

**Switzerland, 16.11.2015**

## **General explanations**

- After a first consultation round within our office (Swiss Federal Office for the Environment) it appears, that Switzerland can agree with this proposal taking into account the remarks and proposals mentioned below.
- A final decision cannot be taken until the consultation of the Swiss Federal Office of Justice and if necessary a political discussion. This second consultation round will be launched with the final proposal of the new Art. 9.

## **Revised draft amendment to Article 9 of the Convention on the Transboundary Effects of Industrial Accidents**

*Prepared by the Small Group of Legal Experts  
established under the Working Group on Development*

### **Background**

The Conference of the Parties at its eighth meeting, 3-5 December 2015, requested the Working Group on Development to prepare a draft amendment to the Convention, including on Article 9, in order to strengthen public participation, on the basis of the Working Group's recommendations and conclusions reached at its fourth meeting.

The Working Group on Development then considered options for an amendment on the basis of an initial draft prepared by the secretariat, in cooperation with a legal expert, during its fifth meeting, 11-13 May 2015. On this basis, delegates exchanged their views and raised several concerns. The Working Group requested the small group of legal experts<sup>1</sup> to prepare a revised draft amendment of article 9, proportionate to the Convention's objectives, taking into account the mandate received from the eighth meeting of the Conference of the Parties and the discussions held.

On this basis, the small group of legal experts has prepared the enclosed revised draft proposal for an amendment to Article 9, under the leadership of its rapporteur, Mr. Erol Mertcan, United Kingdom of Great Britain and Northern Ireland, in cooperation with the UNECE secretariat.

In preparing an updated draft, the small group was mindful of

- the views and concerns raised by delegates during the fifth meeting of the Working Group on Development, as well as the written comments submitted thereafter
- the rationale for an amendment to Article 9, notably to
  - Achieve consistency between legal instruments
  - Align the Convention with the Aarhus Convention
  - Keep compatibility with the Seveso III Directive, and
  - Contribute to better participatory democracy and access to justice in the pan-European region.

Further to the enclosed proposal for an amendment to Article 9, a proposed related amendment to Article 1 Definitions is being put forward. Proposed changes to other related provisions, articles and annexes have not been addressed by the small group of legal experts so far within the limited timeframe.

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<sup>1</sup> The small group of legal experts was established by the Working Group on Development at its fifth meeting to support its work with regard to specific legal questions related to the draft amendments as well as guidance.

As decided during the fifth meeting of the Working Group on Development, Parties are invited to provide their preliminary comments on the draft amendment to the secretariat by 24 August 2015 ([teia.conv@unece.org](mailto:teia.conv@unece.org)). The sixth meeting of the Working Group on Development to be held 30 November – 2 December 2015 in Geneva will provide a platform for a continued exchange of views among the representatives of the Parties and observers. The updated draft amendment will be made available in an official pre-session document, issued in English, French and Russian, in time for the sixth meeting of the Working Group.

## **Article 1**

### **Definitions**

*In paragraph (j) after “persons”, insert: “and, in accordance with national legislation or practice, their associations, organizations or groups”, as agreed by the Working Group on Development at its fifth meeting, to read as follows:*

(j) “The public” means one or more natural or legal persons; **and, in accordance with national legislation or practice, their associations, organizations or groups;**

*After paragraph (j), insert:*

(k) “The public concerned” means the public affected or capable of being affected by an industrial accident arising out of a hazardous activity; or having an interest in decision-making pursuant to article 6, article 7 or article 8, paragraph 3 hereto; for the purposes of this definition, non-governmental organizations promoting environmental protection or public health or safety and meeting any requirements under national law are deemed to have an interest.

*Replace Article 9 by the following text:*

## **Article 9**

### **Information to the public**

1. The Party of origin shall ensure that adequate information, including the information referred to in Annex VIII hereto, is made available to the public. The information shall:
  - (a) be easily accessible to the public, including through electronic databases;
  - (b) be periodically reviewed and, where necessary, updated at least every five years.
2. The Party of origin shall provide the public concerned with the information referred to in paragraph (1) above on a regular basis, at least every five years. This shall include all schools, hospitals and areas of public use and all hazardous activities where the risk or consequences of an industrial accident may be increased because of the geographical position and the proximity of such hazardous activities.
3. The Parties shall ensure that information concerning industrial accidents in accordance with article 1, paragraph (a), hazardous activities in accordance with article 1, paragraph (b), prevention in accordance with article 6, decision-making in accordance with article 7 and emergency preparedness in accordance with article 8 is made available to the public in a timely manner upon request.
4. In the event of an industrial accident or imminent threat thereof, the Parties concerned shall ensure that all information that is held by their authorities that could enable the public to take measures to prevent or mitigate harm arising from the threat is disseminated immediately and without delay to the public concerned. This information shall include at least a brief description of the circumstances of the industrial accident, including its location, the hazardous substances involved (if known) and its immediate effects as well as the information referred to in annex VIII, paragraphs 6 and 7, including clear instructions [on the actions the public should take and behaviour they should adopt].

**Comment to: “... is disseminated immediately and without delay to the public concerned.”**  
**It should be clarified, that the Party of origin (where the industrial accident occurs) will inform the public concerned in its own country and the authorities of the neighbouring country**

**concerned, but not the public of the neighbouring country. The public of the neighbouring country has to be informed by the authorities of the neighbouring country.**

**5. The information to be provided in accordance with paragraphs 1-4 should also take into account the matters set out in Annex V, paragraph 2, subparagraphs (1) to (9).**

6. Nothing in this article prevents the rights of Parties to protect from disclosure certain information in accordance with article 22. With respect to requests for information under paragraph (3), any ground for protection from disclosure shall be interpreted in a restrictive way, taking into account the public interest served by disclosure. If information protected from disclosure can be separated out without prejudice to its confidentiality, authorities shall make available the remainder of the information requested.

**Comment to the EU proposal:**

**Switzerland supports the reference to Art. 5 of the Aarhus Convention and the addition that the Information shall be transmitted through such channels as the Parties deem appropriate.**

**Article 9 bis**

**Public consultation and participation in decision-making**

1. The Party of origin shall ensure that the public concerned is given early and effective opportunities to participate in:

- (a) Decision-making procedures regarding the siting of hazardous activities referred to in article 7;
- (b) Decision-making procedures regarding significant modifications to existing hazardous activities referred to in article 7;
- (c) The development of prevention measures pursuant to article 6, whenever possible and appropriate; and

**Comment: This seems to be difficult from a practical point of view. In the case of a release of an ecotoxic substance on the waterway, the public can be concerned over several hundreds of kilometers down the river. In the case of a release of great amounts of toxic gases, the lethal distances can be several kilometers. In such cases it would obviously be impossible to involve the whole public concerned in the development of prevention measures.**

**Proposal: It is important for Switzerland, that the addition "whenever possible and appropriate" is kept. In the proposal from the EU this addition is deleted.**

- (d) The development or significant modification of off-site contingency plans referred to in article 8(3);

**Comment: This seems to be difficult from a practical point of view. In the case of a release of an ecotoxic substance on the waterway, the public can be concerned over several hundreds of kilometers down the river. In the case of a release of great amounts of toxic gases, the lethal distances can be several kilometers. In such cases, it would obviously be impossible to involve the whole public concerned in the development or the modification of off-site contingency plans.**

**Proposal: For Switzerland it is important to add: " whenever possible and appropriate" to the text.**

and the Party of origin shall ensure that the opportunities given to the public concerned of the affected Party are equivalent to those given to the public concerned of the Party of origin.

2. Affected Parties shall ensure that in the establishment of policies pursuant to article 7 on significant developments in areas which could be affected by transboundary effects of an industrial accident arising out of a hazardous activity, the public concerned is given early and effective opportunities to participate.

3. With regard to paragraphs (1) and (2) above, the public concerned shall be informed by public notices or other appropriate means, including electronic media where available, and in an adequate, timely and effective manner of the following information:

- (a) The proposed activity;

- (b) The nature of the possible decisions or, where there is one, the text of the draft decision;
- (c) Details of the competent authority responsible for making that decision;
- (d) An indication of what environmental information relevant to the proposed activity is available, including, where applicable, the fact that the activity is subject to an environmental impact assessment;
- (e) An indication of the times and places where, or means by which, relevant information will be made available;
- (f) Details of the arrangements for public participation and consultation;
- (g) An indication of how the conclusion of the decision will be notified to the public concerned; and
- (h) After the relevant decision is taken, the responsible competent authority shall make available to the public the text of the decision taken and the reasons on which the decision is based.

4. The Party of origin, pursuant to paragraph (1) and, the affected Party, pursuant to paragraph (2), shall ensure that the public concerned:

- (a) is allowed sufficient time to prepare and participate effectively;
- (b) is provided with access for examination free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in paragraph (1) or paragraph (2) that is available at the time of the public participation procedure; and
- (c) is entitled to express comments and opinions to the competent authority responsible for making that decision when all relevant options in relation to that decision are open;

and that the results of the public participation held pursuant to paragraph (1) or paragraph (2) are duly taken into account in the taking of that decision.

**Comment to the EU proposal:**

**Switzerland supports the reference to Art.6 of the Aarhus Convention. But it does not support, that the addition whenever possible and appropriate is deleted.**

**Article 9 ter**

**Access to justice**

1. Each Party shall, within the framework of its national legislation, ensure that any person requesting information pursuant to article 9 has access to a review procedure before a court of law or another independent and impartial body established by law where that person considers that their request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

- (a) Having a sufficient interest; or
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition;

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission, subject to the provisions of article 9 bis. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public wide access to justice.

3. The procedures referred to in paragraphs (1) and (2) above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and

**not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.**

**Article 9 quarter  
Equivalent opportunities**

**The Party of origin shall ensure that the opportunities for the public concerned of the affected Party to have access to information, to participate in decision-making and to have access to justice pursuant to articles 9, 9bis and 9ter, are equivalent to those given to its public concerned.**