"Recommendations on Public Participation in Decision-making in Environmental Matters" (2nd Draft for consultation, Oct. 2012)

Austrian Comments 4.12.2012

General issues:

Although the draft recommendations have been improved there is still room for some more development. In particular, it still should be made clearer that the draft recommendations are not supposed to serve as an interpretation guide (see remark, introduction or general recommendations) or a guide on how to design legal frameworks. Therefore, their language still needs quite an improvement, when, e.g., in most of the cases the word "should" is not appropriate regarding the non-binding character of the recommendations. **Therefore, "should" is to be replaced throughout the whole text by the word "may"** (otherwise, the phrase "where appropriate" could be added; e.g., designing a public procedure, page 4, para 5 and 7, Carrying out a public procedure, page 6, point 11 etc.). Even swhere the draft uses "should" at several places, its recommendations go far beyond the actual requirements of the Convention (e.g., page 30, point 130). Furthermore, the direct references on how to implement the Convention's provisions into national law should be deleted (e.g., para 2c), since the recommendations do not serve as an interpretation guide of the Convention. They rather should focus on providing examples of good practice and reporting shared experience in implementing the Convention's provisions.

Specific issues

Introduction (page 1)

para 1: According to the decision ECE/MP.PP/2010/2 Add 1, point 2 c, the draft recommendations should support the improvement of the implementation of the Aarhus Convention and its wording should be in compliance with this decision throughout the whole draft. Therefore, the sentence on the ratio of the draft recommendations should read "for more practical guidance on how *to improve the implementation* of the Convention's provisions".

para 3: The introduction should clarify that the draft recommendations are not intended to serve as an interpretation guidance. Therefore, the word "primarily" should be deleted as it may lead to uncertainty and misunderstandings in this respect.

General recommendations

Definitions

2c: Since the draft recommendations are not supposed to serve as an interpretation of legally correct implementation of the Aarhus Convention, they should not instruct

the specification and interpretation of legal issues in the competence of the parties to the Convention . Therefore, the reference to the need for specifications in national law should be deleted, otherwise the wording has to be adapted, e.g., “may” instead of “should”.

Designing a public participation procedure

Replace the word “should” by the word “may” throughout the whole draft text from **point 3 on until point 9.**

Point 7 (a) - (c) lacks clarity and, therefore, requires more clarification. The assignment to monitor an ongoing administrative procedure and to evaluate a finished procedure should not put additional burden on the public authorities. Furthermore, administrative procedures are typically ruled by national administrative procedure legislation ..

Point 8 and box on page 5: The proposal for an additional involvement of NGOs in decision-making bodies related to the decision-making procedures lacks clarity and would lead to a confusion of the roles and functions of all involved. This proposal goes far beyond the Convention’s provisions without being covered by any of its concepts (especially the transfer of the power of decision making ot the public/NGOs).

Public participation on the “zero option”

In point 13: Such legal opinions, as expressed in pt. 13, do not seem to be in compliance with the character of the draft recommendations: Their function consists in recommending various activities rather than in expressing legal opinions and interpreting laws.

Delegating responsibility for public participation

From point 18 until point 21 the recommendations clearly interfere with the competence of the parties to Convention for their own legislation, including the authority to determining and assigning public authority entities or bodies. Moreover, the proposal for delegating responsibility for public participation introduces legal concepts that go far beyond the Convention’s provisions. Some parts of the draft text, e.g. point 19, need substantive revision.

Defining and identifying the public which may participate

Point 24 again lacks clarity; e.g., what does “a well-balanced and inclusive involvement of the public” exactly mean and who decides on that? To what extent do “social and economic interests” found a legal base for public participation? Who decides on what constitutes a “critical voice” to be included in administrative procedure? Are there any criteria for that?

Participation of the public concerned from other countries

The present draft offers some valuable proposals, which indeed might support the conduct of transboundary cooperation between neighbour states and/or regions.

Point 25 (a) (iii) needs more clarification, in particular it should be clarified which type of documents would be concerned; in our view the respective recommendation only refers to the relevant documents subject to the obligation to be translated and transmitted.

Point 27: This recommendation touches and, moreover, interferes with the provision of Art. 3 of the Espoo-Convention, which provides for the procedure for notification of the documentation of a planned project between the party of origin and the affected party. Therefore, it needs a revision in the light of the Espoo-Convention, too.

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

Point 31 (f) and (g): The respective recommendations seem to go against the Convention's provisions as set out in para 22 of annex 1. According to the *expressis verbis* applicable Article 6 para 1 lit. (b), the criteria of "significant effect on the environment" has to be applied.

Points 33, 34, 35: The decisive criteria, whether a planned project is subject to an EIA and therefore to a public participation procedure or not, is still given by the criteria of potentially "significant effects on the environment" by a planned project to be assessed by a case-by-case examination, while the types of projects subject to an EIA are clearly defined and listed in the various relevant legal provisions both national and international (e.g., EIA-Directive, Espoo-Convention). The types of "clear criteria" mentioned in pt. 35 (a) are already set in the EIA-Directive in its Annex III. Is there any need for further criteria or mechanisms to be established?

Adequate, timely and effective notification (article 6, para 2) – pts. 39-56

Point 40 (e): The Convention's provisions in Art. 6 para 2 lit. (e) do not provide for communicating the fact that an activity is not subject to a national or transboundary EIA procedure. According to the national legislation so-called negative screening decisions might be publicly announced.. We do not see the need for any further information or any further publication of the information on such activities.

Point 42: More clarification is needed when requiring "that officials have the knowledge and ability to deliver effective outreach to the public concerned".

Point 46: This provision clearly illustrates how, at several occasions, the draft recommendations tend to misunderstand its actual aim and duty: While it interprets provisions and concepts of the Convention (arg.: "'effective manner' *means* that …" …what will constitute "effective notification" *must*…), it rather should illustrate some good practise examples or recommend some practical steps in applying the respective provision.

Point 49 (a): Possible complaints from members of the public concerned do not necessarily mean that doubts regarding the conduction of an adequate and effective notification on a project are justified. Where the legal system provides for legal actions and remedies for the parties enjoying *locus standi* in a procedure, there seems to be no need for repeated notification. Recommendations in lit. (c) and (d) seem to be reasonable.

Point 51 (d): We do not see the need that public authorities, publicly announcing a planned project and the respective administrative procedure, should start to use so-

called social media (e.g., Facebook, Twitter, blogs) in order to fulfil their administrative assignments (see also point 53, last sentence).

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

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

Point 65: There is no coverage for the recommendation to foresee public participation in screening or scoping procedures in the Convention's provisions, which mainly focus on EIA and permitting procedures, while screening procedures aim at deciding whether or not an activity is subject to an EIA. The same applies for point 67.

Point 66, Nos. (1) to (5), needs a revision, more elaboration and certainly clarification. Some of the listed examples legally would not exclude a situation where "all options are open"; e.g. when No. (4) refers to a politician's promise counteracting an open procedure.

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

Points 93-96: The Convention's provisions mention the submission of written comments or of oral comments at a public hearing or inquiry, without favouring one or the other option as well as without obliging parties to the Convention to legally foresee both options of submitting comments of the public concerned. Therefore, the draft recommendations should not go beyond these provisions by stating or recommending the need for holding one or more public hearings.

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

Point 108: The draft recommendations should avoid additional burden on the public authority and keep a realistic and feasible scenario of the implementation of the Convention; the proposal for individual replies by the public authorities seems to be excessive and unfeasible.

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

Point 11 (b): see under point 108: ditto.

Point 112 : The legal statement at the end of the paragraph needs revision.

Point 113: As mentioned above, the draft recommendations should avoid any legal interpretation of the Convention's provisions or concepts and stick to the role of providing good examples.

III. Public participation concerning plans, programmes, policies (Art. 7)

Point 129 ff: According to Art. 7, the Aarhus Convention knows different levels and degrees of obligations regarding plans/programmes and policies. This issue is not reflected in the recommendations. In addition, Art. 7 refers to Art. 6 para 2, 4 and 8 regarding plans and programmes. The recommendations refer to Art. 6 in general

regarding plans, programmes and policies. The text of the recommendations in 130 and 132 has to reflect the provisions of the Aarhus Convention, the wording “should” is not appropriate in this context.

Point 129 d: Instead of “the potential “public” will be very large”, rephrase “the potential public might be very large.” Experience shows that especially for large scale plans and programmes the public shows less interest.

Point 131: The word “should” should be replaced by “may”. 131 bii): The last part of the sentence “or interested in participating” should be deleted. This seems to go beyond the requirements of the Convention.

Plans and Programmes

Point 133: The word “should” should be replaced by “may”.

Point 134. Ditto. Lit. (b) remains unclear, what kind of plans/programmes may have significant effects on the environment without setting the framework for development consent? Concrete examples would be useful. Point 134 lit. a/b: The link to SEA is unclear, according to which requirements should it happen? If the SEA Protocol or SEA Directive is meant, than the example “national environmental policies” is wrong, because both regulations do not require a mandatory SEA for policies. SEA according to the above mentioned regulations require public participation.

Policies

Point 135: The word “should” should be replaced by “may”.

IV: Public Participation during preparation of executive regulations and laws (Art. 8)

Point 136: According to the requirements of Art. 8 (“strive to promote effective public participation”) the word “should” should be replaced by “may”.

Point 137: The word “should” should be replaced by “may”, since the examples go beyond the requirements of the Convention in relation to the executive regulations and laws.

Point 138: This provision should be deleted since it is not practical. If there are many comments to be integrated into the text directly, the text is not readable anymore..