Public participation - steps of the procedure

PARTICIPATORY AND PROCEDURAL RIGHTS IN ENVIRONMENTAL MATTERS

Warsaw, 4-6 March 2015
Content

- Reasonable time-frames (art.6.3)
- Notification (art.6.2)
- Provision of information (art.6.6)
- Submission of comments (art.6.7)
- Consideration of comments (“due account” - art. 6.8)
- Informing about the decision (art.6.9)
Reasonable time-frames

- **Aarhus Convention** (Art.6.3)
  - The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making”

- **Phases**
  - Notification
  - Inspection of relevant documents
  - Submission of comments
  - Consideration of comments ([ACC/3 Ukraine](#))
Time frames - issues for consideration

- Fixed vs diversified time-frames (ACC/16 Lithuania and Case ACC/22 France)
- Minimum time-frames (ACC/37 Belarus)
- Timing
  - traditional holiday season (ACC/C/24 Spain)
Time frames - examples

- **Not reasonable time-frames**
  - “The time-frame of only ten working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill does not meet the requirement of reasonable time-frames” (Case ACC/16 Lithuania)

- **Reasonable time-frames**
  - “the announcement of the public inquiry...provided a period of approximately 6 weeks for the public to inspect the documents and prepare itself for the public inquiry ...the public inquiry ...provided 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity... The ... provision of approximately 6 weeks for the public concerned to exercise its rights under article 6, paragraph 6, and approximately the same time relating to the requirements of article 6, paragraph 7.. meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention”(Case ACC/22 France)
Reasonable timeframes - change of approach in EIA Directive

- Directive (original version of 1985)
  - „appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period”

- Directive (current version after Aarhus)
  - „Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

- Amendment 2014
  - ‘7. The time-frames for consulting the public concerned on the environmental impact assessment report referred to in Article 5(4) shall not be shorter than 30 days.”
Notification - basic issues

- **Means of notification**
  - Technical means
  - Geographical scope (relation to identification of the public concerned)
  - Manner

- **Content of notification**
  - Elements in art.6.2
  - Subject to modification to make it fit to the respective procedure
Notification - basic issues

- Aarhus (art.6.2)
  - Public notice or individually (case C-15 Romania)
  - Manner:
    - Adequate
    - Timely
    - Effective

- EIA and IED Directives
  - Timely („sufficient time to inform the public and for the public.. to prepare and participate effectively” - compare with the previous version of EIA Directive!)
  - Adequate („nature of possible decisions”)
  - Effective („bill posting...or publication in local newspapers”)
  - still no clear indication that the public notice should be done in „adequate, timely and effective manner” as required in Art.6.2 Aarhus (see ACC/C/17 EC)
Informing the public in amended EIA Directive

- ‘2. In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- ‘5. The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public through at least a central portal or easily accessible

[Image 71x9 to 115x46] [Image 133x9 to 182x43]
Examples from other directives

  - Member States shall ensure that up-to-date information on ambient concentrations of benzene and carbon monoxide is routinely made available to the public as well as to appropriate organisations, such as environmental organisations, consumer organisations, organisations representing the interests of sensitive populations and other relevant health-care bodies, by means, for example, of broadcast media, press, information screens or computer-network services, teletext, telephone or fax.

  - The information shall be made available free of charge by means of any easily accessible media including the Internet or any other appropriate means of telecommunication
Mm
Notification

- **Legal requirements in Poland**
  - Public notice
    - webpage - (in Public Information Bulletin)
    - notice board in the seat of competent authority
    - in the vicinity of project (bus stop, church, local shop etc)
    - press (local or national)
  - Individual notification (letter) - to immediate neighbours

- **Legal requirements in Estonia**
  - Official Announcements (website)
  - Building Register (website)
  - Newspapers
  - A notice in a public place (library, shop, school, bus stop)
  - Direct letters to persons concerned
  - Direct letter to umbrella of environmental NGOs
„Adequate” notice

„it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.” *(Case CCC/C/16 Lithuania)*
„Effective” notice

„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 would have a reasonable chance to learn about proposed activities and their possibilities to participate” (Case CCC/C/16 Lithuania)

„Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies. ” (Case CCC/C/16 Lithuania)
Provision of relevant information (art.6.6)

- Aarhus Convention 9(Art.6.6)
  - Free of charge
  - All information relevant to decision-making
  - As soon as available
  - Exemption from general rules on access to information under art.4
  - Relation to art 6.2

- Convoluted scheme in EIA and IED Directives
  - „information other than that referred to.. And which only becomes available..
Possibility to submit comments - Aarhus

- Art. 6.7 of Aarhus,
- 7. Procedures for public participation shall allow the public to submit...any comments’’

- Possibility to submit comments - two equal methods
  - In writing
  - In public inquiry (hearing)

- Any comments - no need to be motivated (ACC/C/16 Lithuania)

- Cost
  - Free of charge (preamble
    • Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,
  - Fee for commenting allowed? (Case C-216/05 Commission v. Ireland)
Possibility to submit comments - Directives

- Art.6.4 EIA Directive
  - 4. The **public concerned** shall be given early and effective opportunities to participate ..and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

- Annex IV .3 IED
  - „3. The **public concerned** shall be entitled to express comments and opinions to the competent authority before a decision is taken”
Due account- art.6.8

- Due account must be taken of public comments
  - obligation to read and consider seriously
  - but not always to accept all comments (no right of veto - ACC/29 Poland)

- Any comments vs „reasoned or motivated comments”

- Sufficient time for authorities to consider comments ((ACC/C/3 Ukraine)

- Role of the statement of reasons (controversial verdict in (C-182/10, Solvay and Others)

- Annex IV IED
  - 4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.
Informing about the decision- art.6.9

- **Requirement**
  - to notify the public promptly *(ACC/C/8 Armenia)*
    - about the decision
    - where it can be made available
  - to make it accessible to the public *(ACC/C/3 Ukraine)*
    - publicly accessible registers
    - publicly accessible records of decisions
- **Together with a statement on:**
  - reasons
  - consideration
- **Link to review procedures (Case ACC/16 Lithuania)**
Review procedures - standing under art. 9.2

- **Members of the public concerned (art.2.5)**
  - affected or likely to be affected
  - having an interest in environmental decision-making
  - role of NGOs

- **Criteria for standing in art.9.2**
  - Sufficient interest
  - Impairment of a right
  - criteria in national law consistent with the objective of giving wide access to justice
1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the national procedures, and shall ensure that the following information is available to the public:

- (a) the content of the decision and any conditions attached thereto as referred to in Article 8a(1) and (2);
- (b) the main reasons and considerations on which the decision is based, including information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed,
Access to justice under art.9.2 - issues

- Infringement of rights doctrine and access to justice - problems in legislations based on „protection of rights” with addressing
  - procedural legality (ACC/31/ Germany)
  - substantive legality (ACC/50/Czech Republic)
  - general environmental issues (ACC/48/ Austria)
- Scope of review - access to justice needed for screening decisions (C/50 Czech Republic)
- Standing - mostly in systems with infringement of rights doctrine
- Costs - mostly UK (also Denmark and Spain)
- Injunctive relief
Access to justice - scope of review under art.9.2

- Art.9.2 (relation to Art.6 and possibly other provisions) :
  - redress in case of abusing right to participate and/or
  - basis to challenge substantive and procedural legality

- Reasons
  - Substantive or procedural legality
  - Decision, act or omission subject to Article 6
    - Art..6.1.a) - activities in Annex I
    - Art.6.1 b) -
  - Other relevant provisions where so provided for under national law

- Court review and (preliminary) administrative review