

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

Item 3 of the provisional agenda

**SELECTED CONSIDERATIONS, FINDINGS AND REPORTS OF THE AARHUS
CONVENTION COMPLIANCE COMMITTEE RELATING TO PUBLIC
PARTICIPATION IN DECISION-MAKING RELATED TO CHANGES TO OR
EXTENSIONS OF EXISTING ACTIVITIES AND IN A TRANSBOUNDARY
CONTEXT**

Background paper¹

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 3 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 related to changes to or extensions of existing activities and in a transboundary context.

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 3, 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><i>Report by the Committee to the fourth session of the Meeting of the Parties</i> <i>ECE/MP.PP/2011/11</i>³</p> <p>Change or extension of existing activities</p>	<p>In some cases, a decision for the carrying out of an activity might have been taken long before the entry into force of the Convention, but the actual implementation of the activity, with any updates or reconsideration of the original permit, as necessary, began after the entry into force of the Convention. The Committee has considered that this does not, as such, prevent the Convention from being applicable to subsequent reconsiderations and updates by public authorities of the conditions for the activity in question, and to possible permits given for extensions of the activity, after the entry into force of the Convention for the Party concerned (ACCC/C/2009/41 (Slovakia), para. 44). (<i>See paragraph 80 of document ECE/MP.PP/2011/11</i>)</p>	
<p><i>Report by the Committee to the fourth session of the Meeting of the Parties</i> <i>ECE/MP.PP/2011/11</i>⁴</p> <p>Change or extension of existing activities</p>	<p>With regard to the application of the public participation requirements in article 6, paragraphs 2 to 9, of the Convention in activities that are reconsidered or changed, the Committee noted that a decision for such change, regardless of whether it involves any significant change or extension of the activity, amounts to a reconsideration and update of the operating conditions by a public authority of an activity and, thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned is obliged to ensure that the provisions of article 6, paragraphs 2 to 9, are applied, “mutatis mutandis, and where appropriate”. In this context, the Committee stresses that, although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation. (<i>See paragraph 102 of document ECE/MP.PP/2011/11</i>)</p> <p>The Committee considers that the clause “where appropriate” introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that “access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns” and aiming to “further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment”. Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met</p>	

³ https://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp.pp_2011_11_eng.pdf

⁴ https://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp.pp_2011_11_eng.pdf

	and whether the Party concerned should have therefore provided for public participation in a present case. The conclusions of the Committee that a reconsideration or update of the operating conditions of an activity of such nature and magnitude and of serious public concern, as the nuclear power project that was brought before the Committee, are not countered by the fact that all or most changes introduced lead to stricter safety requirements (ACCC/C/2009/41 (Slovakia), paras. 55–57). <i>(See paragraph 103 of document ECE/MP.PP/2011/11)</i>	
<p><i>ACCC/C/2009/41 (Document ECE/MP.PP/2011/11/Add.3)</i></p> <p>Changes to or extensions of existing activities</p>	<p>Nuclear power plants, such as the Mochovce NPP, are covered by article 6 of the Convention. In the present case, however, the applicability of the Convention depends on the relation between the 1986 and the 2008 decisions. The Convention is not applicable to the 1986 decision. The application for the 2008 UJD decisions was made in May 2008. Thus, the Convention was applicable, and accordingly the Party concerned was obliged to ensure public participation before taking the 2008 UJD decisions, if they amounted to a reconsideration or an update of the operating conditions, under article 6, paragraph 10 of the Convention, or if the decisions concerned a change to or extension of the activity in accordance with annex I, paragraph 22, to the Convention. <i>(See paragraph 50 of document ECE/MP.PP/2011/11/Add.3)</i></p> <p>Based on the information given by the communicant and the Party concerned, including the translation of the three decisions in question, it is clear that UJD decision 246/2008 in itself — but even more so in combination with decision 266/2008 and decision 267/2008 — regardless of whether it involved any significant change or extension of the activity, amounted to a reconsideration and update of the operating conditions by a public authority of an activity (a nuclear power plant) referred to in article 6, paragraph 1 (a), of the Convention. Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, “mutatis mutandis, and where appropriate”. In this context, the Committee wishes to stress that, although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation. <i>(See paragraph 55 of document ECE/MP.PP/2011/11/Add.3)</i></p> <p>The Committee finds that when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate. This conclusion is not countered by the fact that most, if not all, changes in the 2008 construction permit lead to stricter requirements than those set in the 1986 permit. Thus, by failing to provide for public participation according to article 6, paragraphs 2 to 9, the Party concerned failed to comply with article 6, paragraph 10 of the Convention. <i>(See paragraph 57</i></p>	<p>Recommended, among other things, that:</p> <p>(a) 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 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; <i>(See paragraph 70 of document ECE/MP.PP/2011/11/Add.3)</i></p>

	<i>of document ECE/MP.PP/2011/11/Add.3)</i>	
<p><i>ACCC/C/2009/43 (Document ECE/MP.PP/2011/11/Add.1)</i></p> <p>Changes to or extensions of existing activities</p>	<p>The licence of February 2001 was issued before the Convention entered into force. However, with its 2004 renewal the 2001 licence became a special licence under the 2002 Law on Concessions and this had an impact on the operating conditions of the activity as a special mining licence has a longer duration and it provides for the possibility of a concession agreement, while the law (art. 53, para. 1 of the 2002 Law of Concessions) sets out a number of operational conditions that can be established by concession agreement on the basis of a special mining license, such as the possibility of limited liability on environmental matters. Therefore, the Committee concluded that the 2004 renewal was not a mere formality and falls under article 6, paragraph 10, of the Convention. Thus, the Party concerned had to ensure that the public participation provisions of article 6, paragraph 2 to 9, be applied, mutatis mutandis, and where appropriate for the renewal. <i>(See paragraph 58 of document ECE/MP.PP/2011/11/Add.1)</i></p>	<p>Recommended, among other things, that:</p> <p>Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:</p> <p>(i) Threshold for activities subject to an EIA procedure, including public participation, are set in a clear manner.</p>
<p><i>ACCC/S/2004/01 and ACCC/C/2004/03 jointly (Document ECE/MP.PP/C.1/2005/2/Add.3)</i></p> <p>Transboundary context</p>	<p>Considering the nature of the project and the interest it has generated, notification in the nation-wide media as well as individual notification of organizations that explicitly expressed their interest in the matter would have been called for. The Party, therefore, failed to provide for proper notification and participation in the meaning of article 6 of civil society and specifically the organizations, whether foreign or international, that indicated their interest in the procedure. With regard to the Romanian NGOs and individuals, such notification and participation could have been undertaken by Ukraine via the Romanian authorities, as there is sufficient evidence to suggest that the Ukrainian Government was well aware of the concerns expressed to the Romanian authorities by citizens and organizations in Romania. The Committee, however, notes that, generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention. <i>(See paragraph 28 of document ECE/MP.PP/C.1/2005/2/Add.3)</i></p>	<p>Recommended, among other things, to:</p> <p>(c) Mandate the Working Group of the Parties to develop for consideration at the third meeting of the Parties guidance to assist Parties in identifying, notifying and involving the public concerned in decision-making on projects in border areas affecting the public in other countries but not requiring transboundary EIA under the Espoo Convention which includes procedures for public participation. <i>(See paragraph 41 of document ECE/MP.PP/C.1/2005/2/Add.3)</i></p>
<p><i>ACCC/C/2012/71 (advanced unedited)</i></p> <p>Transboundary context</p>	<p>Article 6, paragraph 2 - notification</p> <p>Though the Convention does not expressly address a Party's responsibilities when organizing a public participation procedure in the transboundary context, it nevertheless makes clear that, for all decision-making subject to article 6, the Party must ensure that the public concerned is informed in an adequate, timely and effective manner. The Committee notes that the MoE CR gave clear instructions to the German authorities on how to notify the public in Germany (see</p>	<p>Found, among other things, that:</p> <p>(...) by 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</p>

	<p>para. 32 above) and that these instructions were consistent with the means of notification envisaged for notifying the public in the Czech Republic. Nevertheless, the Committee is not convinced that these instructions were sufficient to ensure effective notification in the transboundary context. The Committee recalls its findings on communication ACCC/C/2006/16 concerning Lithuania, where it noted that “the requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities”. The Committee notes that neither the notification requirements in article 16(3) and (4) of the EIA Act (see para. 14 above) nor MoE CR’s above-quoted request to the German authorities include a clear requirement to this effect. <i>(See paragraph 72)</i></p> <p>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 Convention’s requirements, also in situations where the foreign public is involved. In cases which are not subject to a transboundary procedure under an international treaty (e.g. 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 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. via social media. In cases which 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. <i>(See paragraph 73)</i></p> <p>More generally, the Committee notes that while a legal framework which 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 which 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 webpage would not in itself be enough in order to ensure effective notification of the public as it is not feasible to expect that members of the public will 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</p>	<p>mind the nature of the proposed activity, would assure that all those who potentially could be concerned, including the public concerned outside the territory of the Party concerned, have a reasonable chance to learn about the proposed activity, the Party concerned has failed to comply with article 6, paragraph 2 of the Convention with respect to its legal framework. <i>(See paragraph 114)</i></p> <p>Recommends, among other things, that:</p> <p>(a) A legal framework to ensure that when selecting means of notifying the public under article 6, paragraph 2, public authorities are required to select such means as will ensure effective notification of the public concerned bearing in mind the nature of the proposed activity and including, in the case of proposed activities with potential transboundary impacts, the public concerned outside the territory of the Party concerned;</p> <p>(b) The necessary arrangements to ensure that:</p> <p>(i) When conducting transboundary procedures in co-operation with the authorities of affected countries, the competent public authorities make the necessary efforts to ensure that the public concerned in the affected countries was in fact notified in an effective manner;</p>
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	<p>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”. (<i>See paragraph 77</i>)</p> <p>Article 3, paragraph 9</p> <p>On the basis of the information before it, there is nothing to indicate that the public in the Czech Republic was provided with any additional information about the format of the hearing and its opportunities to participate, and thus, the Committee does not find there to have been 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. Having said that, it should not be assumed that all members of the public concerned from the country of origin are familiar with such procedures either. (<i>See paragraph 110</i>)</p> <p>The Committee notes that neither Czech nor international law require that the country of origin organize a formal hearing in the territory of the affected country. Moreover, article 6, paragraph 7, does not require a hearing to be conducted in all cases, but rather as appropriate, bearing in mind the need to ensure effective public participation in the decision-making. While there is no express requirement under national or international law, including the Convention itself, to conduct a hearing in the affected country, neither is there anything to prevent that. The Committee finds however that there is no legal basis to conclude that in this case the Party concerned’s failure to organize an official hearing in Germany constituted a breach of article 3, paragraph 9. (<i>See paragraph 111</i>)</p>	<p>(ii) There will be proper possibilities for the public concerned, including the public outside the territory of the Party concerned, to participate at the subsequent stages of the multi-stage decision-making procedure regarding the Temelin NPP; (<i>See paragraph 118</i>)</p>
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