

Austrian comments on the 3rd Draft “Recommendations on Public Participation in Decision-making in Environmental Matters”

12 April 2013

General remarks

Although the draft has improved to a certain extent, we still see the need for further amendments and improvements. In particular, since the draft is not supposed to serve as an interpretation guide, the various references on how national legal frameworks should be designed should be better deleted. This also includes point (i) of the cover sheet referring to designing national legal frameworks. Generally, the wording should allow more flexibility, therefore, the term “should” better be replaced throughout the whole text by concepts like “may” or “recommend”.

Also, the draft recommendations are becoming rather comprehensive and are getting overwhelmed by too detailed provisions or recommendations. They clearly should focus on the very relevant issues otherwise the whole document won't be a useful tool for the officials and everybody supposed to use it.

Moreover, in certain parts, the draft gives the impression that some of its specific wording and content mainly refers to particular situations in some specific countries. In this regard, the whole text, wherever this applies, should be carefully redrafted and rephrased in order to provide relevancy for all countries and member states. Specific problems of particular countries should be dealt with in a separate document or box within the recommendations.

In any case, the draft recommendations often go beyond the requirements of the Convention. This is not acceptable and rather counterproductive, since it would be an asset for the whole text if it took the actual legal requirements more carefully into account.

The actual draft certainly would also benefit from both a grammatical and linguistic revision as well as from a standardization of certain used terms in order to avoid any misunderstanding.

Finally, when indicating good practice examples, it should be avoided to label these examples as “best” practice but rather refer to these examples as useful or empirically successful examples of implementation of the Convention's provisions.

Designing a public participation procedure

12. (b): Assigning the public with a co-decision power, either for conducting the decision-making procedure or formaking the decision exclusively, doesn't seem to be covered by the Convention. We are still not in favor of this recommendation.

Delegating responsibility for public participation

20 & 21: Both the diagnostic statements and the proposed recommendations fairly interfere with member states' competence to regulate the public participation procedure (e.g. assigning the subject to carry out the pp procedure) within a licensing procedure according to the national law of public administration and, therefore, go beyond the very requirements of the Convention. Assigning private persons or bodies, even when composed of members of a NGO, does not seem to comply with the concept of carrying out administrative procedures according to public law of many member states.

Defining and identifying the public which may participate

26 (b): It is still not clear to what extend “social and economic interests” could create the base for public participation, whereas legal interests actually do. – Some of the criteria mentioned under this point seem quite vague and open for possible misunderstanding or

even misinterpretation (e.g. who decides according to which criteria what constitutes a “critical voice” or a “constructive contribution”).

Participation of the public concerned from other countries

30: Delete this point, since the respective “Good Practice Recommendations on Public Participation in Strategic Decision-making” have not yet been finalized nor adopted .

Public participation in decision-making on specific activities (article 6)

34 (f) (g): These provisions don’t reflect the provisions and criteria as set out in Article 6 (a) and (b) nor those in para 22 of Annex 1 of the Convention, where the decisive criteria are given by the fulfillment of thresholds or by causing “significant effect on the environment”.

38: This point lacks clarity and looks like a circular statement. As far as criteria for the respective determination are concerned, a reference to the criteria as set out in the EIA-Directive would be sufficient.

Early public participation when all options are open (article 6, paragraph 4)

67 & 69: The Convention does not necessarily cover public participation in screening or scoping procedures.

Procedures for the public to submit any comments, information, analyses or options that it considers relevant (article 6, paragraph 7)

95 & 96: Footnote quotes the doc. ECE/MP.PP/C.1/2011/6/Add.1 and indicates para 94 – indeed, this doc. does not go beyond 90. – A quasi unlimited possibility for the submission of written comments should be only foreseen for the public concerned enjoying *locus standi* in a administrative procedure. Some of the recommendations tend to overburden public authorities with various activities (e.g. single responding to members of the public, uploading all comments on a website).

Taking due account of the outcome of public participation – scope of obligation (article 6, paragraph 8)

107 vs. 109: While in the draft in point 107 the term “legal” before the notion of the framework for public participation has been deleted, point 109 still talks about “the legal framework”: This approach seems to be inconsistent.

116: Again, some of the recommendations tend to overburden public authorities with too many activities (e.g. the proposal to organize sort of feed-back meetings with the public).

Public participation in decision-making regarding genetically modified organisms (GMOs) (article 6, paragraph 11 and article 6 bis)

127: The recommendations go beyond the provisions of Convention in Article 6 (11) – by including also the “contained use” - but seem to be covered by the referred “Guidelines ... With Respect to GMOs”.

Plans, programmes and policies (135 ff)

The text has been extended but should again be shortened and focus on key issues . As mentioned in our recent comment the Convention knows different levels and degrees of obligations regarding plans/programmes and policies. This issue needs to be reflected in the recommendations. The text should make these differences clear.

136 the phrase “depending on the content” should be inserted after “the following types of plans and programmes”.

137 c: delete, the meaning is completely unclear.

138 to 140: delete 139 and 140. The design or evaluation of a strategy is not required by the Convention. The text has to make clear that the requirements of the national legislation or practice have to be met when such strategies are designed. The use of the term “should” in 139 is in the given legal framework not acceptable. A general remark relating to a strategy for public participation like in 138 is enough but might be illustrated with a practical example.

141: has to be rephrased. It refers to plans/programmes and policies at the same level and uses the word should (see above remarks). The phrase “at the latest” should be deleted since the next paragraph has a recommendation for early involvement.

142: First sentence delete “throughout” and use the word “during”. This is the wording of the Convention in relation to plans and programmes. Delete second sentence, its wording creates uncertainty.

143: has to be deleted. This para is unclear and creates more confusion than concrete help. The paras 141 and 142 explain already aim and advantage of early public participation.

144: second sentence should be deleted. It is self-evident and at the beginning of process it may not always be clear who is supporting certain decisions and who might not support a plan or programme.

145 – 148: to be shortened and focus on the really important issues. The paragraphs also relate to creating a design for public participation strategy. A positive realistic approach should be taken. Delete 145. 146 reflects the idea of a pro-active approach. The first sentence in 146 should start: “One way of identifying different interests is to encourage different stakeholders and the public to participate in the process. For example ...” Delete 147 since the proposal made above refers to the public. Also delete 148.

149, 150, 151, 153: to be deleted, because far too detailed and no actual benefit.. 152 is the concrete and valuable information.

154 – 157: 154, 156 and 157 should be deleted. 155 contains the relevant information.

158 relates to plans /programmes and policies. Wording has to be redrafted in the legal framework of the Convention (see remarks above). In (b) the wording “including access to the draft texts” has to be deleted. (c) to be deleted, since no requirements of the Convention.

159: to be deleted. 160 should be rephrased especially the wording “need to ensure”.

161 Replace “As a good practice” through “One way may be to seek input by the public through using focus groups.”

162 to be deleted. This is not a requirement of the Convention.

163 – 165: to be shortened and the legal framework of the Convention has to be reflected.

166 – 167 to be deleted. This is not a requirement of the Convention.

Executive regulations and laws

The text has been extended. It should for practical reasons be shortened and focus on the issues of the last draft. The legal requirements of the Convention have to be taken better into account.

168: delete this para. The recommendations including soft recommendations should be in line with the legal framework. There is no requirement in the Convention to establish mechanism or criteria to evaluate if executive regulations or laws may have significant effects on the environment.

169: The word “should” has to be rephrased.

170 -174 has to be deleted.