

## Recommendations on Public Participation in Decision-making in Environmental Matters

### Comments submitted by Claire Mays, Institut Symlog, France (March- April 2013)

#### General comments:

1. The Recommendations are clearly stated to be non-binding. There is no need then to use tentative language in these recommendations (which only reduces their utility, credibility and forcefulness).
2. In particular, the phrase “where appropriate” (and variants) should be eliminated, for it immediately raises the question of criteria for judging appropriateness. Moreover, this phrase appears to signal that the recommendation will be INAPPROPRIATE in a significant number of cases. This could be additional license for recalcitrant governments to refuse to apply the guidance, and **could conceivably weaken plaintiffs’ case** before the Compliance Committee. I have provided in §20 an alternative wording for “it may be appropriate to do” along the essential model of: *“SHOULD be done, and if not done, then a reasoned justification for failing to do so should be provided”*.
3. A similar observation is made concerning the phrase “good practice” and variants. See in particular marginal comments 7 & 9.
4. The well-meaning statement *“Persons with financial or personal interests in the possible outcome of the decision-making should not be permitted to participate in such bodies”* is repeated several times. It is extremely problematic, for each member of the concerned public is defined as having an interest, and the degree to which this is “personal” (e.g., reflects an intellectual engagement, a professional or social history, or a moral conviction), should not be grounds for elimination from deliberation. The bodies in question might have no member if this standard were strictly applied. The possibility for hypocrisy in forming the standard so as to eliminate a certain class of participants is significant. I think that the “financial” dimension is the more tractable criterion. Yet this too needs careful framing, for again, it is possible that a morally irreproachable and impartial person with particular expertise might e.g. live in a region whose housing prices or values could be affected by the decision: after all, it is wisely stated in the Recommendations that environmental questions often have economic and social aspects. Perhaps the best solution could be to recommend that *“persons with a direct financial or commercial interest”* be excluded.
5. The preface below should gain additional text acknowledging that the Recommendations appear to apply principally to top-down procedures of participation activated by requirement, whereas **obeying the spirit** of the Aarhus Convention would entail that public authorities design means for taking due account of spontaneous, autonomous or bottom-up participation or input into decision-making processes. (This may further be a topic for the upcoming Workplan.)

Further input is provided in tracked changes and marginal comments.

These Recommendations have been prepared under the auspices of the Task Force on Public Participation in Decision-making of the Aarhus Convention [\[REFERENCE NEEDED\]](#). They have been developed at the request of the Meeting of the Parties to the Aarhus Convention following calls over several years from officials and [stakeholders](#) for more practical guidance on how to improve the implementation of the Convention’s provisions on public participation in decision-making.<sup>1</sup>

Comment [CM1]: Add definition to listing

<sup>1</sup> Decision EMP II/1, paragraph 2(c); Activity III of the Workplan 2012-2014 adopted through decision IV/6.

The Recommendations are intended as a practical, ~~user-friendly~~ tool to improve the implementation of the Convention's provisions on public participation in decision-making in two key ways:

- (i) To assist Parties when designing their legal framework on public participation in environmental decision-making under the Convention.
- (ii) To assist public officials on a day-to-day basis when designing and carrying out public participation procedures on environmental decision-making under the Convention.

The Recommendations provide helpful guidance on all elements of articles 6, 7 and 8 of the Convention and especially how to address a number of key challenges identified to date including by the Aarhus Convention Compliance Committee concerning those articles' implementation. The Recommendations are non-binding, non-exhaustive and, depending on the recommendation and the wide range of circumstances in different Parties' territories, may not necessarily be the only means of complying with the Convention. While the Recommendations are not ~~intended as~~ an official interpretation of the Convention, they ~~can~~ serve as an invaluable ~~are~~ a tool through which ~~to share~~ expertise and good practice are shared to assist policymakers, legislators and public authorities in their daily work of implementing the Convention. The Recommendations indeed :

- ~~Were written by [...?]~~
- Include references to explicit decisions by the Compliance Committee
- Have been reviewed in an open process; the 3 draft versions over the period of ?date to date benefitted from input from ?N contributors from ?N countries and from a range of backgrounds including inter alia [mention here some of the major stakeholder families like environmental authorities, NGOs, elected rep's, federations of ..., safety authorities, etc etc.]
- have been discussed in an open forum at e.g., the 'Aarhus Convention in Nuclear' final European Roundtable [or mention the number of such meetings]
- [any other fact that demonstrates the well-founded character of this information-sharing tool].

In addition to providing assistance to Parties to the Aarhus Convention and their officials, it is hoped that the Recommendations may also be of value to members of the public, including nongovernmental organizations and the private sector involved in decision-making in environmental matters. They may also be of interest to Signatories and other interested States not party to the Convention as well as officials and stakeholders engaged in public participation in decision-making under the scope of other multilateral environmental agreements.

<b>I.</b>	<b>General recommendations</b> .....	<b><del>43</del></b>
	Definitions .....	<del>43</del>
	Designing a public participation procedure .....	<del>43</del>
	Carrying out a public participation procedure .....	<del>76</del>
	Public participation on the “zero option” .....	<del>87</del>
	Complex decision-making .....	<del>87</del>
	Delegating responsibility for public participation .....	9
	Defining and identifying the public which may participate .....	<del>1140</del>
	Participation of the public concerned from other countries.....	<del>1241</del>
	Individual notification.....	13
	Practical arrangements to support public participation .....	<del>1413</del>
	Evaluation and research on public participation practices.....	14
<b>II.</b>	<b>Public participation in decision-making on specific activities (article 6)</b> .....	14
	Applying article 6, paragraph 1 (a) .....	14
	Applying article 6, paragraph (1) (b) .....	15
	Applying article 6, paragraph 1(c) .....	16
	Adequate, timely and effective notification (article 6, paragraph 2) .....	<del>1716</del>
	<i>Adequate notification</i> .....	<del>1716</del>
	<i>Timely notification</i> .....	18
	<i>Effective notification</i> .....	18
	<i>Methods of notifying the public</i> .....	<del>1918</del>
	Reasonable time-frames to inform the public and for the public to prepare and participate effectively (article 6, paragraph 3).....	20
	Early public participation when all options are open (article 6, paragraph 4) .....	23
	Encouraging developers to engage with the public concerned (article 6, paragraph 5) .....	<del>2324</del>
	Access to all relevant information (article 6, paragraph 6) .....	24
	<i>Access for examination</i> .....	<del>2425</del>
	<i>Access free of charge</i> .....	25
	<i>Providing information as soon as it becomes available</i> .....	26
	<i>All information relevant to the decision-making</i> .....	26
	<i>Exceptions to disclosure</i> .....	27
	Procedures for the public to submit any comments, information, analyses or options that it considers relevant (article 6, paragraph 7) .....	28
	<i>Written submissions</i> .....	28
	<i>Online consultations</i> .....	29
	<i>Oral submissions</i> .....	29
	Taking due account of the outcome of public participation – scope of obligation (article 6, paragraph 8) .....	<del>3031</del>
	<i>Evidence of taking due account of the outcome of public participation</i> .....	<del>3132</del>
	Prompt notification and access to the decision (article 6, paragraph 9).....	<del>3233</del>
	Reconsideration and updating the operating conditions for an activity covered by article 6 (article 6, paragraph 10).....	<del>3335</del>
	Public participation in decision-making regarding genetically modified organisms (GMOs) (article 6, paragraph 11 and article 6 bis).....	<del>3436</del>
<b>III.</b>	<b>Public participation concerning plans, programmes and policies (article 7)</b> .....	<del>3437</del>
	Plans and programmes.....	<del>3538</del>
	Policies .....	<del>3638</del>
<b>IV.</b>	<b>Public participation during the preparation of executive regulations and laws (article 8)</b> .....	<del>4043</del>

## I. General recommendations

### Definitions

1. The use of the terms “public authority”, “environmental information”, “the public” and “the public concerned” in these Recommendations are in line with the definitions of article 2 of the Convention.
2. For the avoidance of doubt:
  - (a) “public authorities” includes all persons coming within the definition of article 2, paragraph 2, of the Convention. This includes persons or bodies, other than the authority competent to take the decision, to which some tasks related to a public participation procedure are delegated;<sup>2</sup>
  - (b) “the public” includes, as well as natural or legal persons, their associations, organizations or groups in accordance with national legislation or practice. As a good practice<sup>\*\*\*</sup>, the most inclusive definition of “the public” would be that based on the “every person” principle, as used in a number of countries of Central and Eastern Europe. Under the “every person” principle, any natural or legal person and any association, organization or group, regardless of its status in national law, is to be considered amongst “the public” for the purposes of article 2, paragraph 4 of the Convention. In order to ensure that the framework for public participation is as transparent, clear and consistent as possible, if it is not intended that every association, organization or group of natural or legal persons regardless of its status in national law, is to be included as “the public”, those that are to be considered as coming within that definition should be clearly specified in national law.
  - (c) “the public concerned” includes, inter alia, non-governmental organizations promoting environmental protection and meeting any requirements under national law. To ensure the framework for public participation is as transparent, clear and consistent as possible, the following may be clearly specified through national law:
    - (i) What constitutes “having an interest in” environmental decision-making;
    - (ii) The requirements, if any, which NGOs promoting environmental protection must meet in order to be deemed to have an interest.<sup>3</sup>

**Comment [CM2]:** Several terms come up very often and would benefit from – on demand – definition. They include: Stakeholder(s). Effective participation. Due account.

Clear definitions would function as criteria and thereby support all paragraphs that mention monitoring or evaluation .

### Designing a public participation procedure

3. Public participation in environmental decision-making enhances the quality and the effective implementation of decisions. Through granting the public the opportunity to express its concerns and requiring public authorities to take due account of those concerns, it furthers the accountability and transparency of environmental decision-making and may strengthen public support for the decisions taken. In the process, it contributes to greater awareness amongst both the public and public authorities of environmental issues.
4. For the above reasons, public participation should be seen by all parties as a prerequisite of effective action, not merely as a formal procedural requirement. To this

<sup>2</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2, para 78.

<sup>3</sup> Preambular paragraph 18 of the Convention

end, public participation should be fully incorporated into the decision-making process on all decisions subject to the Convention. Likewise, efforts should be made to stimulate and encourage the public to participate in decision-making, as without active public participation no public participation procedure can be successful.

5. The legal framework for decision-making for a decision or activity subject to the Convention should:
  - (a) Be based on the principles of transparency, partnership, non-discrimination, equity and good faith;
  - (b) Ensure the most comprehensive, broad, accessible and effective public participation possible in light of the:
    - (i) Differing types of decisions and activities subject to the framework;
    - (ii) Varied number and characteristics of the public concerned corresponding to those activities;
  - (c) As a **good practice**\*\*\*, allow for revision to reconsider past conclusions on the basis of new information.
  - (d) Be designed bearing in mind that any reduction from existing rights of public participation may be perceived as not in line with the objectives of the Convention.<sup>4</sup>
  - (e) Be created in consultation with the public.
6. In order to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, the public participation procedure for a decision subject to the Convention should be designed in such a way that both public authorities and the public know precisely:
  - (a) The decisions to be taken at each stage and who is competent to take them;
  - (b) The procedures to be used at each stage;
  - (c) The range of options to be discussed and decided at each stage, bearing in mind that the process should also be open enough to accommodate any new options introduced as a result of the public participation;
  - (d) The underlying assumptions and uncertainties in the decision-making procedure;
  - (e) The possibilities for the public to participate in decision-making at each stage;<sup>5</sup>
  - (f) The time-frames for each task/stage to, the extent they can reasonably be predicted in advance;
  - (g) The roles of the different persons/entities involved in the decision-making, including who is responsible for the various tasks and stages (for example, **framing the question on which participation will bear**, notifying the public, making information available, organising hearings, organising the collection and collation of comments, considering all comments received, making the decision in light of the comments received, preparing the response document and the statement of reasons etc.) and their contact details;
  - (h) The costs, if any, for the public to participate. To ensure effective public participation, the general rule should be that there will be no fees or charges on the public seeking to participate.
  - (i) **As appropriate**\*\* how a review of a decision once made may be sought, including a review of the final decision.<sup>6</sup>
7. There is no specific set of tools or techniques that constitute “best practices” for all contexts. Rather, the most appropriate techniques will be situation-dependent, and

**Comment [CM3]:** In reference to the request above for definition of „effective participation”, these appear to be elements of same, but that requires also the notion of real INFLUENCE upon the decision (or at least the decision-making process), as per §8b.

**Comment [CM4]:** Are these defined somewhere (could a website be referenced)?

**Comment [CM5]:** See general comment 2 above, and marginal comments 7 & 9 below on use of „good practice” phrase. Forty occurrences were replaced by \*\*\*.

**Comment [CM6]:** See general comment 1 above. Seven occurrences found and replaced by \*\*

<sup>4</sup> Compliance with regard to Hungary, ECE/MP.PP/C.1/2005/2/Add.4, para. 18; Compliance with regard to Denmark, ECE/MP.PP/C.1/2012/7, para. 46.

<sup>5</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 71.

<sup>6</sup> Opinions of the Espoo Implementation Committee 2001-2010, ECE/MP.EIA/IC/2011/INF.1, para. 73 (a).

practices may need to be adapted to changes that occur during the process. To this end, **as a good practice**<sup>\*\*\*</sup>, public authorities should, as a matter of course:

- (a) Monitor the process to evaluate how well it is working. Public authorities may, as part of the design process, establish criteria to aid them in their monitoring. As an additional **good practice**<sup>\*\*\*</sup>, the outcomes of the monitoring may be made available to the public;
- (b) In the light of the above monitoring, revise or adapt the procedure, including the choice of tools, techniques and personnel, if needed to address deficiencies in the public participation process. If there are any significant changes to the public participation process as a result, the public concerned should be duly notified (see paras. 42-59), and **as a good practice**<sup>\*\*\*</sup>, **may be consulted** regarding any significant changes to the public participation process;
- (c) May, **as an additional good practice**<sup>\*\*\*</sup>, after the decision-making process is concluded, evaluate the public participation procedure to identify what might be done to ensure more effective public participation in such processes in the future. **As a good practice**<sup>\*\*\*</sup>, the evaluation may be made publicly available.

8. In addition to the public participation procedures specified in the Convention, public authorities may find it useful to involve non-governmental organizations or other members of the public with relevant expertise in advisory bodies related to the decision-making procedure (for example, general Environmental Protection Councils or Public Councils or specialised EIA Commissions, GMO Commissions or Water Committees). To this end:

- (a) Such persons may serve in their personal capacity or as representatives of the public concerned or relevant stakeholders. In the latter case, those persons should be selected through a transparent, democratic and representative procedure ensuring that they are **accountable to their constituencies and fully transparent** about the constituency they represent. **Persons with financial or personal interests in the possible outcome of the decision-making should not be permitted to participate in such bodies**;
- (b) Any involvement of NGOs or other members of public in such bodies must be effective rather than formal, i.e. they should have a real possibility to influence the decisions of such bodies;
- (c) The involvement of NGOs or other members of the public should not exempt them from voicing their opinion in later stages of decision making;
- (d) The involvement of NGOs or other members of the public in such advisory bodies cannot be a substitute for the participation of the wider public.

9. When designing a public participation process the name or label given to a decision in domestic law (e.g. "permit", "consent", "plan", "programme", "policy", "decree" etc.) is not decisive in determining how that decision should be categorized under articles 6, 7 or 8 of the Convention. Rather, such categorizing should be determined by the decision's legal functions and effects.<sup>7</sup>

10. As both public authorities and the public have limited time and resources, tailoring the tools and techniques to the nature of the decision and its context will help to ensure that public authorities and the public are able to dedicate more attention to those decisions with more significant environmental impacts or affecting a greater number of people while at the same time avoiding so-called "participation fatigue".

11. With respect to the selection of the most appropriate tools and techniques for public participation:

**Comment [CM7]:** Throughout one supposes that the Recommendations cover good practice.

These additional phrases suggest that we don't really MEAN that public authorities should seriously take the following into account – it would just be GOOD that they do it... and not a problem if they did not.

In this case in particular, monitoring and evaluation and adjustment should not be „good“ add-ons but indeed „matter of course“ essential components, as usefully explained in the preceding 2 sentences of Paragraph 7.

**Comment [CM8]:** This demands a suggestion of criteria, which could be linked to the definition to be added above „effective participation“.

It is not possible (as next sentence suggests) to conduct monitoring or evaluation with criteria. Officials should make these explicit.

The legal framework might usefully fore criteria for effective participation, and/or the public authorities might usefully consult stakeholders on how to define „effective“.

Perhaps a UNECE or other blameless reference for further reading on how to design and conduct evaluation could be added in footnote

**Comment [CM9]:** The track changes version provided by UNECE indicates that reviewers have requested the addition of „good practice“.

This stands out as a clear signal that the reviewers consider that the object of recommendation is problematic or troublesome or supernumerary and should not be „required“.

I believe that the reviewers should be reminded that the Recommendations are not binding and that they form in entirety a corpus of good practice.

**Comment [CM10]:** What are the standards for this? Where are they stated

Note that the standard of accountability should be linked to the notion of due consideration; we hear too often that elected officials are „accountable“ simply in that they **may** be subject to stand for reelection in several years.

**Comment [CM11]:** This well-meaning notion is repeated several times in the Recommendations, but it is extremely problematic.

<sup>7</sup> Compliance with regard to Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 29.

- (a) For activities of high environmental significance or affecting a large number of people, more elaborated procedures may be most appropriate to ensure effective public participation. For example, in addition to opportunities for the public to submit written comments, public enquiries (more formal), public debates or public hearings (less formal) with submission of formal evidence and possibility for cross-examination, may be held.
  - (b) For activities with less significant environmental effects or affecting only a small number of people, access to all relevant information and the opportunity to submit written comments and to have due account taken of these may sometimes be sufficient.
12. With respect to the legal effects of the public participation process, this may range from a requirement on the competent public authority to take into account the outcomes of a consultation process to a right for the public to make the decision itself, if possible under national law:
- (a) Depending on the nature of the decision and its surrounding circumstances, consultation with the public coupled with taking due account of the outcomes of that consultation, may be sufficient;
  - (b) In some other cases (for example those with the potential for very significant environmental effects or affecting a large number of people), and subject to national constitutional law, it may be useful to provide the public with a co-decision power (for example by delegating the competence to conduct the relevant decision-making procedure) or even with the exclusive decision-making power (for example, by binding referendum at national, regional or local level *as appropriate\*\**).

**Comment [CM12]:** Reference any law § that gives a standard for what constitutes a reasonable opportunity.

**Comment [CM13]:** Requires definition at top.

### Carrying out a public participation procedure

**Comment [CM14]:** Need to clarify and standardize use of „procedure” or „process”.

13. When carrying out a public participation procedure, public authorities should do so with:
- (a) Clarity of purpose. Both the competent public officials and the public should know the goal of the process. They should also be aware of the framework conditions and parameters for the public participation process, including which decisions, if any, have already been taken and which facts (technical requirements or legal provisions) are unchangeable. In this way, the public should understand from the outset how much influence its participation can have on the final decision;
  - (b) An appropriately high level commitment, made publicly, to use the process to guide their actions;
  - (c) Adequate funding and staff;
  - (d) Sufficient time-frames for all stages of the public participation procedure, including for taking due account of the outcomes of the public participation;
  - (e) Due consideration for the needs and abilities (e.g. language, literacy, access to internet, rural/urban, mobility) of the members of the public concerned in the decision-making;
  - (f) A commitment to accountability, self-assessment and learning from experience.
14. If in the course of the decision-making process, public authorities become aware of significant new information or that the circumstances have changed in some significant way, the public concerned should have, where appropriate, a further opportunity to participate before the decision is taken. Depending on the new information or circumstances, this may require the decision-making process to be “rewound” to re-open options already closed, and in particular if necessary for the protection of the environment. For the avoidance of doubt, the submission of revised EIA or SEA

documentation could be one example of a circumstance requiring the public concerned to be provided with a further opportunity to participate, unless the revisions are of a minor nature only.

### Public participation on the “zero option”

15. In line with the Convention’s requirement for the public to have an opportunity to participate when all options are open, the public should have a possibility to provide input/comments and have due account taken of them, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called “zero option”).<sup>8</sup> This recommendation has special significance if the proposed activity is a technology not previously undertaken in the country and which is of high risk and/or unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of the technology should not be provided only at a stage when there is no realistic possibility for the country not to proceed.<sup>9</sup>
16. With respect to decision-making subject to the Convention, steps should be taken to ensure public authorities do not enter into agreements and/or take decisions, e.g. issue any preliminary or partial consents or permits, that would practically foreclose certain options without providing for public participation in accordance with the Convention.<sup>10</sup>

**Comment [CM15]:** Could a more direct and simple definition be given for „the zero option“? (perhaps in footnote, to avoid twisting the sentence to get it in) Is it an official term?

### Complex decision-making

17. The framework for decision-making may involve various consecutive strategic decisions under article 7 or 8 of the Convention (policies, plans, programmes, legislation/regulations) and various individual decisions under article 6 of the Convention (for example decisions authorizing the basic parameters and location of a specific activity, its technical design, mitigation measures and finally its technological details related to specific environmental standards as applicable to the activity in the selected location). Such decision-making is often known as “complex decision-making”.
18. If so preferred, the framework for public participation in complex decision-making may reflect the concept of tiered decision-making whereby at each stage of the decision-making certain options are discussed and selected with the participation of the public, and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. While the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage where public participation is required, it should occur when all the options to be considered at that stage are still open and effective public participation can take place.

**Comment [CM16]:** This is where Jan Haverkamp’s recommendation should be inserted:  
To wit,  
„in cases where the duty of offering all options to discussion and selection has not been evacuated, this duty should pass down to the subsequent tier”.

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<sup>8</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 74; Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para. 51; Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, ECE/MP.PP/2011/11/Add.3, para. 61 and 63.

<sup>9</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para 74

<sup>10</sup> Compliance with regard to Spain, ECE/MP.PP/C.1/2010/4/Add.2, para. 119 (a) (iii).

18. **[CHARIOT RETURN – new §19]** [respective] of how the framework for decision-making is structured, the public should have a possibility to discuss the nature and need for the proposed activity at all (the so called “zero option”). In order to satisfy the requirements of the Convention and to meet the legitimate expectations of the developer, this possibility should be provided at the earliest stage of the entire decision-making, when it is genuinely still open for the project not to proceed.

**Comment [CM17]:** Suggest that this complicated and important recommendation be given its own paragraph.

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19. When determining which of the multiple decisions in a complex decision-making process should be subject to public participation under the Convention, the following criteria may be taken into account. **[The extent to which]:**

- (a) The decision in question “permits” **effectively results in authorizing** the activity in question;
- (b) The parameters for the proposed activity set by the decision are environmentally relevant and significant;
- (c) The parameters of the proposed activity set by the decision foreclose the options to be considered at later stages;
- (d) The decision may change environmentally significant parameters set by a preceding decision which required public participation;<sup>11</sup>
- (e) The activity, by virtue of its nature, size or location may affect or be of interest to a significant number of people;
- (f) The proposed activity will require a large commitment of public funds (e.g. medium to large infrastructure projects);
- (g) The implementation of the activity, plan, programme, policy or legal instrument requires the decision to be taken in cooperation with those affected and interested;
- (h) The decision, in order to be effective, requires particularly broad comprehension and acceptance.

**Comment [CM18]:** Please frame the checklist more simply in yes/no terms. At least, show in each case which end of a scale calls for „yes” and which „no”.

Recall that this listing caused particular concern to Tatyana Novikova of Belarus

### ***Delegating responsibility for public participation***

20. While the responsibility for carrying out public participation should in general be assigned to the public authority which is competent to take the respective decisions, in certain situations this may possibly not provide for the most effective public participation, for example:

- (a) Where the competent public authority is a central body located far away from the intended location of the proposed activity and this may hinder the public concerned from effectively participating, for example, from inspecting all relevant documentation and/or attending hearings;
- (b) Where the competent public authority has an interest in the outcome of the decision, including where it acts (either itself or through an entity under its control) as a developer of the project. In cases where the competent authority is also the developer, **it should delegate it may sometimes be appropriate for** responsibility for carrying out the public participation **to be delegated to another, impartial, body, or provide a reasoned justification for failing to do so;**
- (c) Where the proposed activity is ~~so~~ controversial and/or ~~so~~ complicated **such that supplementary efforts are needed to provide a sufficient information basis and a serene, inclusive forum for** the public participation; **here it is advisable to call upon a “third party” – could yield better results if carried out by a** body highly experienced in carrying out such processes (see para. 22 below).

**Comment [CM19]:** I feel these modifications are particularly important.

21. If, in situations such as those set out in paragraph 20 above, the legal framework seeks to delegate any administrative tasks related to a public participation procedure

<sup>11</sup> Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para. 43.

to persons or bodies other than the competent authority, **the following principles should be applied: it should borne in mind that:**

- (a) The ultimate responsibility for ensuring the public participation process complies with the requirements of the Convention will still rest with the competent authority;
  - (b) If delegating tasks related to a public participation procedure, the legal framework should clearly specify:
    - (i) the distribution of tasks between the various entities;
    - (ii) the obligation of the entity being delegated to, to report to the competent authority with respect to the completion of the delegated tasks;
  - (c) While developers may hire consultants specializing in public participation, neither the developers themselves nor the consultants hired by them can ensure the degree of impartiality necessary to guarantee proper conduct of the public participation procedure in compliance with the Convention. Therefore, giving the developers sole responsibility for organizing the public participation, including for making available the relevant information to the public and for collecting comments, would not be compatible with the Convention.<sup>12</sup> This should not be read as entirely excluding the involvement of developers, overseen by the competent public authority, in the organization of the public participation procedure. For example, the developer may be required to:
    - (i) Notify the public in line with article 6, paragraph 2, or at least to pay for the costs of such notification (e.g. notices in the press or on television); or
    - (ii) Assist in the organization of public hearings; or
    - (iii) Pay a special fee or fees to cover the costs related to public participation; or<sup>13</sup>
    - (iv) Provide relevant information to the public regarding the proposed activity and respond to questions from the public about the public participation process, e.g. regarding preparations for the public hearing;
  - (d) Arrangements requiring or encouraging developers to enter into public discussions before applying for a permit are in accordance with article 6, paragraph 5, provided that such arrangements are in addition to a mandatory public participation procedure meeting the requirements of article 6 after the application for the permit is made.
22. If the legal framework seeks to delegate administrative functions other than those set out in paragraph 21 (c) (i)-(iv) above, it should ensure that the persons or entities it seeks to delegate to are impartial and do not represent any interests related to the proposed activity subject to the decision-making. So long as they are indeed impartial, such entities might include:
- (a) Other public authorities, for example a central authority may delegate such tasks to the local authority in the location of the proposed activity; or
  - (b) Bodies or persons, whether public or private, specialising in the organization of public participation, for example planning inspectors or commissions d'enquête publique, or specialising in mediation.
23. Alternatively, subject to national law, responsibility for organising public participation may in part be delegated or commissioned to members of the public concerned themselves (including NGOs promoting environment protection) provided:
- (a) Those members of the public are widely considered to act in the public interest and are able to carry out the tasks delegated to them in a equitable and non-discriminatory manner, paying heed to issues of gender, faith, age, disability, poverty, etc;

**Comment [CM20]:** This paragraph should be rewritten in two different sets:

- guidance for preparing the legal framework

- guidance when the framework already exists, possibly without the needed or id features.

Each paragraph in the recommendations should be written from a consistent point view and with a mind to recommendation that can be implemented at a given point time.

<sup>12</sup> Report by the Compliance Committee, ECE/MP.PP/2011/11, para 84

<sup>13</sup> Report by the Compliance Committee, ECE/MP.PP/2011/11, ECE/MP.PP/2011/11, para. 85.

- (b) Those members of the public voluntarily consent to undertake the tasks proposed to be delegated to them. This does not exclude the possibility that those persons may receive remuneration for performing those tasks; and
- (c) The public participation procedure is carried out in a manner that fully meets the requirements of article 6 and the public concerned has access to a review procedure to challenge the substantive or procedural legality of those person's decisions, acts and omissions in accordance with article 9, paragraph 2; and
- (d) A lack of members of the public volunteering to undertake the tasks proposed to be delegated to them does not release the competent public authorities from their obligation to organize the public participation procedure in accordance with article 6 of the Convention.

24. Possible tasks that might be delegated to members of the public concerned might include:

- (a) Notifying the public (article 6, paragraph 2);
- (b) Making all relevant information accessible as soon as it becomes available (article 6, paragraph 6);
- (c) Organizing public hearings (article 6, paragraph 7);
- (d) Collecting and collating comments (article 6, paragraph 7).

25. Legal provisions allowing the public to organise the public participation process (for example the possibility in some countries of the Eastern Europe, the Caucasus and Central Asian region for the public to undertake so-called "public expertiza") should be considered as supplementary measures and not as the only measure to implement the requirements of the Convention.<sup>14</sup>

### **Defining and identifying the public which may participate**

26. To ensure that the legal framework for public participation in environmental decision-making is implemented in a transparent, clear and consistent manner, guidance should be provided to public authorities to assist them to identify the public which may be affected by, or may otherwise have an interest in, a given decision-making procedure. To this end, when identifying the public concerned with respect to a proposed activity, the competent public authority should bear in mind the following:

- (a) The various groups of stakeholders to be considered, as a minimum, among the public concerned with respect to the proposed activity should be clearly specified. This is a key issue to ensure effective public participation in accordance with the Convention;
- (b) Many decisions with an environmental dimension also involve social and economic interests, and the corresponding interest groups should be included in the public participation in an equitable way;
- (c) The process should be open to critical voices, as far as they contribute constructively, because they will voice their opinion anyway and it will make for a more efficient and effective procedure to include them in the discussion at an early stage;
- (d) Attention should be paid to identifying those who could potentially hinder the transparency and balanced nature of the decision-making process, for example strong lobby groups or those with a special relationship to the decision-makers. It may be prudent to monitor their involvement and influence have regard to their involvement on an ongoing basis during throughout the process in order to ensure that a balanced and fair process is maintained throughout;
- (e) Special attention should be paid to identifying groups that are hard to reach for different reasons:

**Comment [CM21]:** This recommendation might be more effective if specific advice is given for ensuring balance. Ex: Should authorities insist that record of contacts between developer and lobby be published?

<sup>14</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2, para. 76.

- (i) Some members of the public can be willing but unable to participate (e.g. vulnerable and/or marginalized groups such as children, older people, women in some societies, migrants, people with disabilities, those with low literacy, language barriers, economically disadvantaged groups, those without access to internet, television or radio, etc.);
  - (ii) Others may be able to participate but unwilling (e.g. people with previous bad experiences, lack of time, see no benefits in participating, etc.);
  - (iii) At a minimum, efforts should be made to involve organizations representing such groups.
- (f) The list of possible public concerned is not a closed one. Other members of the public with an interest in the decision-making may put themselves forward to participate and should be able to do so.
- (g) It may be helpful to consult with already identified members of the public concerned to seek their assistance in identifying other stakeholders addressed in (a)-(f).

### ***Participation of the public concerned from other countries***

27. The environmental impacts of activities subject to the Convention may occur across national borders. In accordance with the requirement in article 3, para. 9, of the Convention, the public must have the possibility to participate in decision-making under the Convention without discrimination as to citizenship, nationality or domicile.<sup>15</sup> To this end:

- (a) The legal framework should not contain anything that discriminates against the public from other countries participating in decision-making in the country of origin that may affect them;
- (b) Steps should be taken to put in place arrangements with other countries, in particular with neighbouring or downstream countries or those with shared natural resources (whether within existing agreements on transboundary cooperation or on transboundary impact assessment or otherwise) to facilitate the reciprocal participation of those countries' public in decision-making under the Convention that may affect them. This could use existing systems of transboundary consultation or not. It may be on an ad hoc basis or in the form of a permanent mechanism or mechanisms to facilitate the participation of the public concerned from an affected country in environmental decision-making. Such arrangements may cover:
  - (i) Time-frames for public participation. The time-frames for public participation that involves a transboundary element should be at least as long as those that do not involve a transboundary element, and on a case-by-case basis, may be longer in order to account for cultural and communication problems. The timescale for public participation should begin when the relevant documents become available to the public concerned in the affected country, not when they are made available by the country of origin to the affected country;
  - (ii) Mechanisms for notifying the public about the commencement of the decision-making procedure, their possibilities to participate, and in due course, about the decision taken and their possibilities to have access to review procedures;
  - (iii) The translation of documents and interpretation during meetings. To prevent misunderstandings, it is important to provide high-quality translation and interpretation. Where it is not possible to translate all relevant documents at once, the timescale for the public to examine the documentation and submit their comments should start afresh each time that a new document relevant to the decision-making becomes available after translation.

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<sup>15</sup> See also article 3, para. 7, of the Protocol on Strategic Environmental Assessment.

- (c) Regional and/or local authorities should be encouraged to make similar arrangements with their counterparts in neighbouring or downstream countries or countries with shared natural resources.
  - (d) In addition and without prejudice to the above arrangements, internal arrangements should be put in place to facilitate the participation, without discrimination, of the public from an affected country in public participation procedures under the Convention. Such arrangements may include:
    - (i) Making accessible on the internet as much information as possible in the main language(s) used by the public concerned in those countries potentially affected (e.g. neighbouring or downstream country/countries);
    - (ii) Waiving visa fees and expediting visa processes to enable the public concerned from the neighbouring or downstream country to enter the country of origin to examine all information relevant to the decision-making and to take part in any hearings that may be held;
    - (iii) Using video- or tele-conferencing to enable the public from an affected country to participate, and where appropriate, to communicate with the public concerned from the country of origin;
    - (iv) Securing additional financial and human resources to address the requirements of public participation in the transboundary context (e.g. added translation and communication requirements and a potentially greater number of public concerned meaning more comments to be taken into account).
28. In determining whether the public from an affected country, including NGOs promoting environmental protection, have an interest in a particular environmental decision-making procedure, the public should be treated at least as favourably as the public from the country of origin.<sup>16</sup> Similarly, the public concerned from an affected country should have access to a review procedure under article 9 on the same footing as the public from the country of origin.
29. If either the competent public authority or the public from an affected country consider that that public has an interest in a particular environmental decision-making procedure, but there are no diplomatic relations between the countries or the public authorities of the affected country refuse to participate in the decision-making process, the country of origin may nevertheless provide opportunities for the public of the affected country to participate, using means that will not constitute an interference with domestic affairs of the affected country. For example, through those means set out in paragraph 27(d)(i)-(iii) above.
30. The Good Practice\*\*\* Recommendations on Public Participation in Strategic Decision-making<sup>17</sup> prepared under the Protocol on Strategic Environmental Assessment may also be a helpful reference tool when making provisions for the public concerned from an affected country to participate.

### **Individual notification**

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<sup>16</sup> Article 2, para. 6 of the Espoo Convention

<sup>17</sup> Draft, 28 August 2012, available at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Good\\_practice\\_recommendations\\_on\\_PP\\_in\\_SEA\\_28082012.doc](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Good_practice_recommendations_on_PP_in_SEA_28082012.doc)

31. To ensure adequate and effective notification of the public concerned, public authorities may wish to establish mechanisms whereby members of the public interested in a particular decision-making process or in all decision-making processes of a particular type may request to receive timely individual notification of a decision-making procedure. This may include, at their request, any member of the public (whether from the country of origin or a potentially affected country) including those not necessarily located in the geographical area of the decision-making. Such mechanisms might include electronic mailing lists and automatic notifications connected to electronic databases.

### ***Practical arrangements to support public participation***

32. Practical arrangements to facilitate effective public participation may be put in place where appropriate. For example:
- (a) Local public authorities and/or public institutions (e.g. schools or public libraries) may be required to assist regional and/or central authorities in carrying out, with due compensation where appropriate, certain functions related to public participation (for example making available documentation for inspection; assisting in organising public hearings or providing the venue);
  - (b) Measures may be taken to facilitate the public's access to information relevant to the decision-making (for example, by providing the public with access to information for the least possible cost, such as by making copies of requested documents available electronically free of charge, and by expediting time-frames for accessing information);
  - (c) Schemes may be established to support, financially or otherwise, the public to participate (for example, to assist with travel costs or arrangements for the public concerned to prepare for and attend public hearings; to provide technical or legal support to assist the public to engage effectively with the participation process).

### ***Evaluation and research on public participation practices***

33. Public authorities designing and carrying out public participation procedures should ~~consult the existing literature of, to the extent feasible and appropriate, use available social science research on such procedures, and feedback from actual experience. The UNECE Clearinghouse (LINK) is one resource to find such literature. Advice may also be requested from university researchers. University researchers may also be engaged to design and perform independent evaluation of the participation process. to inform their practice and build broader knowledge about public participation.~~ Routine, well-designed evaluation of public participation efforts, ~~and study of the conclusions of evaluation,~~ can make an important contribution to ensuring more effective public participation processes in the future.

**Comment [CM22]:** This is not the sa rec. If the „bridge” I have proposed is rejected, this sentence needs own paragraph, or better explication of why is here.

## **II. Public participation in decision-making on specific activities (article 6)**

### *Applying article 6, paragraph 1 (a)*

34. While not expressly stated in the Convention, in applying article 6, paragraph 1 (a) of the Convention, it is recommended that:

- (a) Where one operator carries out several activities falling under the same subheading of annex I in the same installation or on the same site, the production capacities or outputs of those activities be added together;<sup>18</sup>
- (b) References to threshold values “per day” in annex I be read as per twenty-four hour period beginning and ending at midnight;
- (c) Capacities or outputs indicated in annex I be read as capacities or outputs technically possible and/or legally permitted and not capacities or outputs planned to be achieved;<sup>19</sup>
- (d) Paragraph 20 of annex I to the Convention be read to encompass any activity subject to an environmental impact assessment procedure (EIA) requiring mandatory public participation under national legislation by reason of international law (e.g. activities covered by annex I to the Espoo Convention), supranational law (e.g. annex I projects and those annex II projects included by way of categorical screening under the EU EIA Directive) or an independent national determination;
- (e) If domestic legislation requires the carrying out of a procedure that includes all the basic elements of an EIA procedure, without it being named as such, the de facto EIA process be considered an EIA for the purposes of paragraph 20 of annex I;<sup>20</sup>
- (f) Those activities listed in annex I of the Convention for which no thresholds are set (e.g. nuclear power stations, chemical installations, installations for incineration or landfill of hazardous waste, etc.) be subject to article 6, paragraph 1 (a), regardless of their size;<sup>21</sup>
- (g) By virtue of the first sentence of paragraph 22 of annex 1, any change to or extension of an activity listed in annex I of the Convention for which no threshold is set be likewise subject to the requirements of article 6, para. (1)(a), regardless of their size.<sup>22</sup>

*Applying article 6, paragraph (1) (b)*

35. Article 6, paragraph 1 (b), of the Convention requires a mechanism to be established within the national legal framework to determine whether a decision on a proposed activity which is not listed in annex I may yet have a significant effect on the environment and thus require public participation in accordance with the requirements of article 6. The mechanism for such a determination may be related to the system of EIA or may be independent from it, or a mixture of both approaches may be applied.
36. Irrespective of whether the above determination is related to the EIA procedure or not, the recommended first step is to identify all activities which potentially may have an effect on the environment. Such activities may include:
- (a) Any activity which under national legislation requires an environmental permit or licence (such as noise permits, waste permits, permits for logging, authorisations for culling or disturbing animals, water permit for discharge of water or for water intake, fishing permits, export or import permits for endangered species, etc.);
  - (b) Any other activity subject to an individual screening under national law. For example:
    - (i) Changes to or extensions of activities within the scope of the second sentence of paragraph 22 of annex I to the Convention;

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<sup>18</sup> Guidance on Interpretation and Implementation of the IPPC Directive, [http://ec.europa.eu/environment/air/pollutants/stationary/ippc/general\\_guidance.htm](http://ec.europa.eu/environment/air/pollutants/stationary/ippc/general_guidance.htm)

<sup>19</sup> Guidance on Interpretation and Implementation of the IPPC Directive, [http://ec.europa.eu/environment/air/pollutants/stationary/ippc/general\\_guidance.htm](http://ec.europa.eu/environment/air/pollutants/stationary/ippc/general_guidance.htm)

<sup>20</sup> Compliance with regard to Georgia, ECE/MP.PP/C.1/2010/4/Add.1, para. 46.

<sup>21</sup> Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, para. 58.

<sup>22</sup> Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, para. 58.

- (ii) Activities subject to individual screening for environmental assessment (for example, annex II activities under the EIA Directive) or biodiversity assessment (for example, activities subject to article 6.3 of the Habitat Directive);
37. Following the identification of all activities that potentially may have an effect on the environment, a determination must then be made as to which of those may have a “significant effect” and therefore require public participation in accordance with article 6, paragraph 1(b). The mechanism for this determination may take the form of:
- (a) Deeming particular types of decisions concerning certain types of activities to be subject to public participation in accordance with the provisions of article 6 (the “list” approach, as used in annex I of the Convention); or
  - (b) Requiring public authorities to make such a determination through a case-by-case examination (the “case-by-case” approach); or
  - (c) A mixture of both above procedures.
38. If the legal framework requires public authorities to make the determination under article 6, paragraph (1) (b) through a case-by-case examination:
- (a) The legal framework should establish a list of clear criteria against which such a determination should be made;
  - (b) These criteria should include the criteria used in the legal framework:
    - (i) To test for significance in environmental assessment (for example, the criteria listed in annex 3 to the Espoo Convention or annex III of the EU EIA Directive); and
    - (ii) To decide which of the multiple decisions of a complex decision-making process require public participation (see paragraph 19 above).
39. The determination should be subject to review under article 9 at the request of the public concerned, in particular with a view to check if the criteria established for the purpose were properly applied in a given case.<sup>23</sup>

*Applying article 6, paragraph 1(c)*

40. Article 6, paragraph 1(c), is not a mandatory provision. Public authorities that seek to use this provision should bear in mind that the provision requires a determination that a proposed activity both:
- (a) Serves national defence purposes; and
  - (b) The application of the provisions of article 6 would have an adverse effect on these purposes.
41. Such a determination should be made within a clear, transparent and consistent framework, either through establishing and maintaining:
- (a) A list of activities and criteria that if a public authority determines in a particular case are met may be deemed to fulfil the above requirements;
  - (b) A mechanism for a case-by-case determination of whether the above requirements are met based on criteria set by law.
- It is recommended that in either case, the grounds for exemption in article 6, paragraph 1(c) should be interpreted in a restrictive way, taking into account the public interest in ensuring effective public participation in decisions affecting the environment.

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<sup>23</sup> Compliance with regard to Czech Republic, UN document reference forthcoming (ACCC/C/2010/50)

**Adequate, timely and effective notification (article 6, paragraph 2)**

42. The legal framework should expressly stipulate that the public concerned be informed in an adequate, timely and effective manner, so that public authorities have clear guidance as to the timing, content and quality of notification, in particular when they have certain discretion as to how notification is to be carried out.<sup>24</sup>

*Adequate notification*

43. The notification of the public should adequately address all matters listed in article 6, paragraph 2, (a) to (e) accurately, in sufficient detail and in clear language. In particular:

- (a) With respect to article 6, paragraph 2 (d) (ii):
  - (i) The opportunities for the public to participate and the time-frames regarding those opportunities;
  - (ii) As a *good practice*<sup>\*\*\*</sup>, an overview of the public participation process could be prepared and attached to the invitation for public participation. It is recommended that the overview:
    - (1) Provide information about the opportunities for the public to submit comments and the method(s) by which they can be submitted (orally or in writing, electronically, etc);
    - (2) Include a summary of the most important information relevant to the decision-making (e.g. the EIA documentation);
    - (3) Be coordinated with all public authorities involved in the public participation process so as to ensure that those aspects under the competence of other authorities are included also;
- (b) With respect to article 6, paragraph 2 (d) (iv), the precise contact details of the body or person(s) from whom relevant information can be obtained and precise information about where and when it is available for examination;
- (c) With respect to article 6, paragraph 2 (d) (v):
  - (i) The precise contact details of the body or person(s) to which comments or questions can be submitted;
  - (ii) The time schedule for transmittal of comments or questions, recalling that the time schedule should, in accordance with article 6, paragraph 3, provide a reasonable time-frame, inter alia taking into account that the means of notification used may have an impact on the timing for the notification effectively to reach the public concerned (for example, publication in the government's official notification database, though the database is publicly accessible, may not constitute effective notification for most members of the public who do not check such databases on a daily basis);
- (d) With respect to article 6, paragraph 2 (vi), the notice should indicate which particular information will be made available in accordance with article 6, paragraph 6. It should also make clear that access to this information will be available for examination free of charge. While not all information must necessarily be detailed in the notification, at a minimum it should include the application to permit the proposed activity and its

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<sup>24</sup> Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para 48 and 49;; Compliance with regard to the Lithuania, ECE/MP.PP/2008/5/Add.6, para. 91 (a) (i).

main attachments, including EIA documentation if any, and should also briefly outline the other types of information to be made available;

- (e) With respect to article 6, paragraph 2(e), a ~~good practice~~<sup>\*\*\*</sup> for those activities subject to article 6 that are not subject to any national or transboundary EIA procedure, may be to inform the public concerned in a timely and effective manner either:
- (i) If the legal framework provides for the possibility for the public to participate in the screening decision, of the public's opportunities to so participate;
  - (ii) If the legal framework does not envisage public participation in the screening decision, of the results of the EIA screening; or
  - (iii) If the activity was not subject to such a screening, of the nature and results of any other procedure applicable to the activity.

44. To assist the public concerned identify notices that may be relevant to them, it is recommended that the title of any written notice state the proposed activity, the nature of the proposed decision, and the proposed geographical location(s). As a ~~good practice~~<sup>\*\*\*</sup>, the contact details of the decision-maker and the developer should be prominently displayed above any other details.

45. More generally, recalling article 3, para. 2 of the Convention, public authorities should endeavour to ensure that officials have the knowledge and capacity to see that the public concerned is notified in an adequate, timely and effective manner.

46. If the legal framework delegates the task of notification to a third party, for example, the developer, it should require the third party to report on a timely basis to the competent public authority regarding who was notified, regarding what, when and how.

#### *Timely notification*

47. The requirement for informing the public in a "timely" manner should be seen in the context of the obligation to provide "reasonable time-frames" (article 6, para. 3) and "early public participation, when all options are open and effective public participation can take place" (article 6, paragraph 4).

48. The various forms of written notification should be disseminated to the public concerned on the same date. If this is not feasible, the time-frames for the public to participate should be calculated from the latest date that written notification is disseminated and would effectively reach the public concerned.

#### *Effective notification*

49. 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 the proposed activity and their possibilities to participate.<sup>25</sup> What will constitute "effective notification" must therefore be determined on a case-by-case basis, taking into account the particular situation in each case.

50. Public authorities should ensure that the notification and all accompanying information remains available to the public throughout the entire public participation procedure so

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<sup>25</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para 67.

that members of the public learning of the procedure later in the process still have access to all relevant information in order to participate effectively.

51. Care should be taken to ensure that more than one means of notification is used, and that the information provided in the various forms of notification is consistent.
52. In order to ensure adequate and effective notification, as part of the ongoing review of the public participation procedure, the possibility for repeated notifications should be provided, for example:
  - (a) When there is some doubt that the public concerned has been notified effectively;
  - (b) When the proposed activity will entail more than one decision that requires public participation under article 6 (see para. 19 above);
  - (c) When significant new information comes to light or the circumstances change in some significant way necessitating the public to be provided with a further opportunity to participate. This includes significant new information of a procedural nature, for example, the time and venue of the public hearing, if the public has not previously been informed of this;
  - (d) When there is additional information which could not be provided with the original notification regarding the commencement of the procedure and which, in accordance with article 6, paragraph 2 (d), should be provided as and when it can be.

#### *Methods of notifying the public*

53. When designing the methods to notify the public, the following should be borne in mind: :
  - (a) The methods chosen should be tailored to reach as many as possible of the public concerned, in particular as many as possible of those in the immediate vicinity of the proposed activity or its environmental effects;
  - (b) As a good practice\*\*, wherever possible at least three different means of notifying the public are used;
  - (c) Language issues should be addressed as appropriate\*\*, for example by providing translations if the public concerned do not speak the language of the documentation or by enabling representative organisations to relay the notification to their communities in their own language;
  - (d) Any member of the public who has requested in advance to be notified should be so notified and distribution lists should be kept up to date.
54. As a minimum, public notice should be communicated through at least the 3 following physical or virtual methods: ~~placed~~ (i) the notice should be posted readably in a full range of physical, public places in the immediate vicinity of the proposed activity (e.g. on a prominent fence or sign-post on each road leading to the site of the proposed activity, etc.) and (ii & iii) on a physical, accessible public notice-board and on the website homepage of the public authority competent to take the decision. It is recommended to supplement these four types of is notice with at least two other forms of notification, including as appropriate\*\*:
  - (a) Public notice in the mass-media (radio, television and newspapers) corresponding to the geographical scope of the potential effects of the proposed activity;
  - (b) Public notice in places highly frequented by the public concerned and customarily used for the purpose (e.g. notice-boards in community halls, bus stops, post offices, commercial centres, local parishes, schools, kindergartens, sport halls, sport fields, meeting places for marginalised groups, etc);
  - (c) Public notice on the notice boards and websites of all local authorities in the area potentially affected;

- (d) Public notice through social media (e.g. Facebook, Twitter, blogs). This is particularly useful for notifying younger members of the public who may not be reached by more traditional forms of media.
55. If one of the chosen ways of informing the public about its possibilities to participate is via the local press, effective notification would be more likely met by choosing the newspaper with the largest circulation in the geographical area concerned.<sup>26</sup> It will also likely be more effective to publish notification in a popular daily local newspaper rather than in a weekly official journal, although publication in the official journal would also be important, as in many countries it would still be considered the standard source of such notification.<sup>27</sup>
56. It should be recalled that some sections of the population, for example rural populations in some areas, cannot read or write or may not have regular access to the Internet and therefore other appropriate means of effective notification should be sought, for example by contacting relevant NGOs or other bodies that work with those communities.<sup>28</sup>
57. Notification through the notice-boards or the website of the project proponents (whether a private or public entity) should be considered only as a supplementary means. For the avoidance of doubt, such notification can only be in addition to, and not instead of, notification on the notice-board and website of the public authority competent to take the decision.
58. Journalists' articles commenting on a project in the press, internet or television may be very useful as a supplementary means of informing the public. However, they do not in themselves constitute public notice for the purposes article 6, paragraph 2, of the Convention and cannot replace it.<sup>29</sup>
59. In addition to members of the public who have requested in advance to be notified of the decision-making procedure, individual notification may be useful for those members of the public who are identified as having special interests (e.g. those known to have legal interests or those living in the immediate vicinity).

***Reasonable time-frames to inform the public and for the public to prepare and participate effectively (article 6, paragraph 3)***

60. The different phases of a public participation procedure for which reasonable time-frames are required include:
- (a) Informing the public concerned about the commencement of the procedure (article 6, para. 2);
  - (b) Enabling the public concerned to become acquainted with the documentation (article 6, para 6). This period should be long enough to allow the public to request additional information in accordance with article 4, paragraph 1 and paragraph 2 that it considers may be relevant to the decision-making on the proposed activity;
  - (c) Enabling the public to submit any comments, information, analyses or opinions that it considers relevant (article 6, para 7). In setting this time-frame, the way in which comments may be submitted should also be borne in mind. For example, if comments

<sup>26</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 67.

<sup>27</sup> Compliance with regard to Armenia, ECE/MP.PP/2011/11/Add.1, para.70

<sup>28</sup> Compliance with regard to Armenia, ECE/MP.PP/2011/11/Add.1, para.70

<sup>29</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2

- are required to be submitted by post in writing, the effective timeframe for the public to comment will be several days shorter than the stated timeframe due to the public having to post comments earlier to allow time for mail delivery;
- (d) Considering the comments, information, analyses or opinions submitted by the public (article 6, para. 8);
  - (e) Taking the final decision, taking due account of the outcome of public participation (article 6, para 8):
    - (i) Preparing the statement of reasons and considerations on which the decision is based;
    - (ii) Preparing the text of the decision;
  - (f) Notifying the public of the decision, together with how the public may access the text of the decision and the statement of reasons and considerations on which it is based (article 6, para 9).

61. When designing the legal framework for public participation, it should be recalled that as a general principle that the requirement to provide “reasonable time-frames” in article 6, paragraph 3:

- (a) Means “reasonable” from the point of view of the public seeking to prepare for and participate effectively in the public participation procedure;
- (b) Should take into account, inter alia, the nature, complexity, size and potential environmental effects of the proposed activity.<sup>30</sup> Thus, a time-frame which may be reasonable with respect to a small simple project may well not be reasonable in the case of a major complex project or one with potentially very significant environmental impacts;
- (c) Should take into account generally applicable administrative time-frames in the country (e.g. time-frames for making an information request and appealing a refusal).

62. With respect to the setting of time-frames for the various phases of public participation procedures, the legal framework may:

- (a) Set fixed time-frames for each phase; or
- (b) Set minimum time-frames; or
- (c) Adopt a flexible approach whereby the public authorities responsible for a particular public participation procedure are responsible for setting time-frames appropriate to the circumstances of that case, but with a legislated minimum based on the legislated timeframe for accessing information under article 4 of the Convention.

63. A flexible approach has the advantage of enabling public authorities to set time-frames for the public participation procedure that take into account factors such as the nature, complexity, size and potential environmental effects of the proposed activity. However, it potentially leaves public authorities with absolute discretion in setting time-frames, which could result in uncertainty and inconsistency. Thus, if the flexible approach is to be used, the applicable legal framework should specify, for each phase of the public participation procedure, either a maximum or minimum time-frame depending on which will better facilitate public participation in that phase. For example:

- (a) The setting of a minimum time period is generally more suited to the phases of the public participation procedure that the public performs (for example preparing and submitting comments);
- (b) Conversely, the setting of a maximum time period is generally more suited to the phases of the public participation procedure which the public authority must perform (for example the consideration by public authorities of comments submitted by the public). The setting of a maximum time-frame for the public to submit comments,

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<sup>30</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 69.

regardless of how long the maximum time-frame is, runs the risk that, in individual cases, time-frames might be set which are not reasonable;

64. If the legal framework specifies minimum time-frames, the legal framework or accompanying guidance should make clear that they are genuinely minimum time-frames from which the setting of longer time-frames is not only possible but in fact recommended for proposed activities with more significant environmental impacts (e.g. those subject to mandatory EIA procedure) or those affecting a large number of people.
65. The legal framework should provide clarity as to the calculation of the various time-frames, which should be expressed in clear terms. For example:
- (a) Wherever possible, the terms used to express time-frames should be in keeping with those customarily used in national legislation;
  - (b) If time-frames are expressed in days, it should be clear whether those are calendar days or working days, and the approach adopted should be consistent throughout the legal framework;
  - (c) The beginning and end date of time-frames should be calculated with care, taking into account public holidays. For example, if the end date of a given time-frame would fall on a public holiday, the following working day should be used;
  - (d) While “days” are most suitable to express shorter time-frames, longer time-frames may be expressed in “weeks” or “months”;
  - (e) Wherever possible, the main holiday seasons (e.g. mid-summer, late December) should be avoided as times for holding public participation procedures.

Some examples of bad and good and bad practice with respect to the time-frames for the different phases of public participation procedures include:

• Bad: A period of ten working days for the public to analyze the documentation, including the EIA report, and to prepare to participate in the decision-making process concerning a major landfill, can not be considered a reasonable time-frame.<sup>31</sup>

• Bad: A period of 20 days for the public to prepare and participate effectively cannot be considered reasonable if the period includes days of general celebration in the country.<sup>32</sup>

• Good: In contrast, a period of approximately six weeks for the public to inspect the documentation and prepare itself for the public inquiry and a further 45 days for the public to submit comments, information, analyses or opinions relevant to the proposed activity (the construction of a waste incinerator) could be considered as reasonable time-frames.<sup>33</sup>

• Good: A legal framework that provides for a minimum of 30 days between the public notice of the decision-making procedure and the start of public consultations is a reasonable time-frame, so long as the minimum period may, where appropriate, be extended as necessary taking into account, inter alia, the nature, complexity and size of the proposed activity.<sup>34</sup>

<sup>31</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, paras. 69-70.

<sup>32</sup> Compliance with regard to Spain, ECE/MP.PP/C.1/2009/8/Add.1, para. 90

<sup>33</sup> Compliance with regard to France, ECE/MP.PP/C.1/2009/4/Add.1, para. 44.

<sup>34</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2, para. 89.

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

66. In the case of complex decisions, if a tiered decision-making approach is used (see para 18 above), in order to ensure early and effective public participation when all options are open:
- (a) There should be at least one stage in the decision-making process when the public has the opportunity to participate effectively on whether the proposed activity should go ahead at all (the so-called “zero option”) (see also para 15 above); and
  - (b) In addition, at each stage of a tiered decision-making process, the public should have the opportunity to participate in an early and effective manner on the full range of options under consideration at that stage.
67. An example of good practice<sup>\*\*\*</sup> in applying the requirement for early public participation when all options are open is to provide the public the opportunity to participate in both the screening and scoping stages of the EIA procedure, when those issues to be considered as important for further examination are being identified.
68. “When all options are open” may be read as “when any option could still be chosen as the preferred option”. Some examples of when, all options might no longer necessarily be considered open include:
- (1) When a public announcement of a preferred option has been made even though the plan or programme has not yet been adopted; or
  - (2) When a decision-maker has promised to constituents that they will pursue or avoid particular options;
  - (3) When a public authority has concluded contracts or agreements with private parties related to a decision subject to the Convention which would have the effect of foreclosing options without providing for public participation.<sup>35</sup>
69. While providing public participation at the very early stages of the procedure (for example, as a good practice<sup>\*\*\*</sup>, at the screening and scoping stages in the EIA procedure or, in a number of countries of Eastern Europe, the Caucasus and Central Asia, at the stage of the OVOS procedure (during which the developer must take account of the outcomes of the public participation when preparing the OVOS report as part of the developing the project documentation) is to be welcomed as a good practice<sup>\*\*\*</sup>, it should be recalled that such an opportunity for the public to participate must be supplemented with opportunities to participate also at the later stage when all the relevant information/documentation has been gathered/prepared and the public authorities are in a position to take the final decision.

**Encouraging developers to engage with the public concerned (article 6, paragraph 5)**

70. It may be useful to prepare guidance to assist developers, where appropriate, to identify the public concerned, to enter into discussions and to provide information regarding the objectives of their application before applying for a permit.

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<sup>35</sup> Compliance with regard to Spain, ECE/MP.PP/C.1/2009/8/Add.1, para.119 (iii).

71. While such dialogue between the developer and the public concerned is to be encouraged, it is supplementary to the public participation procedure to be carried out by the competent public authority.
72. Measures should be taken to ensure that such dialogue provides accurate and reliable information and does not amount to manipulation or coercion.

#### **Access to all relevant information (article 6, paragraph 6)**

73. Without prejudice to the exceptions detailed in article 4, paras. 3 and 4, access to all relevant information is a prerequisite for effective public participation.
74. The information provided should be balanced. It should present different aspects of the topic and avoid any manipulation. Subject to article 4, paragraphs 3 and 4, all expert opinions relevant to the decision-making should be available to the public.
75. Barrier-free access to information should be provided. Potential barriers that should be avoided or addressed include:
  - (a) The information is too complicated or too technical for the public concerned;
  - (b) It is not in a language that the public concerned (including, where relevant, ethnic minorities or migrants) can understand;
  - (c) The presentation of the information is of poor quality (i.e. difficult to read or hear);
  - (d) It is not located in convenient locations or available at convenient times or for a long enough period of time;
  - (e) There is too much irrelevant information provided making it difficult for the public promptly to access the relevant information; or
  - (f) The information is not accurate or reliable (e.g. it contains inconsistencies).
76. Both the information provided and the means of communication should be tailored to the target groups. As a good practice\*\*\*, in addition to the full original documentation, non-technical summaries to be prepared by the applicant, in simple, user-friendly and understandable language, of, as a minimum, the EIA documentation and permit documentation should be made available to the public. Where the information is of a very technical nature, the public authority may wish to provide opportunities for the public to ask questions or be given helpful explanations, for example through public events, or a question and answer list on the authority's website.
77. Practical measures to facilitate effective public participation should be considered, e.g. the use of electronic tools. For example, public authorities may wish to establish and maintain user-friendly websites where the public can find information about the proposed activity, access relevant documents online and submit electronic comments about the proposed activity. Such websites may also, inter alia, include a list of persons or organizations recognized as parties in a procedure according to the relevant legislation.

#### *Access for examination*

78. In order to facilitate effective examination by the public concerned of all information relevant to the decision-making the information should at a minimum be accessible for examination:
  - (a) At the seat of the competent public authority; as well as the relevant branch location(s);

- (b) If feasible, electronically, e.g. via a publicly accessible register with a user-friendly search function and an accessible archive for the most important documents from past processes;
- (c) If the seat of the competent authority is located far away from the place of activity (e.g. more than two hours away by public transport), the information should in addition be made available at a suitable easily accessible location(s) in the vicinity of the proposed activity;
- (d) During usual working hours on all working days throughout the entire period of the public participation procedure. In addition, the competent public authority should consider how to make the information available to members of the public who cannot access it during usual working hours (e.g. due to their own working hours).

The various locations and as a good practice\*\*\*, their opening hours, for the public to access the information should be specified in the notification under article 6, paragraph 2 (d) (iv).

79. In accordance with article 3, paragraph 2, measures should be taken to ensure that officials and authorities assist and provide impartial guidance to the public in examining the information relevant to the decision-making, for example explaining the information and its relevance to the decision-making. Public authorities may request the applicant and/or consultants hired by them (for example, EIA consultants) to assist with this task.

#### *Access free of charge*

80. There should be no charge for the public to have access to examine the information relevant to the decision-making and in particular, no charges for requesting or conducting a search for information not provided.

#### *Copies at no more than a reasonable charge*

81. The public should be able to receive copies of information upon request, at no more than a reasonable charge or for no charge at all.<sup>36</sup> Public authorities intending to make a charge for copying information should make available, in advance and in a prominent place, a schedule of charges which may be levied.

82. Public authorities may consider providing copies of documents relevant to decision-making free of charge in cases where it is justified by the nature of the documentation (e.g. if it is voluminous), the activity in question (e.g. if it concerns particularly sensitive issues), or the public concerned (e.g. any members of the public for whom attending the location where the information is available free of charge would be difficult). This may be particularly relevant where the information is to be provided in electronic form.

83. In accordance with article 4, paragraph 1(b), the public should be able to receive copies of the information in the form requested (e.g. in electronic or paper form), unless it is reasonable for the public authority to make it available in another form or the information is already publicly available in another form.

84. Subject to the exceptions in article 4, paragraphs 3 and 4, the public should be allowed to make copies onsite using their own means of copying, free of charge, including taking digital photographs of relevant documentation.

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<sup>36</sup> Compliance with regard to Spain, ECE/MP.PP/C.1/2009/8/Add.1, paras. 76 and 95.

*Providing information as soon as it becomes available*

85. All information relevant to the decision-making should be made available for examination by the public concerned:
- (a) As soon as it becomes available to the public authorities, at whatever stage in the decision-making procedure that may be, and
  - (b) Should remain available for examination by the public concerned throughout the entire public participation procedure (see para 78(d) above).
- | 86. As a good practice<sup>\*\*\*</sup>, all information relevant to the decision-making should be held by the competent public authority prior to the commencement of the public participation procedure. This is to ensure that members of the public participating early in the procedure are able to participate on a fully informed basis. If further information becomes available during the public participation procedure, this fact should be clearly flagged in all places where the information is accessible to the public (e.g. on the website, electronic database or paper file). In accordance with article 6, para. 7, members of the public who may have already participated prior to the additional information becoming available, may of course submit further comments etc. in light of the new information.
87. The legal framework may envisage that certain information relevant to the decision-making may be made available directly by the applicants and/or consultants hired by them (for example EIA consultants). However, this should be considered as a supplementary arrangement and does not displace the requirement on the competent public authorities to provide the public concerned with access to all the information relevant to the decision-making.<sup>37</sup>

*All information relevant to the decision-making*

- | 88. While it is good practice<sup>\*\*\*</sup> for public authorities, to the extent feasible, to check the accuracy of information prior to making it publicly available, all information relevant to the decision-making that is available to the public authorities (save for information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4) should be made available to the public concerned regardless of its quality and regardless of whether the public authority considers it to be accurate, comprehensive or up-to date.<sup>38</sup>
89. This includes raw data from monitoring stations, even if not yet validated or made available in its final form.<sup>39</sup> Should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they have not been processed in accordance with the official procedure for processing raw environmental data. The same applies for processed data, in which case the authorities should advise on how the data was processed and what it represents.<sup>40</sup>
90. Public authorities should consider establishing a set of minimum information which is considered to be relevant to decision-making subject to article 6, and to which the public should have access for examination as a matter of course. Without prejudice to

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<sup>37</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2, paras. 69 and 70.

<sup>40</sup> Compliance with regard to United Kingdom, ECE/MP.PP/C.1/2013/3 para 77.

the exceptions to disclosure set out in article 4, paragraphs 3 and 4, such minimum information may for example include:

- (a) The full application for the decision to permit the proposed activity;
- (b) All attachments to the application required by law, for example:
  - (i) The full EIA report;
  - (ii) All relevant maps;
  - (iii) All relevant certificates;
  - (iv) All opinions issued by other public authorities or other statutory consultees, whether public or private bodies;
  - (v) Previous permits for the same activity;
  - (vi) Previous relevant decisions on fines, obligations, suspensions, refusals of permit application with respect to the project applicant;
  - (vii) All comments, information, analyses or opinions submitted by the public in written form or submitted orally and recorded by public authorities or by other entities responsible for the public participation.

91. In addition, without prejudice to the exemptions from disclosure contained in article 4, paragraphs 3 and 4, the minutes, transcripts or recordings from any public hearings held with respect to a decision to permit an activity covered by article 6 should be considered as information relevant to the decision-making.

#### *Exceptions to disclosure*

92. While article 6, paragraph 6, expressly permits the exemptions from disclosure provided in article 4, paragraphs 3 and 4, of the Convention, when designing and implementing the legal framework for article 6 decisions, the following should be taken into account:

- (a) If information is relevant to decision-making, then there is a strong presumption that it is also in the interest of the public seeking to participate in that decision-making to have access to that information. Thus, the grounds for refusal set out in article 4 should be interpreted in a restrictive way, taking this public interest into account;
- (b) Any decisions to exempt certain information from disclosure should themselves be clear and transparent and give reasons for non-disclosure and give information on access to a review procedure;<sup>41</sup>
- (c) In accordance with article 4, paragraph 6, if information exempted from disclosure under article 4 can be separated out without prejudice to the confidentiality of the information exempted, public authorities should make available the remainder of the information relevant to the decision-making;
- (d) If circumstances change over time, so that the exemption from disclosure would no longer apply, the information should be made available to the public as soon as it is no longer confidential;
- (e) Disclosure of documents prepared especially for the decision-making procedure, including in particular EIA reports, in their entirety should be considered as a general rule;
- (f) For the avoidance of doubt, as a minimum, the public shall have access to all the information listed in article 6, paragraph 6 (a)-(f).

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

93. The right to submit comments, information, analyses and opinions in article 6 paragraph 7 of the Convention is granted to “the public” and not to the “public concerned”, which means that any public hearing or enquiry held under article 6, paragraph 7, should also be open to the public generally; the public should be entitled to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity:

- (a) Free of charge;
- (b) Without undue formalities.

For the avoidance of doubt, it is for the member of the public to decide whether those comments, etc. are relevant to the proposed activity.

94. The public is not required to provide:

- (a) Proof of residence, citizenship, or domicile, although some proof of identification may be required in order to prevent duplicate submissions;
- (b) Any evidence as to its sources of information or any justifications or reasoning for its views. However, although there is no legal requirement for the public to provide evidence or reasons for its views, public authorities may consider encouraging members of the public to do so on a voluntary basis, explaining that reasons may assist the public authority to gain a deeper understanding of the comments or opinions submitted.<sup>42</sup>

#### *Written submissions*

95. Clear procedures should be established for the submission of written comments that enable such comments to be submitted:

- (a) Within the entire period of time envisaged for public participation, including before, at or after any public hearings that may be held;<sup>43</sup>
- (b) In electronic form without undue formalities regarding electronic signature;
- (c) Where a member of the public is unable to write, their comments may be received orally and a record kept both orally and in writing.

96. Comments, information, analyses or opinions submitted by the public may be submitted either to the public authority competent for the decision-making or to an appropriate impartial body acting under the direction of that authority. If the latter approach is used, that body should collate all comments, etc. received and deliver them in their entirety to the competent public authority, not only in an aggregated form.<sup>44</sup> As a good practice<sup>\*\*\*</sup>, an acknowledgement should be promptly sent to each member of the public submitting comments etc. to confirm safe receipt and their comments made public on the website of the authority.

97. Where submissions are requested in the form of pro-forma questionnaires, this should not be restrictive and the public should also be facilitated in participating by other means.

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<sup>42</sup> Compliance with regard to Kazakhstan, (ACCC/C/2012/59) UN Document reference forthcoming.

<sup>43</sup> Compliance with regard to Belarus, ECE/MP.PP/C.1/2011/6/Add.1, para. 94.

<sup>44</sup> Compliance with regard to Belarus, ECE/MP.PP/C.1/2011/6/Add.1, para. 94.

### Online consultations

98. With the widespread availability of modern communication technologies, online consultation techniques can help to increase the public's understanding and the quality of their participation. Online consultations can complement face to face meetings and hearings, but should not be used to fully replace physical participation of the concerned public in meetings, hearings etc.
99. A properly conducted online consultation should include the following elements:
- (a) Identification of relevant target group for the consultation;
  - (b) A full explanation of the consultation process, its role and impact in the decision making process;
  - (c) Provision of all relevant documents;
  - (d) An adequate timeframe for providing input into the consultation by stakeholders;
  - (e) An analysis of the input received and publication of the analysis, with the opportunity for further inputs by the target group;
  - (f) A mechanism to feed the outcomes of the online consultation into the decision making process.

### Oral submissions

100. As a **good practice\*\*\***, clear criteria should be established regarding when public hearing or enquiry should be held. Where this is to be determined on a case-by-case basis, a screening process should be carried out in this respect with the reasons given for the determination made available to the public. The criteria for determining the need for public hearing or inquiry may include for example:
- (a) The scale of the activity and/or its potential impact;
  - (b) The size of the affected population;
  - (c) The controversial or high profile nature of the activity, recognising however, that this often may not be known until the public has had an opportunity to present its views;
  - (d) A need to investigate witnesses or to provide an opportunity for the public concerned to be heard;
  - (e) A need to provide for cross-examination or the airing of conflicting views.
101. As a **good practice\*\*\***, it is recommended that more than one public hearing or enquiry should be held when merited by:
- (a) The geographical scope of activity;
  - (b) The scope or location of the public concerned;
  - (c) New facts or evidence coming to light after the first hearing.
102. It is recommended that the procedures for the hearing or enquiry should:
- (a) Be clear, transparent and publicised sufficiently in advance to enable the public to prepare and participate effectively;
  - (b) Make clear the purpose of the hearing and the powers of its outcomes;
  - (c) Provide fair opportunities for all participants to be heard;
  - (d) Provide parity of esteem and as far as possible equality of arms;
  - (e) If necessary, put in place appropriate controls to avoid "paid public" taking part;
  - (f) Ensure sufficient time to hear from all major interests involved;
  - (g) Provide an appropriate balance between time devoted to the provision of necessary background information and time devoted to questions and discussion;
  - (h) Allow the public to express its views without having to have legal representation;

- (i) Allow opportunities for the public to:
  - (i) Distribute written statements and corroborating evidence;
  - (ii) Present evidence through the testimony of witnesses.
- (j) Require a register to be kept of all participants who attended.

103. The procedures for the hearing may envisage:

- (a) To enable public authorities to provide appropriate facilities, the pre-registration of participants wishing to:
  - (i) Speak;
  - (ii) Use technical means;
  - (iii) Distribute written materials;
  - (iv) Present evidence;Care should however be taken to ensure that pre-registration does not present a barrier to participation (including if the registration form could present a barrier to those without literacy skills) and in so far as practicable participants who have not pre-registered to speak should still be allowed to take the floor;
- (b) Time-limits for taking the floor.

104. Public hearings or enquiries:

- (a) Should be notified sufficiently in advance, including regarding the purpose of the hearing and the powers relating to its outcomes, so that the public is able to prepare to participate effectively;
- (b) Should be organized in a convenient location for the public concerned to attend and in a venue that is suitable for the purpose. Where possible, the room location and layout should be chosen to provide a sense of equality and openness so as to encourage the faint-hearted to engage;
- (c) Should be organised at a time that is suitable for the public concerned to attend (e.g. after business hours where practicable and outside holiday season);
- (d) May be recorded and, if appropriate in the light of the nature or significance of the proposed activity, transmitted live by television or internet;
- (e) In addition to the physical hearing, may if feasible be supplemented by technologies such as audio or video-conferencing to enable members of the public who cannot physically attend the hearing to participate.

105. The minutes or transcripts of the public hearing or enquiry may be made available to those who made oral submissions to verify their comments have been transcribed accurately. A good practice<sup>\*\*\*</sup> is to prepare the minutes or transcript on a rolling basis during the hearing and to make it available at the end of the hearing by using technical means.

106. In addition to public hearings or enquiries, other inter-active forms of public participation may be used (e.g. informal public discussions and seminars, bilateral consultations with NGOs and other experts, consensus conferences, round-table discussions, stakeholder dialogues and citizens' juries, multi-optional decision-making, expert environmental evaluation by the public, etc).

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

107. The framework for public participation in decision-making should take into account the following:

- (a) As the right to submit views is granted under article 6, paragraph 7, to “the public” therefore the obligation to take due account of the outcome of the public participation

- must be understood as covering equally the comments, etc. submitted by “the public” and those submitted by “the public concerned”;
- (b) The process for taking the comments, information, analyses or opinions of the public into account should be fair and not discriminatory.<sup>45</sup>
108. So long as the comments, information, analyses or opinions submitted are within the ambit of the relevant decision and competence of the relevant public authority, that authority must seriously consider all such comments, etc. received, regardless of whether:
- (a) Their purpose is to protect private or public interest;
  - (b) They relate to environmental concerns or not (e.g. economic analyses);
  - (c) They are reasoned or not. Though there is no legal requirement for the public to provide reasons, members of the public should be encouraged to do so as reasons may assist the public authority to gain a deeper understanding of the comments or opinions submitted.
109. There should be a clear obligation in the legal framework for the competent public authority itself to have to take due account of the outcome of the public participation. It is not enough if the obligation to take due account of the outcome of the public participation is placed only on the developer and, where relevant, its EIA or OVOS consultant.<sup>46</sup>
110. Some countries have developed guidance on what taking “due account” means in practice. For example in 2008, Austria’s Council of Ministers adopted Standards on Public Participation to assist government officials, which inter alia state that “‘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 programme, or your legal instrument.”<sup>47</sup>

*Evidence of taking due account of the outcome of public participation*

111. With respect to evidence of taking due account of the outcome of the public participation, the obligation to take ‘due account’ under article 6, paragraph 8, should be seen in the light of the obligation in 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’. This means that the statement of reasons accompanying the decision should include a discussion of how the public participation was taken into account. It is recommended that the legal framework should therefore include a clear requirement that the statement of reasons include, as a minimum:
- (a) A description of the public participation procedure and its phases;
  - (b) All comments received, identifying clearly which comments have been accepted in the final decision and why, and which not and why not;
  - (c) How the comments received have been incorporated into the decision.<sup>48</sup>
112. The statement of reasons should be published together with the final decision.

<sup>45</sup> Compliance with regard to Belarus, ECE/MP.PP/C 1/2011/6/Add 1, para. 84.

<sup>46</sup> Compliance with regard to Belarus, ECE/MP PP/C 1/2011/6/Add 1, para. 96.

<sup>47</sup> Standards of Public Participation (2008; adopted by the Austrian Council of Ministers on 2 July 2008), page 13, available at [http://www.unece.org/env/pp/pppeg/Austria\\_pp\\_standards.pdf](http://www.unece.org/env/pp/pppeg/Austria_pp_standards.pdf)

<sup>48</sup> Compliance with regard to Albania, ECE/MP.PP/C.1/2009/8/Add.1, para.100.

113. To assist the preparation of the statement of reasons, it can be helpful to draw up a table where the comments received and the ways in which they have changed the draft are documented. If some comments were not taken on board, the reasons why they have been rejected should also be set out in the table. This is a good method when many comments are received, because similar arguments can be clustered in the table.
114. In addition to the discussion in the statement of reasons of how the views of the public were taken into account, as a good practice\*\*\*, the legal framework may include a requirement that public authorities reply to each submission individually, explaining how it was taken into account and if not why not.
115. Depending on the circumstances of the case, a lack of adequate evidence demonstrating how the outcomes of the public participation have been taken into account may be treated as a significant violation of the legal requirement to take due account giving rise to the quashing of the respective decision.
116. In addition to the written documents demonstrating how comments were taken into account, in the case of decisions with particularly significant environmental impacts or affecting a large number of people, public authorities may wish to hold a meeting with those who submitted comments, to discuss the comments and to explain which arguments will be taken on board and which will not be included and why not. Minutes should be kept of the meeting and made publicly accessible.

***Prompt notification and access to the decision (article 6, paragraph 9)***

117. The legal framework should include clear obligations on the competent public authorities:
- (a) To inform the public promptly about:
    - (i) The decision that has been taken;
    - (ii) How to access the text of the decision together with the reasons and considerations on which it is based;
  - (b) To prepare a statement summarising the reasons and considerations on which the decision is based;
  - (c) To keep the text of the decision along with the statement of reasons and considerations on which it is based in a publicly accessible place on a long term basis.<sup>49</sup>
118. The requirement in article 6, paragraph 9, for the text of the decision to be made accessible to the public includes:
- (a) both the decision when it is still subject to review procedures and the final decision which is not subject to review;
  - (b) all conditions included in or attached to the decision.
119. While article 6, paragraph 9, leaves some discretion to those designing the applicable legal framework regarding the choice of “appropriate procedures” for promptly informing the public of the decision, the methods used to notify the public concerned under article 6, paragraph 2, may also be used here, bearing in mind, however, that under article 6, paragraph 9, the right to be informed is granted to “the public” and not to “the public concerned” only (see recommendations on article 6, paragraph 2 above).

<sup>49</sup> Compliance with regard to Belarus, ECE/MP.PP/2011/11/Add.2, para.98.

120. Article 6, paragraph 9, does not require the text of the decision itself to be published in the mass media. However, it requires that the public is promptly informed of the decision and how they may access the text of the decision together with the reasons and considerations on which it is based.<sup>50</sup>

121. As regards where the final decision may be accessed, a **good practice\*\*\*** would be to make it available at all locations where the public could have access to examine the information relevant to the decision-making (see para 78 above). In addition, **if feasible**, the final decision **should may** be made available electronically, for example via **the developer's and the authority's a** publicly accessible **register-website** with a user-friendly search engine.

**Comment [CM23]:** I cannot imagine any developer or public authority for which it is not materially feasible to place the decision online.

122. The mere fact that the public may be able to access the decision on a proposed activity subject to article 6 through a publicly accessible electronic database does not satisfy the requirement of article 6, paragraph 9, of the Convention if the public has not been promptly and effectively informed of that fact.<sup>51</sup>

123. Whatever time period for informing the public about the decision is specified in national law, it should be reasonable bearing in mind the relevant time-frames for initiating review procedures under article 9, paragraph 2. There should be a possibility for the time-frame for initiating review procedures to be re-started if a member of the public concerned can prove that it did not receive notice due to a failure of the public authority or by *force majeure*.

124. As a **good practice\*\*\***, it is recommended that the content of the information for the public include also information regarding possibilities to appeal the respective decision.

#### **Reconsideration and updating the operating conditions for an activity covered by article 6 (article 6, paragraph 10)**

125. When a public authority reconsiders or updates the operating conditions for an activity referred to in article 6, paragraph 1, it should first make a determination of whether it is appropriate to apply the provisions of article 6, paragraphs 2 to 9. In making this determination, the following should be borne in mind:

- (a) Criteria such as the nature and magnitude of the activity, the potential impact on the environment and the level of public concern should be taken into account;
- (b) The goals of the Convention, recognizing that access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns, enable public authorities to take due account of such concerns, further the accountability of and transparency in decision-making and strengthen public support for decisions on the environment.<sup>52</sup>

<sup>50</sup> Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 81.

<sup>52</sup> Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, para. 56.

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

126. The recommendations regarding article 6 should be applied mutatis mutandis and ~~as appropriate~~\*\* to public participation in decision-making regarding GMOs under article 6, paragraph 11, and article 6 bis.
127. In order to ensure effective public participation, it is recommended that the provisions of article 6bis should be applied not only to decisions on whether to permit the deliberate release into the environment and placing on the market of GMOs but also, ~~as appropriate~~\*\*, to decisions regarding the contained use of GMOs.<sup>53</sup>
128. When designing and implementing the regulatory framework to facilitate public participation in decision-making regarding GMOs, it should be recalled that the exemptions listed in annex I bis to the Convention are not mandatory and may be incorporated into the regulatory framework, or not, on a discretionary basis.<sup>54</sup>
129. The public may submit any comments, information, analyses or opinions that it considers relevant to the proposed deliberate release, including placing on the market, in any appropriate manner.
130. As a ~~good practice~~\*\*\*, in order to improve public awareness and participation regarding GMOs, in addition to public hearings or public enquiries, other mechanisms that allow the public to be heard, for example round-table discussions, consultative bodies involving members of the public, stakeholder dialogues and citizens' juries amongst others, may be considered. This could be in relation to general issues, for example, to obtain the public's views on whether GMOs should be placed on the market in the country, or on more specific issues, for example, risk assessment and risk management of GMOs.
131. Attention should be given to ensuring that measures to promote public participation in decision-making regarding GMOs within the context of article 6, paragraph 11, and article 6 bis are in line with relevant elements of the national biosafety framework and further the implementation of article 23 of the Cartagena Protocol on Biosafety.

**III Public participation concerning plans, programmes and policies (article 7)<sup>55</sup>**

*General issues*

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<sup>53</sup> Guidelines On Access To Information, Public Participation And Access To Justice With Respect To Genetically Modified Organisms, MP.PP/2003/3, para. 3.

<sup>54</sup> Annex I bis, para. 2.

<sup>55</sup> A number of of the recommendations contained in this section build upon good practices identified in the following publication: Department of the Environment, Transport and the Regions, *Public Participation in Making Local Environmental Decisions: The Aarhus Convention Newcastle Workshop Good Practice Handbook* (London, Department of the Environment, Transport and the Regions, 2000).

132. Plans, programmes and policies have a different character to decisions on specific activities and this different character needs to be borne in mind when designing the related public participation procedures. For example:
- (a) It might be harder for members of the public to understand the relevance of a plan, programme or policy to their daily lives. It may thus be useful for public authorities to explain its practical relevance (e.g. through newspaper articles explaining the effects of the plan once implemented etc);
  - (b) There may be more uncertainty in the preparation of plans, programmes and policies than in an application for a specific activity. There may also be a wider range of alternatives. The uncertainty needs to be carefully conveyed to the public. There may be several stages of consideration of alternatives, all of which would benefit from public participation;
  - (c) For larger scale plans, programmes or policies, the potential 'public' might be very large. The competent public authorities may thus need carefully to consider how best to reach them;
  - (d) For other plans, programmes or policies (e.g. those for rural or marine areas), the size of the public directly affected might be more limited, but the potential implications might be longer term, or there may be a distinct 'future public' (e.g. residents of a proposed new residential development) to consider. Public authorities may thus wish to consider forms of participation involving representatives of the 'public' that do not currently have a voice.
133. Bearing in mind the special character of plans, programmes and policies highlighted in the above paragraph, in making provisions for the public to participate in the preparation of plans, programmes and policies, the recommendations regarding article 6 should be applied mutatis mutandis and ~~as appropriate~~.
134. The ~~Good Practice~~\*\*\* Recommendations on Public Participation in Strategic Decision-making<sup>56</sup> prepared under the Protocol on Strategic Environmental Assessment may also be a helpful reference tool when making provisions for the public to participate in the preparation of plans, programmes and policies.

#### *Plans and programmes*

135. While the Convention does not define “plans and programmes”, a broad interpretation is recommended, covering any type of strategic decision:
- (a) Having the legal nature of a general act required 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 organised 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.
136. The following types of plans and programmes may be considered as “relating to the environment”:

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<sup>56</sup> Draft, 28 August 2012, available at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Good\\_practice\\_recommendations\\_on\\_PP\\_in\\_SEA\\_28082012.doc](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Good_practice_recommendations_on_PP_in_SEA_28082012.doc)

- (a) Those which “may have a significant effect on the environment” and require strategic environmental impact assessment (SEA), for example, water management programmes, regional and local waste management plans;
- (b) Those which “may have a significant effect on the environment” but do not require SEA, for example, those that do not set the framework for a development consent; like voluntary programmes or incentives programmes;
- (c) Those which “may have effect on the environment” but the effect is not “significant”, for example, those that determine the use of small areas;
- (d) Those intended to help to protect the environment, for example, national biosafety strategies, air management plans, nature conservation plans, emergency plans for hazardous activities/installations, or anti-smog programmes;
- (e) Financial plans affecting the environment.

#### *Policies*

137. While the Convention does not define “policies”, a broad interpretation is recommended, covering any strategic decision other than a plan or programme:
- (a) Having the legal nature of a general act but not necessarily required by legislative, regulatory or administrative provisions;
  - (b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure;
  - (c) Not necessarily providing an organised and coordinated system;
  - (d) Which does not set in a binding way the framework for certain categories of specific activities (for example, development projects);
  - (e) Which is not sufficient for a specific activity to be undertaken without an individual permitting decision.

#### *Creating a strategy for public participation*

138. Given that the Convention leaves considerable discretion regarding the design of a public participation procedure under article 7, the design phase is very important. In order to ensure a transparent and fair framework throughout the procedure, having a clear strategy for the public participation in place from the outset may be helpful.
139. The public participation strategy should be developed to suit not only the nature of the plan, programme or policy being prepared but also to suit the local conditions. What works well in one area might not work well in another and it is *good practice*<sup>\*\*\*</sup> to find out what is required to address local conditions.
140. Being flexible and responsive to the public is *good practice*<sup>\*\*\*</sup>. During the public participation procedure, the competent authority may wish to evaluate how well its strategy is working, and revise it if needed.

#### *Early public participation*

141. Public authorities should bear in mind that public participation is meaningless if decisions have already been taken – officially or unofficially. At the latest, the public should be involved when a draft of a plan, programme or policy has been elaborated. However, in practice this is often too late for effective participation, because:
- (a) Many smaller decisions have already been taken by that time;
  - (b) There is significant time pressure by that time and only minor changes are possible;

- (c) The drafters of the draft plan, programme or policy are often convinced that they have already found the best solution and are no longer flexible or open to take new ideas on board.

142. Bearing the above in mind it is recommended to involve the public as early as possible and to involve the public throughout the decision-making process. In most cases, it is possible to involve the public from the beginning and to provide further opportunities to participate at several different stages. Involving the public early can help the authority develop a better proposal from the beginning and lead to greater public acceptance of the final product.

143. It is *good practice*<sup>\*\*\*</sup> to prepare a draft plan, programme or policy based on the public's opinions rather than to present the authority's solutions for the public to comment upon. The draft plan, programme or policy can then be subject to further phases of public participation throughout its development.

*Identifying the public which may participate*

144. The decision-making process should be open to allow anyone affected by or with an interest in the decision to participate. This should include those who oppose the authority's ideas.

145. However, simply designing the decision-making process so that anyone who may wish to participate can do so may not be enough. Waiting for people to come forward is not best practice. The better public participation processes actively seek out all the people and organizations likely to be affected by the plan, programme or policy so that they are fully aware of it and its likely effect on them.

146. As a *good practice*<sup>\*\*\*</sup>, a wide range of interests should be identified and encouraged to take part in the process. For example, depending on the nature of the plan, programme or policy, as well as its geographical scope, it may be important to invite representatives of some or all of the following groups to participate:

- (a) Community groups;
- (b) Resident's organizations;
- (c) Business and industry organizations;
- (d) Farmers organizations;
- (e) Universities and research institutions;
- (f) NGOs interested in environmental protection, heritage protection, social welfare etc;
- (g) Associations of users (for example associations of users of given waters);
- (h) Tourist and sport organizations.

147. Authorities should be aware that those most willing to participate in the decision-making process, including NGOs, may not necessarily be representative of the public's views. It is therefore important to involve ordinary members of the public as well as specialist groups and, as a *good practice*<sup>\*\*\*</sup>, actively to encourage all the people and organizations likely to be affected by the decision to take part.

148. To the extent feasible, the decision-makers and other relevant officials should be personally involved in the public participation process. The involvement of officials is usually very important as it allows the public to see that its contribution is valued and taken seriously by the public authority and at the same time helps the officials to feel more invested in the public participation process.

*Modalities for public participation*

149. The modalities for public participation should be designed to ensure effective public participation in the light of :
- (a) The particular plan, programme or policy at issue, including its subject matter, geographical application, intended duration, volume and complexity;
  - (b) The number and characteristics of the public which it is expected may wish to participate.
150. It is often helpful to use a mixture of methods to help the public to gain a deeper understanding of the issues and to participate effectively.
151. Bearing in mind that:
- (a) Only if the public fully understands the issues will it be able to see how the proposed plan, programme or policy may affect it in the future and thus to come to an informed opinion regarding what the proposed decision should be;
  - (b) Discussing with other members of the public and the public authority's officials may often help the public to gain a deeper understanding of the issues;
- The best results may often be achieved by using interactive methods of participation, for example, public hearings, public discussions, debates or seminars.
152. Whatever modalities for public participation are employed, it should be clear to the public:
- (a) what information is available and where it can be accessed;
  - (b) how it can submit comments;
  - (c) how the comments will be handled.
153. As a *good practice*\*\*\*, the public authority may wish to check back with those who have commented during the procedure to make sure that their comments have been taken down correctly.

*Fixing time-frames for public participation*

154. When fixing the time-frames for the different stages of the public participation procedure it should be borne in mind that plans, programmes and policies, unlike decisions subject to article 6 of the Convention, are prepared by public authorities solely in the public interest and therefore ensuring sufficient time-frames for the public to prepare and participate effectively may outweigh other factors, in particular the need for an expedient procedure.
155. Time-frames should be set also bearing in mind:
- (a) The methods intended to be used to notify the public and to make the necessary information available as well as the proposed modalities for public participation;
  - (b) The nature of the plan, programme or policy, in particular its geographical application, intended duration and complexity;
  - (c) The number and characteristics of the public which may wish to participate. In order to ensure that the public authority will have sufficient time to consider properly all comments received from the public, the number of the public expected to participate should be an important consideration when setting that time-frame.
156. Given that it is recommended to involve the public at each of the main stages of preparing a plan, programme or policy (see para. 142 above), the overall time period for the whole decision-making process including public participation may be quite long.

157. Whatever the time frame set at the beginning of the process, it is a **good practice\*\*\***:
- (a) To be flexible and allow more time if it becomes clear that the public need it in order to participate effectively;
  - (b) To inform the public whenever there is a significant delay in the process, including in taking the decision itself.

*Providing the necessary information*

158. There are three main types of information which are necessary to provide to the public during a decision-making procedure under article 7:
- (a) Information about the decision-making procedure, including all opportunities for the public to participate;
  - (b) Information about the proposed plan, programme or policy, including access to the draft texts;
  - (c) Information about the possible effects of the proposed plan, programme or policy.
159. The public should be kept informed about the decision-making on an ongoing basis throughout the procedure: what has happened so far and what will happen next.
160. Bearing in mind that good information is vital for the public to participate effectively, the authorities need to ensure that the information they provide is:
- (a) Easy to understand and accessible. A recommended way of making lengthy or complex documents easier for the public to understand is to provide a non-technical summary;
  - (b) Factual, objective and balanced;
  - (c) Tailored to the particular proposed plan, programme or policy and also to the public who may be interested to participate in the decision-making regarding it.
161. As a **good practice\*\*\***, input from the public may be sought as to how the necessary information should best be provided, for example, through using focus groups to find out how much the public already knows about the subject matter.

162. Information about the potential effects of the proposed plan, programme or policy should include information on:
- (a) Legal consequences, for example on property rights;
  - (b) Social impacts, for example, an increase in the population of a certain geographical area;
  - (c) Economic impacts, for example, prospects for increased employment;
  - (d) Environmental impacts and any proposed mitigation measures.
- To the extent that it is held by the competent public authority, the above information should be made available to the public on an equal basis for all options being considered, not just those favoured by the decision-makers.

*Taking due account of comments*

163. **Project developers and/or public authorities should develop and accessively publish at the same time as inviting public input, a set of reasonable criteria according to which comments will be considered to meet a standard of quality entailing their serious consideration in the subsequent decision making. These criteria should be of essentially formal nature and should not exclude comments on the basis of their content.** While not all the views expressed in the comments must necessarily be accepted, in order to **take all comments submitted seriously into consideration, and**

**Comment [CM24]:** Should be a discussion paragraph, and come in second position after current §164 (which moves up to the top of the section)

demonstrate that ~~this has been the case all comments submitted were seriously considered~~, public authorities may ~~wish to~~ use a variety of methods including for example:

- (a) Preparing a table detailing each comment and the way it was handled;
- (b) Grouping the comments in clusters related to certain issues and explaining how these issues were handled; or
- (c) Providing a written response to each comment.

164. Taking due account of comments may result in:

- (a) Amending the plan, programme or policy in the light of the public's comments;
- (b) Taking additional measures, for example, to mitigate or monitor potential harmful effects;
- (c) Selecting an alternative option preferred by the public; or
- (d) Abandoning altogether the idea of adopting the plan, programme or policy.

165. A useful way to demonstrate that due account was taken of the results of the public participation 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 outlining what that impact has been. Such a statement might be attached to the drafts submitted at each stage of the procedure to prepare a plan, programme or policy. In systems which use regulatory impact assessment the statement might form part of the impact assessment report.

**Comment [CM25]:** Harmonize this with § 163 – why would the 2 paragraphs be separated?  
If you think this is a particularly useful way that should be done as a minimum, say so.  
§ 164 should be placed in first position.

#### *Monitoring and review*

166. Bearing in mind that involving the public once a plan, programme or policy has been adopted might contribute to its better implementation, as a ~~good practice~~ any review of implementation may include an opportunity for the public to participate, at least by way of providing comments.

167. As a ~~good practice~~, after a plan, programme or policy has been adopted, it may be helpful to review how successful the public participation procedure was, for example, by consulting the public or commissioning a study to examine the following issues:

- (a) Did all the public affected find out that the plan/programme/policy was being prepared?
- (b) Were they able to participate?
- (c) Do they feel their comments were taken into account?
- (d) Do they understand the decision-maker's reasons for adopting the plan/programme/policy adopted?

#### **IV. Public participation during the preparation of executive regulations and laws (article 8)**

168. 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

**Comment [CM26]:** Please take into account the proposed modifications above, incl. in particular the comments on due account.

proposed executive regulation or law may have a significant effect on the environment, and thus be within the scope of article 8.

169. When determining the appropriate stages of the procedure at which to provide opportunities for public participation, the following considerations should be taken into account:
- (a) How to promote early public participation when options are still open;
  - (b) How to promote effective public participation;  
Bearing in mind the type of executive regulation/law involved, its legal effects and subject matter.
170. The most effective public participation is when the public is allowed to provide its views at each of the main stages of preparing the proposed executive regulations/laws, including:
- (a) At an early stage, when the need to regulate on the particular issue is first mooted;
  - (b) Any draft outline of the proposed regulatory actions (including possible alternatives);
  - (c) The initial draft of the proposed executive regulations/laws;
  - (d) Any subsequent drafts.
171. For the public to participate effectively, in addition to the draft rules, it is important for the public to have access to other relevant information. For example, information about:
- (a) The rule-making procedure, and the public's opportunities to participate during that procedure;
  - (b) The reason(s) lawmakers consider there is a need to regulate on the particular issue;
  - (c) Alternative actions that could be taken to achieve the stated goals;
  - (d) The constraints lawmakers are under or requirements the lawmakers must meet in the draft rules (e.g. international law obligations).
172. If the public is given the opportunity to comment directly, this may include the possibility to submit its views in writing or through more interactive methods of participation, such as public hearings, public discussions, debates or seminars.
173. If the public is given the opportunity to comment through representative consultative bodies, the persons representing the public in those bodies should be selected through a transparent, democratic and representative procedure ensuring that they are accountable to their constituencies and fully transparent about the constituency they represent. Persons with financial or personal interests in the possible outcome of the decision-making should not be permitted to play this role.
174. 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. Such a statement might be attached to the drafts submitted at each stage of the procedure to prepare the draft executive regulations/law. In systems which use regulatory impact assessment such a statement might form part of the impact assessment report.

*(to be further developed in future drafts)*