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Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee on general issues of compliance

Summary

The present document was prepared by the Compliance Committee pursuant to the request set out in paragraph 10 of decision V/9 of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (see ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraphs 13 (b), 14 and 35 of the annex to decision I/7 on review of compliance (ECE/MP.PP/2/Add.8).

The document reports on general issues of compliance by Parties with the provisions of the Convention considered by the Committee during the period between 6 April 2014 and 19 June 2017, being the respective deadlines for the Committee's reports to the fifth and sixth sessions of the Meeting of the Parties as set out in paragraph 35 of decision I/7.

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Introduction

1. During the period between 6 April 2014 and 19 June 2017, the deadlines respectively for the Committee's reports to the fifth and sixth sessions of the Meeting of the Parties as envisaged in paragraph 35 of decision I/7 (the reporting period), the Committee adopted findings on nineteen cases.¹
2. The present document reports on general issues of compliance with the provisions of the Convention considered by the Committee in its findings on those nineteen cases.

I. Definitions and general provisions

Definition of "environmental information" - article 2, paragraph 3

3. The Committee considered the definition of environmental information in article 2, paragraph 3 of the Convention in three cases in the reporting period. In this context, it considered that the size of a land parcel fell within the scope of article 2, paragraph 3(a).² The Committee also found that mining licences, including the "quantities of non-ferrous ore" that were entitled to be extracted under those licences, was "environmental information" under article 2, paragraph 3(b).³ It also considered that an archaeological study, an archaeological discharge certificate⁴ and a Preliminary Safety Analysis Report and the Basic Design for a nuclear facility⁵ were all environmental information within the meaning of article 2, paragraph 3 (c).

"The public" and "the public concerned" in the transboundary context – article 2, paragraphs 4 and 5⁶

4. The Committee notes that the definitions of the public and the public concerned in article 2, paragraphs 4 and 5, of the Convention do not contain any wording that limits their scope to only the public in the Party concerned. Rather, the Committee considers that those definitions should be seen in the context of the requirements set out in article 3, paragraph 9, of the Convention, which requires that the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile. In the light of the above, and given that no provision of the Convention states otherwise, the scope of obligations related to public participation in decision-making with respect to proposed activities subject to article 6 of the Aarhus Convention is not limited to the public only in the Party concerned.⁷ That is to say, in cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country will be members of the "public concerned" for the purposes of article 6. Moreover, foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.⁸

¹ See ECE/MP.PP/2017/39, paras. 44-61.

² Recommendations on advisory request ACCC/A/2014/1 (Belarus), para. 25.

³ Findings on communication ACCC/C/2012/69 (Romania), para.51.

⁴ Findings on communication ACCC/C/2012/69 (Romania), paras. 49 and 50.

⁵ Findings on communication ACCC/C/2013/89 (Slovakia), para. 80.

⁶ See also paras. 29-32 below.

⁷ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 68.

⁸ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 69, citing findings on communication ACCC/C/2004/03 (Ukraine), ECE/MP.PP/C.1/2005/2/Add.3, para. 26.

Assisting the public in facilitating participation in a transboundary context – article 3, paragraph 2

5. It is clear to the Committee that the obligation in article 3, paragraph 2 of the Convention to “endeavour to ensure that officials assist and provide guidance to the public...in facilitating participation in decision-making” applies also to decision-making procedures outside the Party concerned where authorities of the Party concerned are not competent to take decisions.⁹ For the avoidance of doubt, the Committee points out that this means that both the Party of origin and the affected Party have obligations under article 3, paragraph 2, to endeavour to ensure that their officials assist and provide guidance to the public concerned of the affected Party to facilitate their participation in the relevant decision-making.¹⁰

6. Article 3, paragraph 2 requires that “each Party shall *endeavour* to ensure that officials and authorities assist and provide guidance to the public [...] in facilitating participation in decision-making” (italics added). While this is an obligation of effort, rather than of the result, nevertheless the efforts taken may be subject to due diligence scrutiny. Moreover, while the obligation to “endeavor to ensure”, just like all other obligations in the Convention, is addressed to the Party concerned, the Committee may examine in specific cases whether a public authority or an official, as a representative of the Party concerned, took the efforts needed to meet the requirement of this provision.¹¹ In cases concerning ultra-hazardous activities, such as nuclear power plants, it is clear to the Committee that, generally speaking, the possible adverse effects in case of an accident can reach far beyond state borders and over vast areas and regions.¹² The obligation to take efforts to ensure that officials facilitate the public’s participation in decision-making concerning these activities, being activities invariably of wide public concern, must be seen in this context.¹³

7. While the Committee considers that the obligation in article 3, paragraph 2 to “endeavour to ensure that officials assist and provide guidance to the public ... in facilitating participation in decision-making” should not be interpreted as requiring a Party to necessarily always use all of the rights and competences that it has under international or national law with respect to a decision-making procedure in another country, a level of effort appropriate to the actions open to it in the particular context is required. For instance, whether or not a Party should facilitate the participation of its public, if its public so requests, by itself requesting to enter into a transboundary procedure under applicable international or EU regimes may differ depending on whether the Party was formally notified or not.¹⁴ In the case of a formal notification from another country, the Committee considers that when deciding whether to enter into a transboundary procedure under applicable international or EU regimes, a mere awareness by the Party of a strong interest by its own public in the outcome of the decision-making subject to the EIA procedure is a relevant consideration to be taken into account, even without a clear request from its public, when deciding whether to enter into the transboundary procedure in order to facilitate the participation of its public in that decision-making.¹⁵

8. In a case where a Party concerned is not formally notified by the Party of origin, but it is nevertheless aware of the strong interest of members of its public in the decision-making,

⁹ Findings on communication ACCC/C/2013/92 (Germany), para. 86.

¹⁰ Findings on communication ACCC/C/2013/92 (Germany), para. 87.

¹¹ Findings on communication ACCC/C/2013/92 (Germany), para. 88.

¹² Findings on ACCC/C/2011/71 (Czech Republic), para.74.

¹³ Findings on communication ACCC/C/2013/92 (Germany), para. 89.

¹⁴ Findings on communication ACCC/C/2013/92 (Germany), para. 90.

¹⁵ Findings on communication ACCC/C/2013/92 (Germany), para. 91.

it would be obliged by article 3, paragraph 2, of the Convention to at least inquire with the Party of origin what could be done to facilitate the participation of its own public in the decision-making. If, as a result of those efforts, it ultimately became clear that nothing further to facilitate the participation of its own public could be done, the Party concerned's refusal of the member of the public's request to participate should clearly demonstrate that due account has been taken of her concerns and not only of the views of the authorities. Moreover, at a minimum it should provide the links to where the relevant information and contact details concerning the public participation procedure can be found on the Party of origin's website.¹⁶

Penalization, harassment and persecution of persons exercising their rights under the Convention – article 3, paragraph 8

9. The Committee considers that in order to demonstrate a breach of article 3, paragraph 8, by the Party concerned, four elements must be established:

- (i) One or more members of the public have exercised their rights in conformity with the provisions of the Convention,
- (ii) The member of the public or those members of the public have been penalized, persecuted or harassed;
- (iii) The penalization, persecution or harassment was related to the member(s) of the public's exercise of their rights under the Convention;
- (iv) The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur.¹⁷

Each of these elements is discussed in more detail below.

(i) One or more members of the public have exercised their rights in conformity with the provisions of the Convention

10. The Committee considers that the rights referred to in article 3, paragraph 8, encompass the broad range of rights granted to members of the public by article 1 of the Convention, namely the rights of access to information, public participation in decision-making and access to justice, which contribute to the right of every person of present and future generations to live in an environment adequate to their health and well-being. The exercise of these rights would include situations in which the provisions of the Convention concerning access to information, public participation in decision-making and access to justice set out in articles 4 to 9 of the Convention are applicable as well as situations covered by the general provisions of article 3 of the Convention, but is not limited to them. Accordingly, the Committee finds that article 3, paragraph 8 applies to all situations in which members of the public seek access to information, public participation or access to justice in order to protect their right to live in an environment adequate to their health or well-being.¹⁸

(ii) The member of the public or those members of the public have been penalized, persecuted or harassed

11. The terms "penalized", "persecuted" and "harassed" are not defined in the Convention and they are to be understood according to their ordinary meaning in their context and in the light of the Convention's object and purpose.¹⁹ As stated in the Aarhus Convention

¹⁶ Findings on communication ACCC/C/2013/92 (Germany), para. 93.

¹⁷ Findings on communication ACCC/C/2014/102, para. 65.

¹⁸ Ibid., para. 66.

¹⁹ Ibid., para. 67, citing the Vienna Convention on the Law of Treaties, article 31.

Implementation Guide, article 3, paragraph 8 “is a broadly worded provision which aims to prevent retribution of any kind.”²⁰

12. In determining whether the treatment complained of amounts to penalization, persecution or harassment, the Committee notes the approaches taken within the framework of human rights instruments. Such instruments generally provide wide protection against human rights violations combined with possibilities for the State concerned to claim its actions served a legitimate aim or at least did not relate to the special characteristics of the person concerned. This approach envisages that, depending on the particular facts of the case at hand, an action taken by the State may be objective and reasonable, pursue a legitimate purpose and be proportional in one set of circumstances, and not in another.²¹

13. Whether the treatment complained of amounts to penalization, persecution or harassment must be assessed on a case-by-case basis in the light of the particular circumstances, including whether the action taken by the State is objective and reasonable, and pursues a legitimate purpose. When making this assessment, the Committee considers whether the treatment complained of could be reasonable and proportional and pursue a legitimate public purpose. If so, the treatment could be in compliance with article 3, paragraph 8, of the Convention. However, the Committee must also consider whether acts taken ostensibly in order to serve a legitimate purpose (such as protecting public order) may in fact have another, illegitimate, purpose, for example to prevent persons from exercising their rights to participate under the Convention. If that were the case, such acts or treatment may amount to persecution, penalization and harassment within the meaning of article 3, paragraph 8 of the Convention.²²

14. The Committee notes that the wording of article 3, paragraph 8 is not limited in its application to acts of public authorities as defined in article 2, paragraph 2, of the Convention, but rather covers penalization, persecution or harassment by any state body or institution, including those acting in a judicial or legislative capacity. It also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent.²³

(iii) The penalization, persecution or harassment was related to the member(s) of the public’s exercise of their rights under the Convention

15. A key element of article 3, paragraph 8 is causation. The treatment amounting to penalization, persecution or harassment must have occurred because the communicant has sought to exercise his or her rights under the Convention. If a person has been penalized, persecuted or harassed but that was entirely unrelated to his or her exercise of his or her rights under the Convention, then there is no breach of article 3, paragraph 8.²⁴

16. With respect to the level and burden of proof, the Committee considers that useful guidance may be drawn from the approach taken by the European Court of Human Rights to cases of alleged discrimination under article 14 of the European Convention of Human Rights. When determining whether discrimination has occurred, the European Court of Human Rights has held that the applicant is only required to show evidence of a difference

²⁰ Ibid., para. 67 citing The Aarhus Convention: An Implementation Guide (second edition), p. 71.

²¹ Ibid., para. 68.

²² Ibid., para. 69.

²³ Ibid. para. 70.

²⁴ Ibid., para. 71.

in treatment, after which the onus passes to the State to demonstrate that the difference in treatment can be justified.²⁵

17. Applying the above approach to article 3, paragraph 8, the Committee considers that the communicant must first establish a prima face case that members of the public were penalized, persecuted or harassed because they sought to exercise their rights under the Convention. The burden of proof then moves to the Party concerned to show, on the balance of probabilities, that the penalization, persecution or harassment was entirely unrelated to the fact that those persons sought to exercise their rights under the Convention.²⁶

(iv) The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur

18. The final element examines the extent to which the penalization, persecution or harassment has already been fully redressed through domestic remedies, for example by compensation to the persons concerned or other appropriate means.²⁷

19. The Committee emphasizes the seriousness of a finding that a Party concerned is in non-compliance with article 3, paragraph 8 of the Convention. If members of the public are penalized, harassed or persecuted for exercising their rights under the Convention, it puts in grave jeopardy the Party concerned's implementation of the Convention as a whole.²⁸

Discrimination of foreign public - article 3, paragraph 9

20. In deciding whether the Party concerned has complied with article 3, paragraph 9, the Committee considers the general test to be whether the foreign public concerned was given any less favourable treatment than the public concerned in the Party of origin with regard to its opportunities to participate in the procedure.²⁹

Information about the hearing

21. So long as the public in the Party of origin is not provided with any additional information about the format of the hearing and its opportunities to participate than is provided to the foreign public there would not be discrimination within the meaning of article 3, paragraph 9, in this respect. The Committee notes, however, that, in public participation procedures involving the public in countries other than the country of origin, the competent public authorities should be mindful of the need to give clear and full explanations of the relevant procedures, as the foreign public cannot be presumed to be familiar with how such procedures work in the Party of origin. This being said, it should not be assumed that all members of the public concerned from the country of origin are familiar with such procedures either.³⁰

²⁵ Ibid, para. 72, citing *Timishev v Russia*, European Court of Human Rights, Applications 55762/00 and 55954/00, judgement 13 December 2005, at para 57.

²⁶ Ibid., para. 73.

²⁷ Ibid., para. 74.

²⁸ Ibid., para. 110.

²⁹ Findings on communication ACCC/C/2012/71 (Czechia), para. 107.

³⁰ Findings on communication ACCC/C/2012/71 (Czechia), para. 109.

II. Access to environmental information

Copies of the requested information to be provided – article 4, paragraph 1

22. The Committee notes that article 4, paragraph 1, expressly requires the applicant to be provided with copies of the actual documentation. It is not sufficient to simply provide access to examine the documentation free of charge.³¹

Manifestly unreasonable – article 4, paragraph 3(b)

23. The Committee also clarifies that whether an access to information request is “manifestly unreasonable” under article 4, paragraph 3(b) relates to the nature of the request itself, for example, its volume, vagueness, complexity or repetitive nature, rather than the reason for the request, which is not required to be stated.³²

Internal communications – article 4, paragraph 3 (c)

24. As to what constitutes “internal communications” for the purposes of article 4, paragraph 3(c), the Committee considers that the underlying purpose of such an exception is to give a public authority’s officials the possibility to exchange views freely. Accordingly, not every document that is communicated internally can be considered as an “internal communication”. For instance, factual matters and the analysis thereof may be distinguished from policy perspectives or opinions.³³ However, if it were shown that the public authorities routinely denied access to information, including assessments (legal, environmental, technical or otherwise), by referring to it as internal communication, thus denying access to assessments informing its internal decision-making relating to the environment, this could very well constitute non-compliance with article 4, paragraph 1 of the Convention.³⁴

Assessing the public interest in disclosure – article 4, paragraph 3 (c) and article 4, paragraph 4

25. The Committee considers that, in the context of a request for environmental information, an assessment of the public interest in disclosure is not complete without weight being given to the fact that the information relates to the environment, including whether the information requested relates to emissions into the environment.³⁵

Partial disclosure - article 4, paragraph 6

26. Even if parts of the requested information could validly be exempted from disclosure under article 4, paragraphs 3 or 4 of the Convention, those parts might be redacted and the rest of the requested information disclosed. The analysis of what is to be exempted and what disclosed should be on a document-by-document basis. The Committee stresses that the classification of an entire type of environmental information as exempt from disclosure runs contrary to the letter and spirit of the Convention.³⁶

³¹ Findings on communication ACCC/C/2012/69 (Romania), para. 55.

³² Recommendations on request ACCC/A/2014/1 (Belarus), para. 29.

³³ Findings on communication ACCC/C/2013/93 (Norway), para. 71.

³⁴ Findings on communication ACCC/C/2013/93 (Norway), para. 72.

³⁵ Findings on communication ACCC/C/2013/93 (Norway), para. 74.

³⁶ Findings on communication ACCC/C/2012/69 (Romania), para. 63.

Reasons for refusing information request – article 4, paragraph 7

27. The Committee points out that the duty to state reasons for refusing an information request under article 4, paragraph 7 is of great importance, not least to enable the applicant to be in a position to challenge the refusal for information under the procedures stipulated in article 9, paragraph 1 of the Convention. It is, therefore, inadequate if these reasons are only provided at a very late stage, as the applicant will potentially only then be able to fully formulate the grounds for challenging the decision.³⁷ Likewise, the statement of reasons provides higher administrative authorities and the court with a better basis to assess whether the officials have correctly implemented the law.³⁸

III. Public participation in environmental decision-making

Public participation in decisions on specific activities – article 6

Public participation in the transboundary context

28. It is clear from the wording of article 6 that the obligations imposed by that article are not dependent on obligations stemming from other international instruments. An international treaty may envisage that a Party of origin and an affected Party share joint responsibility for ensuring public participation in the territory of the affected Party (as under the Espoo Convention), or even that the affected Party has sole responsibility for this. However, the obligation to ensure that the requirements of article 6 are met always rests with the Party of origin.³⁹ The situation in such cases is akin to those where the domestic legal order delegates administrative tasks for public participation to other domestic bodies. Accordingly, as the Maastricht Recommendations state, if “the legal framework seeks to delegate any administrative tasks related to a public participation procedure to persons or bodies other than the competent public authority, it should be borne in mind that the ultimate responsibility for ensuring the public participation procedure complies with the requirements of the Convention will still rest with the competent authority”.⁴⁰ The Committee considers this wording applies equally to situations where the responsibility for certain tasks related to public participation in the affected country’s territory rests (by virtue of an international instrument or ad hoc agreement) on that country’s public authorities.⁴¹

Identification of the public concerned – article 6, paragraph 2

29. While not explicitly mentioned in article 6, paragraph 2 of the Convention, it goes without saying that proper identification of the public concerned is an essential precondition for ensuring the correct implementation of that provision. In order to effectively notify the public concerned, it is first necessary to identify who the public concerned may include. In this respect, while emphasising that it in no way diminishes the obligation on the competent public authority itself to identify who is affected or likely to be affected or will have an interest in the decision-making, the Committee commends an approach pursuant to which members of the public may also self-enrol as among the public concerned. In this way, effectively any person who makes such a representation in the prescribed form and time is to

³⁷ Findings on communication ACCC/C/2013/93 (Norway), para. 82, and findings on communication ACCC/C/2012/69 (Romania), para. 62.

³⁸ Findings on communication ACCC/C/2012/69 (Romania), para. 72.

³⁹ Findings on communication ACCC/C/2012/71 (Czechia), para. 67.

⁴⁰ Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, para. 28.

⁴¹ Findings on communication ACCC/C/2012/71 (Czechia), para. 68.

be considered as an “interested party” and may actively participate in the procedure. The possibility to make a representation is not limited to persons residing on the territory or nationals of the Party concerned. Moreover, the possibility to make a representation is offered at the beginning of the procedure but not excluded at later stages of the public participation procedure. The Committee commends this approach and considers that it may serve as a useful example for other Parties.⁴²

30. With respect to decisions to permit specific activities within the scope of article 6 of the Convention, the public may be concerned either because of the possible effects of the normal or routine operation of the activity in question or because of the possible effects in the case of an accident or other exceptional incident, or both. In either case, the decision to permit a particular activity may not only impact measurable factors such as the property or health of the public concerned but also less measurable aspects, like their quality of life.⁴³

31. Moreover, whether the public is affected or likely to be affected by the environmental decision-making must not be determined only by considering the risk of adverse effects or accidents in statistical terms. In the same vein, the notion of having an interest in the environmental decision-making should include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity, but also those who have a mere factual interest (for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable). It may also include, as is the case in many jurisdictions, persons who have expressed an interest in a given case without having stated any specific reason for their interest.⁴⁴

32. In cases concerning ultra-hazardous activities, such as nuclear power plants, members of the public may be affected or likely to be affected by, or have an interest in, environmental decision-making within the scope of the Convention, even if the risk of an accident is very small. When determining who is concerned by the environmental decision-making, the magnitude of the effects if an accident would indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and worries of persons living within the possible range of the adverse effects, should be considered. It is clear to the Committee that with respect to nuclear power plants, the possible adverse effects in case of an accident can reach far beyond state borders and over vast areas and regions. For decision-making that relates to complex and ultra-hazardous activities such as nuclear power plants, it is therefore important to secure public participation appropriate to that activity with respect to these areas and regions both within and beyond the state borders of the Party concerned.⁴⁵

Notification in the transboundary context – article 6, paragraph 2

33. As indicated above, ultimately it is for the competent public authorities of the Party of origin to ensure that the public participation procedure complies with the requirements of article 6, also in situations where the foreign public is involved. In cases that are not subject to a transboundary procedure under an international treaty (e.g., the Espoo Convention), the requirement to inform the public concerned in the affected countries in an adequate, timely and effective manner will be the sole responsibility of the competent authority of the Party of origin. Ensuring that the notification is effective may include, inter alia, publishing

⁴² Findings on communication ACCC/C/2013/91 (UK), para. 78.

⁴³ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 73.

⁴⁴ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 74, citing the Implementation Guide, second edition, page 57.

⁴⁵ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 75.

announcements in the popular newspapers and by other means customarily used in the affected countries, as well as by exploring possibilities for using more dynamic forms of communication (e.g., through social media). In cases that are subject to a transboundary procedure under an international treaty, the Party of origin remains responsible under the Aarhus Convention for the adequate, timely and effective notification of the public concerned in the affected country, either by carrying out the notification itself or by making the necessary efforts to ensure that the affected Party has done so effectively.⁴⁶

34. Not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would ensure that all those who potentially could be concerned, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activity, constitutes non-compliance with article 6, paragraph 2 of the Convention with respect to the Party concerned's legal framework.⁴⁷

Notification regarding ultra-hazardous activities – article 6, paragraph 2

35. The Committee is convinced that in the case of decision-making on ultra-hazardous activities⁴⁸ like a nuclear power plant (NPP), being activities invariably of wide public concern, particular attention must be taken at the stage of identifying the public concerned and selecting the means of notification in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activities and their possibilities to participate. In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact not only on matters, such as property or health, but also on less measurable aspects, like quality of life. For an ultra-hazardous activity such as an NPP, members of the public may be affected or be likely to be affected by, or have an interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small. In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident should indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and concerns of persons living within the possible range of the adverse effects. It is clear to the Committee that with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond State borders and over vast areas and regions.⁴⁹

36. More generally, the Committee notes that, while a legal framework that chiefly relies on the affected territorial self-governing units using locally specific ways of informing the public may well be adequate for activities whose potential effect on the environment would be confined to that locality, it may be insufficient for ultra-hazardous activities that are invariably of wide public concern (whether specific activities subject to article 6 or in the context of plans and programmes subject to article 7). Moreover, notice on the Ministry's

⁴⁶ Findings on communication ACCC/C/2012/71 (Czechia), para. 72.

⁴⁷ Findings on communication ACCC/C/2013/91 (United Kingdom), para. 84.

⁴⁸ "An activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions", *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, commentary to article 1, para. 2.

⁴⁹ Findings on communication ACCC/C/2012/71 (Czechia), para. 74.

web page would not in itself be enough in order to ensure effective notification of the public, as it is not reasonable to expect members of the public to proactively check the Ministry's website on a regular basis just in case at some point there is a decision-making procedure of concern to them. In this respect the Committee recalls paragraph 64 (c) of the Maastricht Recommendations, which provides that public notice should be placed also in "the newspaper(s) corresponding to the geographical scope of the potential effects of the proposed activity and which reaches the majority of the public who may be affected by or interested in the proposed activity".⁵⁰

Informing the public of its opportunities to participate – article 6, paragraph 2 (d) (ii)

37. Providing only very basic information about the hearing, namely its timing and venue, does not meet the requirement in article 6, paragraph 2 (d) (ii), to adequately and effectively inform the public concerned of its opportunities to participate. If a hearing is to be held, the public concerned should be notified of its opportunities to participate in that hearing, e.g., the format of the hearing, the format in which the public may make interventions, and any time limits on those interventions. This is particularly important in the case of a foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin, though it should not be presumed that all members of the public concerned from the Party of origin will necessarily know this either.⁵¹

Reasonable time-frames for public participation - article 6, paragraph 3

38. The Committee considers that providing notice a minimum of 20 calendar days before the public hearing for the public to become acquainted with the documentation and to prepare to participate may generally be sufficient, bearing in mind that longer periods may be required in complex cases or when there is voluminous documentation.⁵² The Committee considers a period of 60 days for the public to comment on the EIA documentation and 43 days to comment on the EIA expert report were likewise sufficient to meet the requirements of article 6, paragraph 3.⁵³ However, it is apparent that when periods partially or fully overlaps with the days of the major religious festivals, national days or to a certain extent, the main summer or winter holidays, the actual time-frames envisaged for the public to prepare to participate are automatically shortened.⁵⁴

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

39. With respect to article 6, paragraph 4, the Committee cites with approval the Maastricht Recommendations, which state that:

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. If a particular tier of the decision-making process has no public participation, then the next stage that does have public participation should provide the opportunity for the public to also participate on the options decided at that earlier tier.⁵⁵

⁵⁰ Findings on communication ACCC/C/2012/71 (Czechia), para. 76.

⁵¹ Findings on communication ACCC/C/2012/71 (Czechia), para. 80.

⁵² Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 106.

⁵³ Findings on communication ACCC/C/2012/71 (Czechia), para. 86.

⁵⁴ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 107.

⁵⁵ Findings on communication ACCC/C/2012/71 (Czechia), para. 91, citing ECE/MP.PP/2014/2/Add.2, para. 18.

40. The Committee considers that the discretion as to the range of options to be addressed at consecutive stages of the decision-making is closely related to the opportunities for public participation on those options. A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an “opportunity for the public to also participate on the options decided at that earlier tier”⁵⁶ would be incompatible with the Convention. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage but leaves other options to be considered at a later stage without public participation would likewise not be compatible with the Convention.⁵⁷

Use of “envelope” or “black box” method – article 6, paragraph 4

41. So long as the public concerned, including the public concerned in other countries, will be provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including the risk factor and potential environmental impacts of each) are under consideration, the use of an “envelope” or “black box” approach at the EIA stage does not, in itself, constitute non-compliance with the requirement in article 6, paragraph 4, of the Convention to provide for early public participation when all options are open. The Committee stresses, however, that if the public concerned was not provided with the opportunity to participate effectively in that subsequent stage, the Party concerned would be in non-compliance with article 6, paragraph 4, of the Convention.⁵⁸

Access to information in tiered decision-making – article 6, paragraph 6

42. While the competent authority may have certain discretion as to the range of options to be addressed at each stage of a multi-stage decision-making procedure to permit an activity subject to article 6, at each stage at which public participation is required all information relevant to the decision-making at that particular stage which is available to the public authorities should be made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4).⁵⁹

Partial disclosure – article 6, paragraph 6 in conjunction with article 4, paragraphs 4 and 6

43. With respect to providing access to the information relevant to the decision-making under article 6, paragraph 6, the Committee stresses that an approach where whole categories of environmental information are unconditionally declared as confidential and for which no release is possible is incompatible with article 6, paragraph 6, in conjunction with article 4, paragraphs 4 and 6 of the Convention.⁶⁰

Organizational matters concerning public hearings – article 6, paragraph 7

44. Depending on the stage of the decision-making procedure, the immediate responsibility to ensure that the arrangements for the hearing enable the public to participate effectively may fall on the developer or the relevant authority. The Committee stresses, however, that regardless of the stage of the decision-making, the ultimate responsibility to

⁵⁶ ECE/MP.PP/2014/2/Add.2, para. 18.

⁵⁷ Findings on communication ACCC/C/2012/71 (Czechia), para. 92.

⁵⁸ Findings on communication ACCC/C/2012/71 (Czechia), para. 93.

⁵⁹ Findings on communication ACCC/C/2012/71 (Czechia), para. 94.

⁶⁰ Findings on communication ACCC/C/2013/89 (Slovakia), para. 84.

ensure that the requirements of the Convention are met always rests with the Party concerned.⁶¹

45. Parties may choose to codify the rules for public hearings in detail in their legislation or by way of established administrative practice. Alternatively, the rules for public hearings may be set case by case by the authorities responsible for each hearing. Whichever approach is taken, Parties must ensure that the rules to be applied are clear, transparent and consistent, as required by article 3, paragraph 1, and non-discriminatory, as required by article 3, paragraph 9, of the Convention. Furthermore, in accordance with article 3, paragraph 2, Parties should endeavour to ensure that officials provide guidance to the public so that it knows and understands the rules to be applied during the hearing in advance. This is of particular importance in the case of the foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin.⁶²

46. Given a transboundary project of such a contentious nature as an NPP, the Committee considers that the competent authorities should foresee that the hearing might require longer than one working day and they should therefore plan and organize accordingly. Article 6, paragraph 3, requires that the time frame for each phase of the public participation procedure must be reasonable and enable the public to participate effectively. The public cannot be expected to participate effectively if its opportunity to be heard comes only after it has been already sitting in the hearing for more than a full working day. Nor does it ensure that the public authorities present are in a fit state to take due account of that participation.⁶³

47. Parties should ensure that if private security services or police officers are to be used at public hearings to maintain the public order they must in no way restrict the opportunity of the public to participate in the decision-making procedure and submit comments.⁶⁴

48. While a television talk show or a citizen-hearing initiated by an NGO may facilitate dialogue and raise public awareness, such means can only ever complement but never replace the Party's obligation to ensure that there is an official procedure in place through which the public may submit its comments in accordance with article 6, paragraph 7, of the Convention.⁶⁵

Informing the public of the decision to permit the activity - article 6, paragraph 9

49. The Convention leaves the Parties some discretion in designing "appropriate procedures" for informing the public under article 6, paragraph 9 about the decision once it has been taken. However, these procedures must ensure that information about the decision taken is communicated to the public in an effective way.⁶⁶ The Committee considers that, as a good practice, the methods used to notify the public concerned under article 6, paragraph 2, should be utilised as a minimum for informing the public under article 6, paragraph 9, of the decision once taken, recalling that the latter requires the public generally to be informed, and not just the public concerned.⁶⁷ In the view of the Committee, informing the public about the decision taken exclusively by means of the internet does not meet the requirement of article 6, paragraph 9 of the Convention.⁶⁸ The Committee commends a practice of making

⁶¹ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 110.

⁶² Findings on communication ACCC/C/2012/71 (Czechia), para. 100.

⁶³ Findings on communication ACCC/C/2012/71 (Czechia), para. 88.

⁶⁴ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 112.

⁶⁵ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 116, citing the Committee's findings on communication ACCC/C/2009/37 (Belarus), para. 95.

⁶⁶ Findings on communication ACCC/C/2013/99 (Spain), para. 103.

⁶⁷ Findings on communication ACCC/C/2013/99 (Spain), para. 103.

⁶⁸ Findings on communication ACCC/C/2013/99 (Spain), para. 104.

the full text of the decision available electronically on the website of the competent authority (and that of the developer as well – though not only). However, relying only on publishing the decision electronically may exclude members of the public who do not use the internet regularly or do not have easy access to it from the possibility to be effectively informed about the decision that has been taken.⁶⁹ Moreover, the mere fact that the public may be able to access a decision subject to article 6 through a publicly accessible electronic database does not satisfy the requirement of article 6, paragraph 9, if the public has not been promptly and effectively informed of that fact.⁷⁰

Mutatis mutandis and where appropriate - article 6, paragraph 10

50. The clause “mutatis mutandis, and where appropriate” in article 6, paragraph 10, does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.⁷¹ This discretion must be considered to be even more limited if the update in the operating conditions may itself have a significant effect on the environment.⁷²

Deliberate release of genetically modified organisms into the environment – article 6, paragraph 11

51. The Committee considers that the planting of genetically modified organisms at a testing site is a “deliberate release into the environment” within the meaning of paragraph 2(d) of Annex I to the Lucca Guidelines.⁷³

Public participation concerning plans, programmes and policies relating to the environment – article 7

Definition of “plan or programme relating to the environment” – article 7

52. When examining whether a measure is a plan or programme within the scope of article 7, the Committee recalls its past findings in which it had observed that when examining whether a decision falls within the ambit of article 7 of the Convention, its label under the national law of the Party concerned is not decisive, and it is necessary to examine the content of the document and its legal effects.⁷⁴ In this respect, the Committee considers that, as set out in the Aarhus Convention Implementation Guide, a typical article 7 decision (plan or programme) has the legal nature of (a) a general act (often adopted finally by a legislative branch), (b) initiated by a public authority, (c) which sets, often in a binding way, the framework for certain categories of specific activities (development projects), and (d) which usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.⁷⁵

⁶⁹ Findings on communication ACCC/C/2013/99 (Spain), para. 104.

⁷⁰ Findings on communication ACCC/C/2013/99 (Spain), para. 104 citing the Committee’s findings on communication ACCC/C/2004/8 (Armenia) ECE/MP.PP/C.1/2006/2/Add.1, para. 31.

⁷¹ Findings on communication ACCC/C/2009/41 (Slovakia), para 71.

⁷² Findings on communication ACCC/C/2013/99 (Spain), para. 85.

⁷³ Recommendations on advisory request ACCC/A/2014/1 (Belarus), para. 58.

⁷⁴ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 126, recalling the Committee’s findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 29; ACCC/C/2005/12 (Albania) (ECE/MP.PP.C.1/2007/4/Add.1), para. 65; and ACCC/C/2008/27 (United Kingdom of Great Britain and Northern Ireland) (ACCC/MP.PP/C.1/2010/6/Add.2), para. 41.

⁷⁵ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 127, citing *The Aarhus Convention: An Implementation Guide* (second edition), p. 125.

53. The Committee considers, as also stated in the Aarhus Convention Implementation Guide, that whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” (article 2, para. 3). The following types of plans, programmes and policies may be considered as relating to the environment: (a) those which may have a significant effect on the environment and require SEA; (b) those which may have a significant effect on the environment but not require SEA; (c) those which may have an effect on the environment but the effect would not be significant; (d) those intended to help to protect the environment.⁷⁶

Early participation when all options are open – article 7 in conjunction with article 6, paragraph 4

54. The incorporation of article 6, paragraph 4 into the text of article 7 means that Parties must provide for early public participation on plans and programmes relating to the environment when all options (including the so-called “zero option”) are open and when due account can be taken of the outcome of the public participation. In light of the above, the Committee considers that it would be too late to provide public participation only at the stage of permitting the specific activity if by then all options, and in particular the “zero option” not to proceed at all, were no longer open.⁷⁷

IV. Access to justice in environmental matters

55. The Committee points out that the Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention.⁷⁸

Meaning of “national law relating to the environment” – article 9(3)

56. The Convention does not define the term “national law relating to the environment”.⁷⁹ The text of the Convention does not refer to ‘environmental laws’, but to ‘laws relating to the environment’, and consequently article 9, paragraph 3, is not limited to ‘environmental laws’, e.g., laws that explicitly include the term ‘environment’ in their title or provisions”.⁸⁰ In this regard, the Committee agrees with the Aarhus Convention Implementation Guide that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.”⁸¹

57. The Committee considers that, in general, private nuisance proceedings should be considered as judicial procedures aimed to challenge acts or omissions by private persons and public authorities that contravene national law relating to the environment in the sense of article 9, paragraph 3, of the Convention. This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal

⁷⁶ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 130, citing *The Aarhus Convention: An Implementation Guide*, p. 176.

⁷⁷ Findings on communication ACCC/C/2013/88 (Kazakhstan), para. 134.

⁷⁸ Findings on communication ACCC/C/2012/76 (Bulgaria), para. 68.

⁷⁹ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (UK), para. 70.

⁸⁰ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (UK), para. 73.

⁸¹ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), para. 85.

criteria for assessing the Convention's applicability to a specific private nuisance case would be whether the nuisance complained of affects the "environment", in the broad meaning of this term. The number of people affected, the claimant's motivation for bringing private nuisance proceedings or the proceedings' possible significance for the public interest are not decisive to an assessment of whether the procedure falls within the scope of national law relating to the environment.⁸²

58. The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators), and then subsequently to complain to the ombudsman, provide for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, the ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations.⁸³

Sufficient that one procedure meets all the requirements under article 9, paragraph 3

59. It is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.⁸⁴

60. The Committee points out that, for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4, of the Convention.⁸⁵

Criteria for standing under article 9, paragraph 3

61. Article 9, paragraph 3, requires "members of the public" that meet the criteria, if any, laid down in the law, to be given access to administrative or judicial procedures.⁸⁶ The Committee notes that article 9, paragraph 3, may not be used to effectively bar almost all members of the public from challenging acts and omissions.⁸⁷ The term "members of the public" in the Convention includes, but is not limited to, NGOs. It follows that barring all members of the public except NGOs meeting the criteria set out in national law, would fail to correctly implement article 9, paragraph 3.⁸⁸

62. Despite the discretion given to Parties in article 9, paragraph 3, to lay down criteria for standing in their national law, if reviewing bodies, when considering whether the criteria

⁸² Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), para. 78.

⁸³ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), para. 78.

⁸⁴ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), para. 78.

⁸⁵ Findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), para. 79.

⁸⁶ Findings on communication ACCC/C/2008/32 (European Union), Part II, para. 92.

⁸⁷ Findings on communication ACCC/C/2006/18 (Denmark), paras. 30-31.

⁸⁸ Findings on communication ACCC/C/2008/32 (European Union), Part II, para. 93.

were met in practice failed to take into account all considerations relevant to those criteria, that Party would be in non-compliance with article 9, paragraph 3.⁸⁹

63. It is also important to note that while article 9, paragraph 3, allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice,⁹⁰ it does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws.⁹¹

“Fair” review procedures require reasoned decisions - article 9, paragraph 4

64. It is clear to the Committee that the requirement in article 9, paragraph 4, for review procedures to be “fair” should be read as a requirement to ensure that claimants are able to know the reasons for the decision of the review body, inter alia, to enable the claimants to challenge that decision where they so choose.⁹²

Injunctive relief - article 9, paragraph 4

65. The Committee emphasizes that it is implicit from the wording of article 9, paragraph 4, that in a review procedure within the scope of article 9 of the Convention, the courts are required to consider any application for injunctive relief to determine whether the grant of such relief would be appropriate, bearing in mind the requirement to provide fair and effective remedies. The Committee also notes the importance of court decisions being provided with supporting reasoning and in a timely manner. This is an essential part of a fair and timely procedure, not least because the reasons may be needed in order to mount an appeal.⁹³

66. The Committee confirms that the requirement in article 9, paragraph 4, that injunctive relief and other remedies be “effective” includes, inter alia, an implicit requirement that those remedies should prevent irreversible damage to the environment.⁹⁴

67. The Committee commends a legislative approach whereby administrative acts may not be enforced prior to the expiry of the time limits to contest them or, where an appeal or a protest has been lodged, until resolution of that dispute by the relevant authority. The provisions, which in themselves operate as a form of automatic temporary injunction and which do not require the appellant in the substantive proceeding to first give a bond as security nor open the applicant to risk of damages against it if its substantive appeal is subsequently unsuccessful, may provide a useful legislative model and inspiration for other Parties.⁹⁵

68. Making a designation of national importance by a superior authority a decisive factor in deciding to grant an order for preliminary enforcement would neglect the need for a balancing of interests, which should be the key factor in any determination on whether to grant interim relief.⁹⁶

69. While the Convention does not preclude the use of financial guarantees per se in judicial procedures covered by the Convention (and indeed guarantees may in appropriate cases play a useful role in helping to protect the environment), they may in practice be applied

⁸⁹ Findings on communication ACCC/C/2013/81 (Sweden), para. 98.

⁹⁰ Findings on communication ACCC/C/2005/11 (Belgium), para. 35.

⁹¹ Findings on communication ACCC/C/2008/32 (part II) (European Union), para. 52.

⁹² Findings on communication ACCC/C/2013/81 (Sweden), para. 96.

⁹³ Findings on communication ACCC/C/2013/89 (Slovakia), para. 97.

⁹⁴ Findings on communication ACCC/C/2012/76 (Bulgaria), para. 69.

⁹⁵ Findings on communication ACCC/C/2012/76 (Bulgaria), para. 59.

⁹⁶ Findings on communication ACCC/C/2012/76 (Bulgaria), para. 66.

in a manner counter to article 9, paragraph 4, of the Convention. This could be the case when a financial guarantee imposed as a condition for upholding an order for preliminary enforcement is not set at a level that would be a disincentive to the taking of action that may cause environmental damage or, alternatively, that would provide an adequate remedy for any harm caused.⁹⁷

Timeliness of review procedures regarding requests for access to information - article 9, paragraphs 1 and 4

70. Article 9, paragraph 4, of the Convention requires that the procedures referred to in article 9, paragraphs 1 to 3, of the Convention provide inter alia adequate and effective remedies and are fair, equitable and timely. This provision is applicable to all remedies within the scope of article 9 of the Convention, including those referred to in article 9, paragraph 1, second indent.⁹⁸ Article 9, paragraph 1, second indent, sets out that procedures within the scope of that indent be “expeditious”, a reference lacking in regard to the other remedies in article 9 of the Convention. Procedures under article 9, paragraph 1, second indent, of the Convention will potentially be used prior to seeking review by a court of law under the first indent of article 9, paragraph 1, which may justify the imposition of the additional requirement on authorities to act without undue delay. The Committee notes in that regard that time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure.⁹⁹

71. In this context, the Committee notes that a number of the Parties to the Convention impose explicit deadlines for public authorities to reconsider a refusal of an information request. While article 4, paragraphs 2 and 7, do not directly apply to such reconsideration, the Committee sees no reason why a public authority should need more time to reconsider its decision at the request of an Ombudsman, a court or the original applicant, than when deciding a request for information by a member of the public in the first place. Accordingly, when considering in these contexts whether the procedure is “expeditious” or “timely” under article 9, paragraphs 1 and 4, respectively, the time limits set out in article 4, paragraphs 2 and 7, are indicative.¹⁰⁰

⁹⁷ Findings on communication ACCC/C/2012/76 (Bulgaria), para. 79.

⁹⁸ Findings on communication ACCC/C/2013/93 (Norway), para. 87.

⁹⁹ Findings on communication ACCC/C/2013/93 (Norway), para. 88.

¹⁰⁰ Findings on communication ACCC/C/2013/93 (Norway), para. 90.