applications for permits for new installations, and of Article 6 of the Aarhus Convention, which provides, first, for early public participation, that is to say, **when all options are open and effective public participation can take place**, and, second, for access to relevant information to be provided as soon as it becomes available. It follows that the public concerned must have all of the relevant information from the stage of the administrative procedure at first instance, **before a first decision has been adopted**, to the extent that that information is available on the date of that stage of the procedure.

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.....⁹¹ Therefore, the answer to the second question is that Directive 96/61 must be interpreted as meaning that it:

- requires that the public concerned have access to an urban planning decision, such as that at issue in the main proceedings, from the beginning of the authorisation procedure for the installation concerned,
- does not allow the competent national authorities to refuse the public concerned access to such a decision by relying on the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, and
- does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned an urban planning decision, such as that at issue in the main proceedings, during the administrative procedure at first instance, provided that all options and solutions remain possible and that rectification at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine.

Public Participation, Compliance Committee

Slovakia ACCC/C/2009/41; ECE/MP.PP/2011/11/

Each Party to the Convention has certain discretion to design the decision-making procedures covered by article 6 of the Convention.

Also, in tiered decision-making procedures, each Party can decide which range of options is to be discussed at each stage of the decision-making.

Yet, within each and every such procedure where public participation is required, it should be provided early in the procedure so as to ensure that indeed all options are open and effective participation can take place (ACCC/C/2006/16 (Lithuania) ECE/ MP.PP/2008/5/Add.6, paras. 57 and 71).

Public Participation, Compliance Committee

*European Union and United Kingdom ACCC/C/2012/68;
 ECE/MP.PP/C.1/2014/5,*

In this case, the Committee finds that the public concerned, including the communicant, had ample opportunity in more than one instance to participate in the consultation process and to submit comments. In this respect the Committee notes the following aspects.

First, the way the notice for the project was advertised in the local press fits the local significance of the project and meets the requirements of article 6, paragraph 2, of the Convention.

Second, the time frames provided for public consultations (almost one month each time for the original and revised versions of the environmental statement) were reasonable and therefore in line with article 6, paragraph 3, of the Convention. Third, the public concerned was involved from the beginning of the process. The process was therefore in conformity with article 6, paragraph 4, of the Convention.

Fourth, the comments submitted by the public were addressed, in particular the main point of concern regarding the protection of the Golden Eagle, entailing that the Party complied with the requirements of article 6, paragraph 6, of the Convention.

Public Participation, Compliance Committee

*(European Union and United Kingdom ACCC/C/2012/68;
ECE/MP.PP/C.1/2014/5,
Public Participation in relation to the Wind farm*

93..... In this regard, the Committee confirms that the requirement of article 6, paragraph 8, of the Convention that public authorities take due account of the outcome of public participation does not amount to a 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 required. **Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account** (findings on communication ACCC/C/2008/24 concerning Spain (ECE/MP.PP/C.1/2008/Add.1), para. 98 as well as remark by the Committee in the report of its twenty-fourth meeting (30 June – 3 July 2009) on the occasion of the scheduled discussion of communication ACCC/C/2008/29 concerning Poland, para. 29).

Public Participation, Compliance Committee

*(European Union and United Kingdom ACCC/C/2012/68;
ECE/MP.PP/C.1/2014/5,
Public participation in relation to the access road*

The assessment of whether a Party concerned is in compliance with article 6 of the Convention depends on whether the **steps taken to ensure public participation are commensurate with the size and possible environmental impact of the project**. If, for instance, the project concerns the construction of a nuclear power plant, then there is clearly an obligation for the public notice to be advertised widely in national and local media. However, if a project is of local significance, such as the opening of a forest road, a public notice in local media may suffice for informing the public concerned (see also findings on communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/C.1/2008/5/Add.6), para. 67).

Public Participation, Compliance Committee

France ACCC/C/2007/22; ECE/MP.PP/C.1/2009/4/Add.1,

...The next question is whether the public was duly informed about the decision-making procedures. According to article 6, paragraph 2, of the Convention, the public concerned shall be informed, either by public notice or individually as appropriate, "early in an environmental decision-making procedure and in an adequate, timely and effective manner". The communicant alleges that the public notice of the decision-making before the Prefect did not meet the requirements of the Convention. While the public was informed about the project by CUMPM through the press in 2004, that was not related to the decisionmaking procedure before the Prefect. Provided that all options were open and effective participation could take place in the decision-making before the Prefect, the question is rather whether the public concerned was informed early enough about the authorization procedure. As held by the Committee with regard to communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/2008/5/Add.6), *the requirement for the public to be informed in an "effective manner" means that the public authorities should seek to provide a means for informing the public which ensures that all those who could potentially be concerned have a reasonable chance to learn about decision-making on proposed activities and their possibilities to participate*

Public Participation, Compliance Committee

Armenia ACCC/C/2009/43; ECE/MP.PP/2011/11/Add.1,

The requirement for early public notice in the environmental decision-making procedure is not detailed in article 6, paragraph 2, of the Convention.

Article 6, paragraph 4, points to the purpose of giving notice early in the environmental decision-making procedure, that is, that the public has the possibility to participate when all options are open and participation may be effective.

The timing needed from the moment of the notification until the hearing, in which the public concerned would be expected to participate in an informed manner, namely, after having had the opportunity to duly examine the project documentation, depends on the size and the complexity of the case.

Public Participation, Compliance Committee

Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6,

At the same time, 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.*

...Indeed, it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6) ...

Public Participation, Compliance Committee

United Kingdom ACCC/C/2011/61; ECE/MP.PP/C.1/2013/13,

With regard to the public notice, the Committee notes that information about the project and the elements of article 6, paragraph 2, of the Convention were available for the public early on during the permitting procedure, on the Internet (via the websites of the developer and the Parliament), in the press and also at the information centres set up along the route of the project.

The number of petitions objecting to the project, including to the demolition of buildings, shows that members of the public were adequately informed.

Therefore, the Committee finds that the Party concerned did not fail to comply with article 6, paragraph 2, of the Convention.

Public Participation, Compliance Committee

Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/,

The Committee considers that the present case is slightly different from the two cases [ACCC/C/2006/16 and ACCC/C/2007/22] with regard to article 6, paragraph 3, in that in the present case it is not only the time span itself which is questioned, but most importantly the timing of the commenting period, which was during the summer holiday season or during the Christmas holiday season.

In that respect, the Committee is fully aware that in many countries of the UNECE region the period between 22 December and 6 January is considered as Christmas holiday season, despite the fact that officially many offices work during that time.

Public Participation, Compliance Committee

Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/,

.....the Committee finds that a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country.

Moreover, the Committee notes that the initial proposal was made on 12 December 2005, and that the time span between this initial proposal and the public notice on 22 December 2005 was ten days, indicating that the authority was in an extraordinary rush to initiate the commenting period; this can indeed give reason to suspect that making the notice so fast was not a routine procedure, as also evidenced by other cases reported in the current communication.

Therefore the Committee finds that the Spain was in non-compliance with article 6, paragraph 3.

Public Participation, Compliance Committee

Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/,

The Committee notes that public participation in decision-making for a specific project is inhibited when the conditions described by the communicant in the case of the oil refinery project are set by the public authorities.

The Committee finds that, **by requiring the public to relocate 30 or 200 kilometres, by allowing access to thousands of pages of documenttion from only two computers without permitting copies to be made on CDROM or DVD, and by, in these circumstances, setting a time frame of one month for the public to examine all this documentation on the spot,** the Spanish authorities failed to provide for effective public participation and thus to comply with article 6, paragraphs 6 and 3, respectively, of the Convention.

Public Participation, Compliance Committee

Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11,

While Czech law provides for wide public participation at the EIA stage, **it limits opportunities for public participation after the conclusion of the EIA.** The Committee stresses that environmental decision-making is not limited to the conduct of an EIA procedure, but extends to any subsequent phases of the decision-making, such as land-use and building permitting procedures, as long as the planned activity has an impact on the environment.

Czech law limits the rights of NGOs to participate after the EIA stage, and individuals may only participate if their property rights are directly affected. **This means that individuals who do not have any property rights, but may be affected by the decision, are excluded.** Although the Party concerned contends that the results of the EIA procedure are taken into account in the subsequent phases of the decision-making, members of the public must also be able to examine and to comment on elements determining the final building decision throughout the land planning and building processes.

Public Participation, Compliance Committee

Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11,

Moreover, public participation under the Convention is not limited to the environmental aspects of a proposed activity subject to article 6, but extends to all aspects of those activities.

In addition, even if, as the Party concerned contends, the scope of stakeholders with property rights is interpreted widely to include the most distant owners of land plots and other structures, individuals with other rights and interests are still excluded from the public participation process.

Therefore, the Committee finds that through its restrictive interpretation of “the public concerned” in the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure, the Czech legal system fails to provide for effective public participation

Public Participation, Compliance Committee

Spain ACCC/C/2008/24; ECE/MP.PP/C.1/2009/8/Add.1

The Committee recalls that the obligation to take 'due account' under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to 'make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based'.

Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.*

* See The Aarhus Convention Implementation Guide, United Nations, 2000 at 109.

Public Participation, Compliance Committee

Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11,
 [T]he Committee finds that the Czech legal system fails to provide for effective public participation during all stages of the environmental decision-making process. Moreover, under article 6, paragraph 7, of the Convention, **public participation must not be limited to the consideration of the environmental impact of a proposed activity, but entitles the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity, including its views on aspects of the activity's permissibility and its compliance with environmental law.** According to the Environmental Assessment Act (art. 10, sect. 1) the EIA opinion "is issued also based on the public comments". Furthermore, the same act (art. 10, sect. 4) provides that "without the opinion it is not possible to issue a decision needed for carrying out a project". However, Czech law does not require that the authorities issuing the permitting decision fully uphold the content of the EIA opinion.

Public Participation, Compliance Committee

Czech Republic ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11,

...While the EIA procedure provides for public participation, the Committee considers that the above legal framework does not ensure that in the permitting decision due account is taken of the outcome of public participation.

In the light of the above, the Committee finds that the Party concerned fails to comply with the requirement in article 6, paragraph 8, of the Convention to ensure that due account is taken in the decision of the outcome of the public participation....

Public Participation: Good Practice Guidance

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

The Aarhus Convention An Implementation Guide



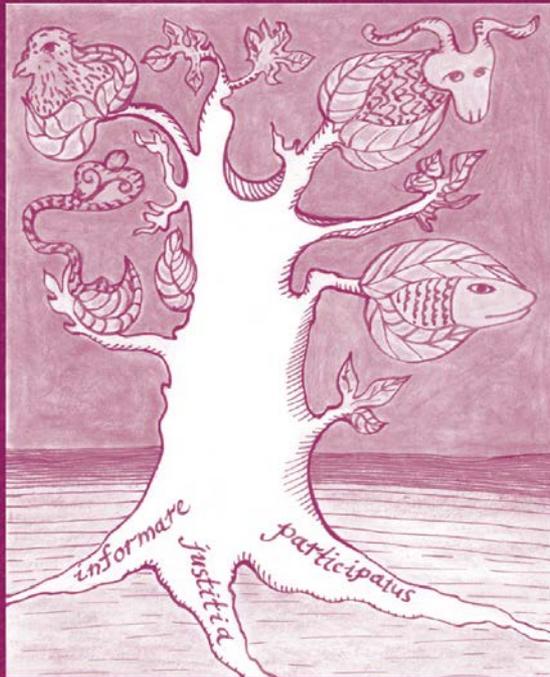
http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Public Participation: Practice Guidance

Case Law of the Aarhus Convention Compliance Committee (2004-2014)

Case Law of the Aarhus Convention Compliance Committee

2004-2014



http://www.unece.org/fileadm/in/DAM/env/pp/Media/Publications/ACCC_Jurisprudence_Ecforum_2011.pdf