

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Task Force on Public Participation in Decision-Making

Seventh meeting

Geneva, 15-16 December 2016

**SELECTED CONSIDERATIONS, FINDINGS AND REPORTS OF THE AARHUS CONVENTION
COMPLIANCE COMMITTEE RELATING TO PUBLIC PARTICIPATION IN DECISION-MAKING
RELATED TO SUSTAINABLE DEVELOPMENT**
Background document¹
Prepared by the secretariat

This background paper is not intended to be exhaustive but to outline a selection of considerations, findings and reports of the Aarhus Convention Compliance Committee² (hereinafter – the Committee) in regard to item 2 of the agenda of the seventh meeting of the Task Force on Public Participation in Decision-Making under the Aarhus Convention relating to public participation in decision-making for sustainable development.

Participants are invited to consult this document in advance of the meeting in order to gain an overview of issues to be discussed under agenda item 2, the challenges encountered by the Parties in implementation, and to discuss good practices and further needs to be addressed under the auspices of the Task Force on Public Participation in Decision-Making.

¹ The document was not formally edited

² Available from <http://www.unece.org/env/pp/cc.html>

Case/Report	Consideration and evaluation by the Committee (for cases) / Comments (for Committee Reports to MOP)	Findings and recommendations of the Committee
<p>ACCC/C/2012/66(Document ECE/MP.PP/C.1/2014/4)</p> <p>Sustainable development</p>	<p>The fact that the waste management plans are not mentioned in the EPA and in sectoral laws as sustainable development and environment protection documents is not relevant; an insufficient coverage by the legislation of one of the subject matters of the Aarhus Convention cannot be invoked as an excuse to avoid its application to an activity which is obviously related to the protection of the environment. (See paragraph 40 of document ECE/MP.PP/C.1/2014/4)</p>	<p>Recommended, among other things, that the Party concerned:</p> <p>(...) ensure that a transparent framework is in place providing for appropriate practical and/or other provisions for the public to participate during the preparation of municipality waste management plans, by, inter alia, including municipality waste management plans in the list of plans relating to the environment which are not formally subjected to SEA, but for which public participation is required, so that article 7 of the Convention is clearly applicable to such plans. (See paragraph 56 of document ECE/MP.PP/C.1/2014/4)</p>
<p>Report by the Committee to the second session of the Meeting of the Parties ECE/MP.PP/2005/133</p> <p>Sustainable Development</p>	<p>The Committee furthermore believes that there would be value in developing guidance on the scope of the permitting processes in which the public participation procedures set out in article 6 should apply, i.e. the extent to which such processes should be environmental in character and what 'environmental' would mean in this context, having in mind the environmental focus of the Convention. It has therefore recommended that the Working Group of the Parties should be mandated to develop such guidance and to present it for endorsement by the Parties at their third meeting (addendum 2). (See paragraph 41 of document ECE/MP.PP/2005/13)</p>	
<p>ACC/C/2011/57(Document ECE/MP.PP/C.1/2012/7)</p> <p>Sustainable development</p>	<p>In this regard, the rights granted to the public by the Convention and its three pillars aim not only at the protection of the individual right to a healthy environment, but also at improving the environment (preambular para. 7) and enhancing the quality and the enforcement of environmental decisions (preambular para. 9). The Convention explicitly recognizes the importance of the role that environmental NGOs can play in environmental protection (preambular para. 13). The Committee also considers that, in keeping with the objective set out in preambular paragraph 7 and article 1 to protect and improve the</p>	

³ <https://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.13.e.pdf>

	environment for the benefit of present and future generations, concomitant implementation of the rights under the Convention, in general, should be strengthened over time. (See paragraph 46 of document ECE/MP.PP/C.1/2012/7)	
<p>ACCC/C/2004/08 (Document ECE/MP.PP/C.1/2006/2/Add.1)</p> <p>Sustainable development</p>	<p>Another question that arises is whether a further, more detailed permitting process, with public participation, is envisaged for the various specific activities. The information available to the Committee on this point is somewhat ambiguous. The communicants maintain that Armenian legislation requires that an EIA be carried out, with public participation, for such activities (see para. 10). If this takes place, it would certainly help to mitigate the lack of public participation in the formulation of the decrees. However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6-type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4). (See paragraph 29 of document ECE/MP.PP/C.1/2006/2/Add.1)</p>	<p>The Committee also finds that by failing to ensure effective public participation in decision-making on specific activities, the Government of Armenia did not comply fully with article 6, paragraph 1 (a); with annex I, paragraph 20, of the Convention; or, in connection with this, with article 6, paragraphs 2–5 and 7–9. It considers that the extent of non-compliance would be somewhat mitigated if public participation were to be provided for in further permitting processes for the specific activities in question, but it notes that the requirement under article 6, paragraph 4, to ensure that early public participation is provided for when all options are open would still have been breached. In this regard, the Committee notes, however, the information provided to it by the Government of Armenia regarding the new draft law on Environmental Impact Assessment and understands that the drafters of the new law will take this opportunity to ensure its approximation with the requirements of the Convention. (See paragraph 42 of document ECE/MP.PP/C.1/2006/2/Add.1)</p>
<p>ACCC/C/2006/16(Document ECE/MP.PP/2008/5/Add.6) and ACCC/C/2005/17 (Document ECE/MP.PP/2008/5/Add.10)</p> <p>Sustainable development</p>	<p>Bearing in mind the general considerations in paragraphs 73 to 75, a system whereby the IPPC permitting process starts after the construction is finalized, as is the case in Lithuania, need not of itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events</p>	

	<p>on the ground” have effectively eliminated alternative options. If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention. (See paragraph 74 of document ECE/MP.PP/2008/5/Add.6 and paragraph 54 of document ECE/MP.PP/2008/5/Add.10).</p>	
<p>ACCC/C/2007/22 (Document ECE/MP.PP/C.1/2009/4/Add.1)</p> <p>Sustainable development)</p>	<p>According to the communicant, when examining the application the Prefect is in no circumstance in the position of questioning the usefulness of the activity for which the permit is required. While in many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention. Rather, from the viewpoint of compliance with article 6, paragraph 4, of the Convention, the decisive issue is whether “all options are open and effective participation can take place” at the stage of decision-making in question. This implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making. (See paragraph 38 of document ECE/MP.PP/C.1/2009/4/Add.1).</p> <p>In the present case, to meet the criteria that all options are open and effective public participation can take place, it is not sufficient that there is a formal possibility, de jure, for the Prefect to turn down the application. If the practice in the jurisdiction of the Party concerned is such that, despite the possibility of the permit authority to reject an application, this never or hardly ever happens, then de facto all options would not be open at the stage in question. Thus, there would be no room for effective public participation as required by the Convention. The information given to the Committee does not suggest that this is the case with the authorization procedures before the French Prefects. According to the Party concerned, about 50 applications before the Prefects are refused in France each year. While the communicant argued that the Prefect could not question the usefulness of the activity, it neither confirmed nor contested the figure of refusals given by the Party concerned. It thus appears to the Committee that at the stage of deciding on the application, the Prefect indeed was in a position to reject the application on environmental or other grounds, as set out in French law. For that reason, the Committee cannot see that the Prefect was already constrained during the procedures for public participation or was unable to take due account of the views of members of the public on all aspects raised. Thus, the Party concerned did not fail to comply with article 6, paragraph 4, of the Convention on this ground. (See paragraph 39 of document</p>	

	ECE/MP.PP/C.1/2009/4/Add.1).	
ACCC/C/2009/41 (Document ECE/MP.PP/C.1/2009/4/Add.1)	<p>Providing for public participation after the construction permit can only be compatible with the requirements of the Convention if the construction permit does not preclude that all issues decided in the construction permit can be questioned in subsequent or related decision-making so as to ensure that all options remain open. Yet, a mere formal possibility, de jure, to turn down an application at the stage of the operation permit, when the installation is constructed, is not sufficient to meet the criteria of the Convention if, de facto, that would never or hardly ever happen (ACCC/C/2007/22 (France) ECE/MP.PP/2009/4/Add.1, para 39). The risk is obvious that providing for public participation only after the construction permit precludes early and effective public participation when all options are open. Rather, it is likely that once an installation has been constructed in accordance with a construction permit, political and commercial pressures, as well as notions of legal certainty, effectively foreclose discussions concerning the construction itself as well as options with regard to technology and infrastructure (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, paras. 74-75). (See paragraph 63 of document ECE/MP.PP/C.1/2009/4/Add.1).</p>	<p>Recommended, among other things:</p> <p>Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to review its legal framework so as to ensure that early and effective public participation is provided for in the decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Convention;</p>
ACCC/C/2009/43 (Document ECE/MP.PP/C.1/2010/8/Add.2).	<p>In this case, a special mining licence was issued for the developer to exploit deposits in the Teghout region in 2004, and the developer organized public participation in the framework of the EIA procedure in 2006. Providing for public participation only after the licence has been issued reduced the public's input to only commenting on how the environmental impact of the mining activity could be mitigated, but precluded the public from having input on the decision on whether the mining activity should be pursued in the first place, as that decision had already been taken. Once a decision to permit a proposed activity has been taken without public involvement, providing for such involvement in the other subsequent decision-making stages can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide "early public participation when all options are open". This is the case even if a full EIA is going to be carried out (ACCC/C/2005/12, para. 79). Therefore, the Committee finds that the Party concerned failed to provide for early public participation as required in article 6, paragraph 4, of the Convention. (See paragraph 76 of document ECE/MP.PP/C.1/2010/8/Add.2).</p>	<p>Recommended, among other things:</p> <p>(ii) The public is informed as early as possible in the decision-making procedure, when all options are open, and that reasonable time frames are set for the public to consult and comment on project-related documentation;</p>
ACCC/C/2008/26 (Document ECE/MP.PP/C.1/2009/6/Add.1)	<p>The Committee notes that the planning process is still ongoing. Important in this respect is the assurance of the Party concerned that during the strategic assessment, still to be conducted based on the SP-V Act, all options will be open and considered and participation in accordance with the Convention will be afforded. In this context, the Committee, however, expresses concern in respect of the motion adopted by Styrian Provincial Government of 21 April 2008 and the document dated 27 March 2008 which provides the basis for this motion. These documents express a strong presumption in favour of the 4-lane option (corroborated by information available on the website of the Styrian Government), which may de facto narrow down the available options and thus hamper participation at an early stage when all options are still open and due account can be taken of the outcome of the public participation. Similarly, the Committee expresses concern with respect to the statements of the member of the provincial government, Mag. Kristina Edlinger-Ploder on public television and in newspapers that the 4-lane road will be built, excluding the consideration of other options. (See paragraph 57 of document</p>	

	ECE/MP.PP/C.1/2009/6/Add.1).	
ACCC/C/2012/70) Document ECE/MP.PP/C.1/2014/9)	<p>It is acknowledged that the application relates to the environment since it proposes measures in the energy sector that affect or are likely to affect the elements of the environment. This is further supported by the fact that paragraph 60 of the 2011 Guidance Document states that “any application submitted by a member State should be considered environmental information.” (See paragraph 50 of document ECE/MP.PP/C.1/2014/9).</p> <p>Among other things, the Czech application for the allocation of free emission allowances proposed measures for investment into equipment and for the modernization of infrastructure and clean technologies in the electricity sector for a period of seven years. To this end, the accompanying plan envisaged the implementation of 350 projects throughout the territory. Through the application, including the accompanying documentation, the Party concerned set out its investment direction in the sector and proposed specific projects for the accomplishment of the plan. On the basis of this, the Committee finds that the application, including the accompanying documentation, is a plan under article 7 of the Convention. (See paragraph 51 of document ECE/MP.PP/C.1/2014/9).</p>	