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TASK FORCE ON PUBLIC PARTICIPATION IN DECISION-MAKING

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Item 2(b) of the provisional agenda

Challenges in implementing public participation in decision-making

Overview of challenges considered by the Expert Group on Public Participation, as well as issues identified through the national implementation reports and other sources

1. Determining activities subject to article 6 (Article 6.1)

(a) Clarity is needed on when to provide public participation in multiple decision-making processes, e.g. when both environmental permits and construction permits needed to be granted and several legal obligations related to environmental protection are applicable, such as requirements under environmental impact assessment (EIA) and the integrated pollution prevention and control (IPPC) directives.

(b) Non-listed activities: how to determine their environmental “significance” and who should make that determination?

2. Informing the public concerned (Article 6.2)

(a) Notification of the public is often not performed adequately.

(b) A lack of detailed provisions on notification of the public, resulting in a lack of knowledge and ability of officials to ensure effective outreach to the concerned public.

(c) In some cases only electronic tools are used; in other cases not all required information is provided or access to documentation is poor.

2.1. Defining ‘the public concerned’ (Article 6.2)

(a) The scope of article 6 needs clarification, as well as the definition and consistent interpretation of ‘the public concerned’, with respect to which diverging practices exist.

(b) In some countries, the term ‘public concerned’ is not defined in legislation, resulting in concerns that due to the narrower definition included in different legal acts of the “affected”

and “interested” parties, part of the “public concerned” may be left out of the public participation procedures.

(c) Some EU countries have also reported a diverging practice regarding the interpretation of the term “public concerned”.

(d) NGOs in Eastern Europe have indicated that competent authorities have a tendency to interpret the definition of the public concerned narrowly, focusing on the formal application of the law rather than substantive implementation (e.g. they alleged that article 6 is not applied in the case of motorway construction).

(e) Some national implementation reports indicate that NGOs find it too limiting if the public is only allowed to participate in decision-making on environmental impact assessments (EIA) and integrated pollution prevention and control (IPPC) permits, and consider that public participation should be provided consecutively, also at the stage of decision-making on a construction permit.

(f) In some countries where criteria have recently been set up to define “public interest NGOs”, it was reported that these criteria seem to be too limiting and no NGO has so far been able to obtain this status and be party to specific decision-making processes.

2.2. Timely informing of the public concerned (Article 6.2)

Reports from the EECCA subregion covered legislation with requirements for public participation in decision-making on defined lists of activities with potentially significant impacts on the environment. Some of them, however, suggested that in practice environmental assessment often takes place at the very end of the decision-making process or even after the activity has already started. There are also examples of failures to organize public participation in decision-making on activities with potentially significant environmental effects.

3. Reasonable time-frames (Article 6.3)

(a) A lack of reasonable time-frames for public participation has been flagged as a problematic area for the implementation of articles 6, 7 and 8

(b) In some countries, the fixed 21-day period for submitting comments was reported to be too short in the opinion of NGOs, and therefore not “reasonable”.

4. Early participation ‘when all options are open and effective public participation can take place’ (Article 6. 4)

(a) Lack of public participation in an early stage of decision-making.

(b) Lack of public participation in the screening and scoping stage of an activity.

5. Engaging the prospective applicant in the proceedings at a pre-permit stage (Article 6.5)

(a) Many countries reported the absence of a specific legal obligation for authorities to engage a prospective applicant in a pre-permit public participation procedure.

(b) Some countries noted limited cooperation between authorities and developers in the course of public consultations.

(c) Many countries reported practical implementation problems, including in connection with taking ‘due account’ of comments, for which, in most cases, the developer is made

responsible. The reports suggest that in the absence of proper control by authorities over this procedure, it is difficult to achieve a satisfactory level and quality of public participation.

6. Access to information in the public participation process (Article 6.6)

- (a) Problematic areas included incomplete or inaccessible information.
- (b) Some EU countries mentioned that the information presented to the public does not always contain all the necessary details on the process and that EIA reports are not always made publicly available because of authorities' concerns over violation of copyright laws.
- (c) While in many EU countries responsibility for making the necessary arrangements for public participation with regard to a specific activity, such as notifying the public concerned and making the required information available, usually lies with the competent authority, in most EECCA countries it is mainly the applicant that has this responsibility. Several reports indicated that representatives of civil society observed problems with notification of the public and poor access to documentation in this regard.

7. Taking due account of the outcome of the public participation (art. 6.8)

Implementation problems reported include the lack of proper regulation of the public participation process, including with regard to early notification, and the lack of procedures for taking comments into account. The public is often not informed as to why comments have not been taken into account.

8. Public participation concerning plans, programmes and policies relating to the environment (Article 7)

- (a) Several problems concerning public participation in decision-making on plans, programmes and policies relating to the environment covered by article 7 have been identified, including a lack of clarity on the scope of the article's applicability because of the wide variety of plans and programmes and corresponding legislation, and a lack of legislation on public participation in strategic decision-making. Some countries applied the same public participation requirements to policies, plans and programmes, while in other countries there was no legal obligation for public participation in political programmes or strategies.
- (b) Reports indicate that the quality of practical implementation of the public participation provisions varies between regions within countries and between countries.
- (c) Reports indicate that where there is a lack of public participation at an early stage of decision-making, public comments can not effectively influence the outcome.
- (d) With respect to the implementation of articles 7 and 8, the exclusive use of electronic tools for public participation can result in a lack of transparency, feedback and debate, as well as a lack of clarity on how public comments will be taken into account.
- (e) In some countries legislation fails to clearly specify the types of strategic decisions relating to the environment in which public participation is required under the Convention, for example infrastructural plans and programmes being excluded from the list of activities subject to environmental assessment.
- (f) In some countries, the quality of practical implementation of article 7 in decision-making at the local level varied significantly from one region to another, and certain deficiencies were noted. At the national level, comments from NGOs suggested that often no substantive

consideration is given to the results of consultation in the planning process. Some reports noted NGO concerns that there is a lack of transparency in decision-making on environmental policies, for which public participation is often limited to electronic consultation.

9. Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments (Article 8)

(a) Regarding the preparation of legal regulations covered by article 8, timeframes for public participation in the drafting of normative acts were reported as being too short and draft texts were published too late for effective commenting.

(b) Some reports indicated that, as with implementation of article 7, where public participation is mainly limited to electronic discussions, civil society often sees the process as not sufficiently transparent and lacking possibilities to debate the matter or receive feedback from the decision-makers.