



**Preliminary Submission to the
Aarhus Convention Compliance
Committee
re.**

ACCC/A/2020/2 (Kazakhstan).

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Introduction.

The following comments are made in response to the Committee's call for input in advance of its preparation of draft advice in response to the query from Kazakhstan on whether carrying out public hearings through video conferencing during the coronavirus pandemic would meet the requirements of the Convention, your reference : ACCC/A/2020/2 (Kazakhstan). We apologise that they are brief and somewhat hurried given the short timeframes involved, but we appreciate the urgency with which the Committee needs to respond in order for its advice to be meaningful and effective. We are also grateful for this opportunity to provide input at this early opportunity as the Committee moves to prepare its draft advice, which we then understand will be subject to a further brief period of public consultation before being finalised. Should the Committee need to clarify any of the following we would of course be happy to do so.

Commentary and recommendations for consideration of the Committee

1. Scope of advice:

- We noted that the request from the Ministry simply refers to "hearings", as does the secretariat's response on the 25th of May and email to the eNGO EcoForum focal points on May 27th.
- We therefore queried the scope and nature of the "hearings" which are to be the subject of this advice. In response we received the following helpful email clarification from the Secretariat on June 2nd: "*It is the understanding of the Committee and secretariat that Kazakhstan's request relates to public hearings held under article 6 of the Convention only.*"
- We thus understand the scope of this advice **does not** extend to hearings which may for example be part of an administrative review for an appeal of a decision, or hearings as part of Judicial Review by the Courts of decisions acts or omissions under Article 9 and the Access to Justice Pillar. Our comments are thus framed accordingly.
- We are conscious that Article 6 consultation/public participation obligations are triggered by activities captured under Article 6(1), and that hearings are explicitly referred to in Article 6(7) as an option for participation.
- However, we are also conscious that Article 7's public participation obligations for plans, programmes and policies relating to the environment, triggers obligations under Article 6(3),(4)and (8),and that Article 8 while requiring effective public participation does not explicitly reference Article 6.
- ***We recommend respectfully that given the potential misunderstanding which might arise consequent on the term "hearing" that the Committee clarify in its advice the nature of hearings covered i.e. that it is those under Article 6, and also clarify the extent to which they consider it may apply to Article 7 and 8.***

2. The effectiveness and thus compliance of public participation facilitated through video hearings, given the wider effect of the Covid-19 pandemic and its implications for effective public participation.

In summary we submit that in considering whether video conferencing is compliant for the purposes of Article 6 – it must first be properly considered

- a) If it is **reasonable** to expect the public to participate in environmental decision-making at this time given the public mind-set and scale of issues with which they may be dealing with through various phases and outbreaks of this pandemic, and
- b) If the **notifications** have been effective and adequate to alert the public or whether they have been compromised consequent on the various initiatives, ordinances and advice which have been deemed necessary in many jurisdictions to control the spread of the pandemic, and which may emerge again in the future.

The Committee has made clear in its various findings the importance of Article 6(3) in terms of both: **effective notification and reasonable time periods**¹ for all phases in order to meet the obligation to enable effective public participation. In effect we submit that the decision on the compliance of video conferencing for hearings to be conducted cannot be considered absent the wider context and issues arising for effective public participation consequent on the Covid-19 pandemic and that further specific adjustments are needed to respond to these challenges. The obligations of Article 6(3) in respect of informing the public and affording them reasonable timeframes need to be central to any approach to engage the public in participation via remote video hearings.

While we understand the committee may wish to keep the scope of its advice narrow and focused as a matter of expediency, there is a significant risk that a competent authority in proceeding with a video conferencing hearing may overlook either inadvertently or otherwise, the extent to which the public can actually participate effectively in that hearing consequent on the issues arising with notification and on whether the period for participation is reasonable.

This is set out in more detail below with reference to the effect of the pandemic on what is or is not reasonable to expect of the public's ability to participate at this time and the further considerations needed in respect of notifications. A final further dimension is highlighted in respect of the compatibility necessary between the pillars of the convention, given that access to environmental information may have been compromised due to the impacts of the pandemic, and thus may in turn compromise the ability of the public to participate.

¹ For example: ACCC/C/2008/24 (Spain)

2.1 The reasonableness threshold:

As noted earlier the Committee has made clear that traditional holiday periods do not serve as a reasonable period in which to consult the public – as the public are entitled to be otherwise engaged. Thus for example the Christmas holiday period is not an appropriate period in which to expect the public to engage in consultations as they are entitled to be focusing on enjoying the period and spending time with family and friends, as opposed to pouring over complex technical environmental impact statements, legislation and various application documents etc. By the same logic it can be and we submit it must be argued that the public's mind is otherwise engaged consequent on this global pandemic and its many impacts on them. These impacts on people's ordinary lives have been unprecedented. They render for many people this period of time, as one in which it is entirely unreasonable to expect them to be able to engage in environmental decision-making, as they are struggling with some many issues arising from the global pandemic. It is also an experience from which they will need a period of adjustment prior to be reasonably able to engage in environmental decisions in many instances, and of course this will vary across parties depending on the extent of impacts from the pandemic.

While we focus here on the experience in Ireland, we know from talking to colleagues across Europe, and wider news reports, that the experiences of people here is so similar to that experienced in many other countries. It hardly needs therefore to be set out, but we feel it is ultimately necessary as it is very disappointing to see that the Government in Ireland have wholly discounted such factors in deciding to continue with the planning process and other environmental consent regimes, and are focused only on whether the authorities can operate their end, ignoring the other players and the public entitled to participate in such environmental decision-making. So in considering the practical impacts on the public:

- Many people have been trying to adjust to working remotely from home, struggling often with inadequate internet.
- Many are also having at the same time look after small children who would normally be in a crèche.
- Many others also have to address home-schooling needs for their children.
- Many are having to deal with all of these issues on top of experiencing long queues just to get basic groceries, and limited public transport.
- For many their core focus is on the basic necessities of paying their bills and how they will keep a roof over their heads as many hundreds of thousands here in Ireland, and all over the world, have lost their jobs consequent on the lockdowns and the disruption of so many businesses and services, many are worried about the end of emergency support payments, and many others are worried about the prospect of losing their jobs or their businesses.

- Many are deeply worried about their separation from, and concern for, family members resident in Care Homes, which have been in many countries devastated by the pandemic.
- Worst of all sadly of course, many are also coping with the loss or illness of loved ones from the virus, or are dealing with those who are ill who cannot be supported as normal through our medical care and hospital services.

These are not small isolated subsets of individuals. These scenarios and various permutations and combinations of them are happening on a large scale across our communities, across countries and continents, and as it happens the public participation rights of each individual are important in terms of their Aarhus Convention Article 1 rights.

Thus we submit the extent to which the public's mindset is otherwise engaged has got to be central to any consideration of whether it is reasonable to expect the public to engage in environmental decision-making at this time, and their physical capacity to participate. This is a pre-requisite to facilitate such engagement such as via video-conferencing, and is entirely consistent with the requirements of Article 6(3) in respect of reasonable timeframes, sufficient time to inform, prepare etc and facilitation of effective participation.

While the lockdowns and controls are being lifted gradually, we are all aware that there will be bumps along the road and ripples of outbreaks necessitating the re-imposition of restrictions with all of the consequent impacts on people and their focus for some time. Consideration of the public's ability to meaningfully engaged needs to continually inform the approach to any mechanisms intended to facilitate public participation in the context now of a new world subject to the impact of Covid-19.

We would recommend therefore that:

- ***Proper period(s) of adjustment(s) should also be considered prior to the re-establishment of environmental decision-making as a Party comes out of lockdown and its economy and society starts to re-open following any period of outbreak of the pandemic. This is in order to enable the public adjust and be able to meaningfully accommodate the concept of public participation in their lives once again, and to recognise the recovery may not be linear, but may involve several bumps along the way with sporadic increases in outbreaks and associated increase in restrictions and controls imposed on society.***

- ***Suspension of timelimits for participation, and suspension of environmental decision- making will need to be considered proactively and very sensitively and responsively where incidents of the virus re-emerge significantly.***
- ***As will be highlighted later – both of the above considerations also need to take account of the situations in different countries where transboundary consultations are involved.***
- ***Periods for public participation will therefore need to be much more generous, avenues to engage will need to be much more flexible, open, and accessible, opportunities to hear the public's views will need to be offered repeatedly in order to facilitate those who otherwise might not be able to engage if the windows offered are too narrow and limited and this applies equally to the hearings conducted over video links. For example – those who have to look after children during the day and who can't arrange childcare consequent on the restrictions of schools or creche's or because of underlying health issues making them more vulnerable to the virus necessitating them staying at home – will need to be facilitated with further hearings perhaps in the evenings, and recordings of earlier sessions of any video hearings.***

Notifications:

We fully expect that similar or other issues may arise in the jurisdictions of other Parties with how notifications to alert and inform the public about applications and potential decisions in which they may wish to participate have been compromised because of the pandemic. We set this out below in respect of some of the impacts experienced in Ireland which regrettably are not being properly considered by authorities here.

In Ireland as in the Countries of many other Parties to the Convention – it has been necessary to advise and/or order those who are most vulnerable or susceptible to the Covid-19 virus to stay at home, and to avoid unnecessary contacts. Additionally restrictions have been imposed on the range of movements that other members of the public can have, for example a 2km limit on movements has been imposed on the public in Ireland for a number of weeks now, and that range is for exercise and essential activity such as food shopping only, and this is only now being gradually lifted. So people won't be out and about in their normal ranges, going to work or visiting people or their favourite haunts.

Yet the most fundamental method of "Notification" to inform the public of environmental decision-making in Ireland for planning decisions relies on physical site notices posted or displayed prominently at key points on the location of a

proposed development, and a single newspaper notice is required to be published in a local paper, many of which may or may not have online versions.

These mechanisms to alert the public on decisions on which they may wish to engage have thus been fundamentally compromised consequent on the controls on people's movements which have had to be imposed consequent on the pandemic. People haven't been and won't be out and about to see physical site notices as they would normally be.

Many are also limiting their newspaper purchases for a variety of reasons, and/or a notice may have been published at the height of the pandemic and been missed. Other issues pertain to such newspaper notices which we can elaborate on if useful to the Committee.

Certain other types of applications for developments in different sectors are even more restrictively notified, being only displayed in police stations, and frequently rely on word of mouth or various informal and formal community gatherings or interactions – all of which are significantly compromised given the pandemic. Other types of applications are only notified on the internet. With very different levels of internet availability in homes across countries – the supplementary internet access people normally would have had through their work or through internet cafés or public libraries have all been restricted consequent on the pandemic. Thus notification across a range of environmental decisions has been significantly compromised.

While statutory timelimits, including those for public participation were effectively extended in Ireland for a brief period for a very limited set of decisions during the initial spread of the pandemic – site notices weren't updated so people unfamiliar with the intricacies of emergency legislation extending the participation periods, and who may see these notices in the coming weeks, and the dates and timeframes specified in them, may feel they have missed the opportunity to participate, and won't follow-up. Many still don't have the capacity to engage, information may not be available online, and/or they may not have the facility to access it.

For a very limited set of development or environmental decision, certain applications are published by Local Government Authorities. But these are not the sort of thing ordinary members of the public peruse on a daily or weekly basis, and indeed many authorities have been unable to keep them up to date consequent on impacts on their staffing and other community care and pandemic response initiatives they are now engaged in.

Therefore we would additionally recommend that: for any hearings to be properly effective in the context of the pandemic – they need to be preceded by a further period of notification to alert the public of the opportunity to participate, and a generous period to enable them prepare, given the further difficulties at this time around community liaison and co-operation so often associated with public engagement in environmental decisions.

In summary once again the obligations of Article 6(3) in respect of informing the public and affording them reasonable timeframes need to be central to any approach to engage the public in participation via remote video hearings.

2.3 Compatibility with the Access to Environmental Information pillar.

Many public authorities have struggled with responding to access to environmental information requests, and the Committee will be aware of significant issues and delays Ireland's appeal system consequent on a communication in that regard before it.² While many requestors are being very reasonable in respect of the difficulties being encountered by public authorities, it would be most unfair if environmental decision-making proceeds apace while participants ability to participate is compromised as they haven't been provided with information sought.

Therefore we would recommend that in any decision about establishing remote video hearings – that the scheduling of such hearings take account of the greater timeframes needed to provide such information and to enable participants time to properly review it etc.

3. Transboundary Consultation consideration.

The Convention is explicit in terms of its obligations in respect of non-discrimination in Article 3(9), including in respect of public participatory rights. We submit the practicalities of public participation in a transnational boundary context through video conferencing has both pros and cons. On the one hand it may facilitate engagement with the public concerned or having an interest in the environmental decision from other countries. However further issues will arise in terms of:

- a) The availability of adequate translation services to support the effective conduct of the remote video conferenced hearing.
- b) The status of the pandemic in the other countries, and whether it is reasonable for the public in those countries to participate in that context, and whether notifications

² ACCC/C/2016/141

have been effective or if they have been compromised consequent on the controls associated with the pandemic.

4. Technological, cost and logistical considerations

The Digital Divide: Significant disparity and issues persist across and within Parties in relation to access to internet broadband services necessary to be able to connect with sufficient quality and reliability to be able to participate effectively in remote hearings, including with video links. This is important which for both a feeling of connectedness and to stimulate concentration and engagement over a prolonged hearing, and also to view materials being displayed, or to share materials.

Clearly Developers and State authorities are more likely to be able to rely on adequate internet services, but the public may not have such access, and thus be effectively disenfranchised and disadvantaged in the proceedings.

Costs: While people may have access to the internet that may be only very limited via their mobile phone accounts with limits on data which may now also be needed to support home schooling and remote working. They may incur significant charges associated with their participation, and/or personal inconvenience if their data usage is consumed.

Devices: It is not reasonable to assume that everyone who would wish to participate in a hearing has access to devices suitable for participation in remote video hearings. Some people rely on small handheld devices which are suitable for their normal personal uses such as mobile phones or small tablets or other handheld devices, and these are not suitable for hearings running for several hours over several days.

Proprietary software and other issues associated with software used: Issues may also arise if proprietary software is needed to engage in the video hearing, or to view materials, and if there are costs associated with that, or if people are restricted in being able to download such software consequent on poor internet connectivity, or if they only have access to work PC's or laptops or internet services at home and are restricted in what they can install or download.

Logistical and physical location constraints: Those living in small accommodation, or in shared spaces, including in Direct Provision Centres being the very controversial system of asylum seeker accommodation used in the Republic of Ireland, or in hostels or temporary hotel accommodation for those experiencing homelessness which is a significant issue in Ireland, will experience real practical and logistical difficulties in participating in a hearing for a number of hours in shared facilities where others are having to cook, chat and live, or from which they are effectively expelled or excluded from during the day.

We would recommend that in order for hearings to be able to be conducted in a way which is fair and non-discriminatory, state authorities will have to support or make

available facilities to enable those who wish to participate to do so without incurring or experiencing disadvantage. The practical implication of assessing and facilitating this should not be underestimated.

5. Technological interface – implications for the structuring of hearings, levels of participation, restrictions and other considerations.

Duration and scheduling: It is important to acknowledge the fatigue and other practical considerations necessarily limiting what is a practical and effective time period to engage in a remote meeting. Hearings would need to be appropriately structured to allow for this. Invariably it could then be expected that they would need to run over more days than they might if conducted as a physical hearing. But then on the other hand, it will be unreasonable to expect people to engage over extended periods of time continually.

We would recommend the conduct of hearings would need to be broken up and structured to allow for short sessions, interspersed with appropriate intermissions and also non-hearing times, with access to recordings. As highlighted earlier sessions would also need to be available to facilitate participation of those who have care duties during the day, and who can't rely on crèches or schools or other support services as normal to perform those assist with those care duties.

Volumes of participants: Levels of participation may actually in certain instances be greater than might occur during certain physical hearings, despite all the issues. A consequential concern arises that there might be a tendency for the authorities to use this to restrict the time available to the public to make their contributions, and thus diminish the quality and effect of the participation.

Data protection & privacy rights: Parties will need to afford particular consideration to data protection and privacy rights, and the extent to which concerns in relation to data protection and privacy may impact upon people's participation. Clearly for Parties to the Convention who are members of the European Union – certain considerations may arise for example under the General Data Protection Regulation in respect of the manner in which peoples particulars become available through such interfaces.

Drop-outs and replay facilities: If there are problems with internet connections or drop-outs during hearings – there would need to be a facility to replay part of the hearing so people can continue. Such issues don't occur in physical hearings – or at least they can be more easily responded to. However in remote video hearings such issues could operate to significantly compromise the conduct of the remote hearing and the presentation of evidence, cross examinations, or the making or oral submissions.

We would recommend that provision needs to be made to enable participants request replay, but at the same time note that such could be subject to abuse by participants. We acknowledge this will be a difficult issue to balance.

We would recommend that transcripts of the hearings need to be made available via open source software and immediately following a hearing, and with time to allow people review them before the next sessions. These transcripts will also be important for review of the decision-making.

Mitigating against abuse through manipulation of the technical interface: The potential for the hearing to be subject to abuse in interfering with the participation of the public is a potential concern, which may or may not be justified. However such fears could operate to compromise the effectiveness and engagement in the remote hearings process unless they are clearly mitigated against.

Therefore we would recommend that serious consideration be given to requiring that the service providers hosting the hearings be truly independent, and that an authority be established who can meaningfully address any complaints in a very timely way may be essential to mitigate against any concerns and issues.

6. Decisions on the conduct of oral hearings.

Given the complexity of the interfaces needed, we would recommend that Parties should be urged to consider closely and carefully, whether it is on balance in the public interest to proceed or to delay the decision making. That is until such a time at least as either public gatherings can be re-established, and/or technology and infrastructure is available to support an appropriately sophisticated solution.

In some jurisdictions, a decision on whether to conduct an oral hearing is already currently discretionary. For example, in Ireland, An Bord Pleanála, which is a decision maker of first instance for certain types of development decisions, holds such discretionary power, but such hearings are conducted as physical hearings. A decision to conduct an oral hearing is typically exercised where the matter in question has commanded significant public interest, and/or there are significant and complex technical issues and the Board considers that a hearing would assist its decision-making.

Given the practical considerations associated with large gatherings – and indeed difficulties associated with remote hearings, there is a possibility also that such discretion will be exercised to decide against hearings and for the decision-making to proceed, and the quality of the decision may suffer as a consequence.

We would recommend that the practical difficulties associated with facilitating remote hearings should not compromise or influence what ordinarily would have been a

decision to hold an oral hearing. Such decisions should be very open and transparent in setting out the various considerations involved in arriving at the decision on hearings.

We would also recommend that any decision to institute remote video hearings be of a temporary nature and require that any extension of it as a modus operandi be subject to rigorous and independent scrutiny so that it cannot end up eroding the quality of public participatory engagement into the future.

7. Avoiding a tsunami of public participation and access to justice issues.

We have little doubt but that the Committee will be more than aware of the potential tsunami of public participation issues and access to justice issues which may arise consequent on the various fallout associated with this pandemic. The issues of legal certainty which will arise for consents where concerns arise on the adequacy and compliance with public participation rights and obligations will: add to uncertainty for business encountered during this pandemic; add to the economic consequences of the pandemic; and will we fear lead to pressure on access to justice rights. Very strong, unequivocal advice from the Committee is therefore needed on the need to respect public participatory rights. Moreover, we would urge a much more proactive engagement of the Committee with Parties, eNGOs and the wider public to mitigate against issues, engaging also with the press and academic and key institutions in what needs to be a constructive and collaborative approach to re-engaging in environmental decision-making, as we will invariably continue to deal with the ongoing effects of this pandemic over a long period of time, and will hopefully facilitate in the process a more considered approach to environmental decision-making, for a more sustainable future for all, and this all to fragile environment on which we are critically dependent on, and all too critically responsible for.