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Meeting of the Signatories to  
the Convention on Access to Information,  
Public Participation in Decision-making and  
Access to Justice in Environmental Matters  
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(Item 5 (g) of the provisional agenda)

**KEY ISSUES IN THE IMPLEMENTATION OF  
ARTICLE 7 ON PLANS, PROGRAMMES AND POLICIES,  
AND ARTICLE 8 ON REGULATIONS AND LAWS**

Prepared by the European ECO Forum  
and the Regional Environmental Center for Central and Eastern Europe

Executive Summary

1. Both articles 7 and 8 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters cover public participation in decisions that are generally applicable, rather than activity-specific. The Aarhus Convention sets out certain principles and requirements for public participation in plans, programmes and policies (art. 7), as well as in regulations and other generally applicable legally binding normative instruments (art. 8). This paper reviews the principles and practices for public participation in such instances and makes recommendations to help future implementation of Articles 7 and 8.

2. A key principle of article 7 is that Parties provide for and take account of public participation in the preparation of plans and programmes. This principle holds true for policies as well. We recommend that the Signatories

CEP/WG.5/2000/10  
page 2

GE.00-31436

should establish an assessment system to incorporate public comments into plans, programmes and policies, similar to the internationally acknowledged system of strategic environmental assessment (SEA), which includes procedures for environmental assessment of plans, programmes and policies in which public participation plays a central role.

3. Article 8 supports important principles of early and meaningful participation in the development of executive regulations and generally applicable legally binding normative instruments. Yet, article 8 is a framework that Parties will need to fill in with concrete procedures for consistent public participation. We recommend that the Signatories should establish guidelines for public participation in the development of executive regulations as a standard and required procedure. We also recommend that the Signatories should build upon best practices for public participation in law-drafting to ensure regular and consistent public input.

4. The European ECO Forum and the Regional Environmental Center for Central and Eastern Europe (REC) propose that the Signatories to the Aarhus Convention establish a task force to support the implementation of article 7 and article 8. A task force is a suitable body to study best practices, develop guidelines, encourage national implementation, and integrate the principles of these two articles into developing international practice. For example, such a task force can provide important input to the development of an international SEA instrument, since SEA can be effectively applied to plans, programmes and policies, as well as to the development of regulations and laws.

**I. IMPLEMENTING ARTICLE 7 ON PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT**

**A. Analysis of the Convention's requirements**

5. The Convention requires the establishment of an extensive public participation procedure for plans and programmes based on the following elements:

(a) Early start of public participation (art. 7, referring to art. 6, para. 4);

(b) Identification of the public (art. 7);

(c) Notification of the public (art. 7, referring to art. 6, para. 3, and hence to art. 6, para. 2) and public access to documents (art. 5, para. 5(a));

(d) Sufficient time for effective public participation (art. 7, referring to art. 6, para. 3);

(e) Due account of outcome of public participation (art. 7, referring to art. 6, para. 8); and

(f) Public access to explanatory materials on dealings with the public (art. 5, para. 7 (a) and (b)).

6. The Convention also requires that, to the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment. Therefore, although the requirements for policies are not as detailed as those for plans and programmes, the Convention gives Parties the same goals for early and effective public participation in the preparation of policies as exist for plans and programmes.

7. The above requirements establish opportunities for the collection of public comments. The participating public should be notified about the preparation of plans, programmes and policies, be allowed to participate early enough when all options are open, and have sufficient time for participation.

8. The capacity of the public to participate during the preparation of plans, programmes and policies relating to the environment will be severely hampered if mechanisms are not in place to facilitate easy access to information and to receive feedback on these plans, programmes and policies in a coherent, systematic and timely manner. To this end, Parties should encourage better use of new information and communications technologies.

9. When public authorities give prompt notification and have received public comments, the key remaining question is: What happens with those comments? This question should be asked when evaluating the implementation of article 7 of the Convention. It is of the utmost importance because it indicates whether the public concerned is duly provided with the Convention-guaranteed right to have due account taken of its comments in the preparation of plans, programmes and policies.

B. Needs and realities of the practical application of article 7

10. In practice, public participation in plans, programmes and policies takes place to a limited extent in western Europe and is just beginning in several countries in central and eastern Europe and in the newly independent States (NIS). Public participation most often occurs when the public authorities have a system for assessing the environmental impact of the plan, programme or policy. Such public participation greatly improves the technical analysis and final substantive content of the plan, programme or policy in question. In many cases, alternatives and options proposed by the public make the plan, programme or policy stronger and more economically viable for the region. The following examples are based on actual public participation efforts in plans, programmes and policies.

Example of a programme

11. The Regional Operational Programme for the South West, Czech Republic (1999): Background documents for the draft programme suggested financing various business promotion schemes and the development of a new highway and regional airport. After initial consultation with NGOs concerned about these proposals, the planning agency provided for the participation of elected NGO representatives in the planning teams and organized an ad hoc environmental assessment parallel to the elaboration of the programme. Successive drafts of the programme and the environmental assessment were periodically put on the Internet and the final drafts of both documents were sent to 140 regional stakeholders. The public was given the opportunity to provide written comments, either by e-mail or by post, or to give verbal comments at two regional public hearings. It is generally accepted that environmentally harmful elements have been removed from the final programme, which is accepted by NGOs and other regional stakeholders.

Example of the plan

12. The Territorial Development Plan for Naissaar Island, Estonia (1997): Naissaar Island is a unique environmental asset. The need for a comprehensive territorial plan for the island emerged in 1995 after re-privatization of its land. Territorial planning began with the active surveying of citizens' alternative suggestions. Preliminary environmental assessment was carried out to review three alternatives to the plan. The recommended optimal solution was developed into a draft territorial plan, which was subjected to detailed environmental assessment. Each of these stages of the planning process enabled landowners, NGOs and interested citizens to raise comments through public hearings and interactive exhibitions. Such an approach to territorial planning stands out as "voluntary good practice" and demonstrates the importance of strategic environmental assessment in the evaluation of public comments.

Example of a policy

13. Slovak Energy Policy (1999): The draft strategy from 1998 suggested the further development of a nuclear power plant, new hydro-power schemes and the intensification of coal power plants. Concerned NGOs and academic institutions drew up an alternative energy policy which put the emphasis on transforming the energy sector, and on energy-saving and alternative energy schemes. Based on an agreement with the Ministry of the Environment, a special working group was established involving stakeholders to assist the Ministry of the Environment and the Ministry of the Economy in communicating with the

public concerned and evaluating public comments. Together with both Ministries, the working group organized a large-scale media campaign and provided information through the Internet and regional information points. Five public hearings, including large public hearings attended by the Ambassador of Austria and Members of the Slovak Parliament, were held. The comments received were evaluated through an ad hoc strategic environmental

assessment. The outcomes of the public participation and strategic environmental assessment were periodically provided to the agencies preparing the official Slovak Energy Policy and were effectively reflected in it.

14. The practice of such public participation has shown that many societies use a written process for public input, which excludes especially local people, who do not always have access to information concerning both the proposal and the process. To achieve a detailed, substantive evaluation of plans, programmes and policies by the public, the public authorities should go beyond requesting written comments and reach out to the public, through such methods as hearings and meetings.

15. Practice has also shown that taking due account of the outcome of public participation in plans, programmes and policies goes hand in hand with a strategic environmental assessment or review of those same plans, programmes and policies. Thus, the implementation of article 7 will, in part, depend on whether or not Parties have some type of assessment or review of proposed plans, programmes and policies. Most relevant is the ability of the established review system to guarantee that clear and effective procedures exist for gathering public comments and that public authorities take due account of these comments in the preparation of plans, programmes and policies.

C. Principles for the effective implementation of article 7

16. To effectively implement article 7, the Signatories and Parties should build a system to assess the environmental impact of plans, programmes and policies. The Convention's principles guiding the implementation of article 7 are:

(a) Relevant public authorities shall start with public participation when all options are open (art. 6, para. 4);

(b) The participating public should be as broad as possible, taking into account the objectives of the Convention. The public should be effectively notified (art. 7 and art. 6, para. 2), provided with sufficient

time for provision of comments (art. 6, para. 3) and have access to documents relating to the strategy (art. 2, para. 3(b) and art. 4). Access to documents, public notification and response gathering must be organized in a coherent manner and may effectively use Internet-based communication tools;

(c) Each Party shall ensure that due account is taken of the outcome of public participation. Relevant public authorities will review all comments on the proposed plan, programme or policy as well as the alternatives and options proposed by the public. The review process should at least cover the environmental aspects of the plans, programmes and policies;

(d) The public should have access to explanatory material on the dealings with the public (art. 5, para. 7(a) and (b)). These materials should include the review of the proposed plan, programme or policy, all public comments and proposed alternatives, and all responses from the public authority to the public comments with information on whether and how they were taken into account in the review process and in the final plan, programme or policy.

17. The principles for the application of article 7 are very similar, if not identical, to internationally recognized principles of effective strategic environmental assessment (SEA). This is evident, for instance, from a comparison of the above principles with the baseline principles for SEA application in central and eastern Europe and NIS (presented in ARH.CONF/BD.17):

- (a) There should be a well-grounded formal basis for SEA requirements;
- (b) There should be early and adequate public participation;
- (c) The agency proposing the plan, programme or policy should undertake the assessment;
- (d) The SEA procedures should require the evaluation of alternatives, and should always enable the consideration of environmental and human health impacts as well as socio-economic implications;
- (e) There should be clear reporting and documentation of the process and of commitments;
- (f) There should be a clear and substantive relationship between the SEA and the decision-making process;
- (g) The SEA process should have built-in checks and balances, both formal and informal.

## **II. IMPLEMENTING ARTICLE 8 ON PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS**

### **A. Analysis of the Convention's requirements**

18. Article 8 illustrates an extremely important belief that public participation in the development of regulations and other legally binding instruments, such as laws, will help make them fair and accountable. Article 8 applies to all regulations, executive orders, decrees or other rules of general application that are developed by public authorities. It also applies to the development of draft legislation within public authorities, although, under the Convention, "public authority" does not include legislatures.

19. Article 8 sets out several very basic ideals for public participation in the development of regulations and other legally binding instruments:

- (a) Public participation early in the process;
- (b) Clear time frames for the public participation process;
- (c) Publication of draft regulations and other legally binding instruments so that the public can have access,
- (d) Opportunity for public comment;
- (e) Input from the public taken into account by the public authority.

20. Article 8 differs from most other articles in the Convention in that it establishes a framework of principles that Parties must strive to meet as they develop procedures for public participation in the development of regulations and other legally binding instruments by public authorities. This leaves it up to the Signatories to discuss how best to meet these goals.

21. In general, experience with public participation in the preparation of regulations and laws has been haphazard and in some countries non-existent. Parties will need more information and guidance to implement article 8 in the spirit of the Aarhus Convention. Public participation in the development of regulations and laws is extremely important. Regulations, laws and other similar legally binding instruments have a huge impact on the environment and provide an excellent opportunity for governments to take advantage of the public's technical, economic, social and other expertise.

#### B. Needs and realities of the practical application of article 8

22. The extent to which members of the public participate in the preparation of regulations and laws by public authorities differs greatly from country to country. However, very few countries have formal procedures for public notice, publication of draft rules and public input. In addition, very few have formal procedures for taking this input into account.

23. This lack of formal rules, in general, means that participation is rarely open to everyone, participation occurs in an inconsistent fashion, and there is no access to justice where barriers exist to such participation.

24. In general, NIS do not require the government to inform the public about

draft laws or regulations or to publish them for public comment. Laws are usually published only after their passage.

25. Example: Participation in law-drafting in Ukraine. The few draft laws that were published for wide public discussion greatly benefited from this process. For instance, the draft law on the protection of the natural environment was published in newspapers and discussed and commented upon by the public. The public proposed an alternative draft, which was taken into account together with public comments and proposals.

26. In general, in NIS, the preparation of regulations within a public authority is not open to public input. Information about the process of decision-making by the president, the cabinet of ministers or other central executive bodies is generally not available. There is no regular publication of draft regulations or decisions made by executive bodies.

27. In most central and east European countries, public participation in the preparation of regulations and legislation is also based on ad hoc practices, without clear legal procedures. However, there are a few exceptions that are rooted both in the legal system and in practice.

28. Example: Legal requirements for public participation in Hungary. Hungary is an exception in the region, requiring public participation in drafting legislation both in the drawing-up phase (in the public authority) and in parliament. Hungary also requires regulations passed by ministries, other agencies or at the local level to go through a public comment process. Citizens must be allowed to participate directly or through their representative organizations. The Environmental Protection Law requires procedures for public involvement in drafting both laws and regulations. Act XI (1987) outlines practical and procedural issues, including an obligation on the Ministry of Justice to ask for input from NGOs, chambers of commerce, municipalities, and other bodies of the State structure. In addition, the Ministry of the Environment passed a decree requiring its offices to follow specific procedures for public involvement in rule-making, including early notification and the involvement of NGOs before and during the drafting process.

29. Example: Public participation in practice in Poland and elsewhere. Although not set out in law, a similar practice exists in Poland, where the Ministry of the Environment and regional agencies consult members of the public and NGOs that are on an informal consultative list. Several other countries in the region have also developed the practice of consulting selected NGOs when drafting new laws or new regulations in which there is widespread public interest. In several countries (e.g. Albania, Bulgaria, Croatia, Latvia, Lithuania, and Yugoslavia), NGOs are invited on an ad hoc and individual basis to participate in consultations or discussions of draft laws and regulations.

30. In western Europe, most countries have some formal procedure for participation in the drafting of legislation. Fewer have formal procedures for participation in the preparation of regulations.

31. Examples: Public participation in Denmark and Norway. In Denmark, the largest NGOs are regularly consulted on draft laws and appointed to advisory committees on rule-making. In Norway, the Minister finalizes the draft law and sends it for public comment to all institutions and interested groups, who have three months to comment.

32. In conclusion, countries throughout the UN/ECE region show different levels of legal requirements and actual inclusion of the public in the preparation of both regulations and laws. In general, the higher the public scrutiny of a drafting exercise, as is often the case in law-drafting, the higher the level of public involvement. Due to the lack of formal procedures, regulations, as opposed to laws, enjoy less public involvement in their preparation and, in some cases, are formulated entirely behind closed doors.

#### C. Principles for the effective implementation of art. 8

33. The Convention has set out a framework of goals for Parties regarding public participation in the preparation of regulations and other legally binding instruments, but has not yet laid out a system of requirements in this area. As seen in the above section, this echoes in many ways the practice found throughout the region. Although some Parties invite public comment on laws and regulations, this public participation process is characterized by the following:

(a) The "public" tends to be selected by the public authority and is rarely understood as the broadest definition of "public";

(b) Public input with regard to proposed laws tends to occur after the law has been drafted by the public authority and before it goes to parliament. There is much less opportunity for public involvement earlier in the process within the public authority;

(c) Although public input is sometimes allowed concerning proposed laws, this is infrequently the case in the development of administrative or executive rules;

(d) There are very few clear rules and procedures in place that govern public participation in this area, so it is very difficult for a member of the public to know how to participate or to claim access to justice;

(e) When public input is allowed, it is usually in an ad hoc fashion so that only certain rules and laws benefit from public input and so that some segments of society (such as businesses) are consulted but others (such as

environmental, consumer or labour interests) not.

34. It is extremely important to have effective and consistent public participation in the development of both regulations and laws. Especially regulations, decrees, executive orders and other instruments often include the precise requirements for the implementation of environmental and other laws.

It is exactly at this level that public involvement is the most meaningful and useful to the public authority. It is also at this level that the public can contribute towards the most effective implementation of environmental requirements.

35. The current level of public participation in the preparation of regulations and other generally applicable legally binding normative instruments does not meet the spirit or the basic requirements of the Convention.

36. Signatories may find it difficult to know exactly what can and should be done to implement article 8 without some type of exchange of information and guidelines. The framework for article 8 and the other values embodied in the Convention guide Parties towards the following principles:

- (a) As broad as possible a public should be involved in rule-making;
- (b) Public input should be requested very early in the rule-making process;
- (c) Public input is as important to the development of administrative or executive rules as it is to the development of new legislation;
- (d) For consistent and effective public participation, Parties should develop clear procedures and guidelines upon which both public authorities and members of the public can rely.

### III. CONCLUSION

37. At their Second meeting, the Signatories to the Convention should establish a task force to develop guidelines for "appropriate practical and/or other provisions" to ensure the effective implementation of articles 7 and 8.

38. For article 7, such guidelines should focus on approaches to (i) public notification, access to documents and response-gathering and (ii) systems to ensure that public authorities take due account of public comments on plans,

programmes and policies.

39. The task force should develop guidelines to fill in the framework of article 8. This should include the development of methods of active and open notification of the public; the development of notification and participation timeframes sufficient for effective participation; options for making draft regulations and laws public; options for giving the public the opportunity to comment; and methods for taking the public comments into account in the rule-making and law-drafting process.

40. For the implementation of both articles, the task force should examine how to best use electronic communication as one means for facilitating notification and public participation. (See also CEP/WG.5/2000/11.)

41. The European ECO Forum and REC support the development of a protocol on strategic environmental assessment, which would aid in the implementation of articles 7 and 8 by establishing common principles and requirements for the environmental assessment of plans, programmes and policies, as well as of regulations and legislation. Documents prepared by a task force on articles 7 and 8 would support the implementation of the Convention by its Parties and may also be used for future negotiation of such a protocol on strategic environmental assessment.

42. In summary, the task force is needed to:

(a) Identify both opportunities and barriers under articles 7 and 8 and promote best practices for public participation in plans, programmes and policies, as well as in executive regulations and generally applicable binding legal instruments;

(b) Develop guidelines for achieving consistent participation at the national level that fully takes the public comments into account;

(c) Develop an assessment system to incorporate public comments into plans, programmes and policies, as well as into regulations and laws;

(d) Assist in sharing information on legal and procedural requirements for public participation under articles 7 and 8 and encourage training, workshops and exchanges for public authorities at all levels, as well as for non-governmental organizations, on the implementation of public participation under articles 7 and 8;

(e) Assist in developing national legislation that fulfils the goals of articles 7 and 8;

(f) Assist national parliaments in incorporating the Convention's principles into the parliamentary rules in each Signatory country, including access to drafts of legislation for the purpose of public consultation and comment; and

(g) Provide important input to the development of an international SEA instrument, since SEA can be effectively applied to plans, programmes and policies, as well as to the development of regulations and laws.