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Public participation

**Working Group meeting on EIA/SEA
legislative reform in Kazakhstan
15-16 February 2018, Astana**

Content

- Public participation
 - Role in EIA and relation to Aarhus
 - Public and public concerned EIA and public participation
- Aarhus Convention
- Public participation in Espoo Convention
- Public participation in EIA Directive
- Public participation – principles
- Procedural steps

Public participation in Espoo Convention

- Mandatory element of
 - Domestic EIA framework
 - Transboundary procedure
- Public
 - national
 - from affected Party (from areas likely to be affected)
 - equivalent opportunities (Art.2.6)
- Joint responsibility of Parties concerned!

Public participation in Espoo Convention cd

- Possibility to submit comments (Art.4.2)
 - directly to the competent authority in the Party of origin
 - through the Party of origin (for example via Point of Contacts)
- Comments
 - concerning proposed activity
 - concerning EIA documentation
 - ‘any comments’ according to Aarhus
- Public participation at various stages
- Public to be informed about the final decision and possibilities to appeal (ECE/MP.EIA/8)

Public participation in EIA Directive – art.6.2-6.6, art.8 and art.9.1

- Meant to implement art.6 of the Aarhus Convention
- Relation with transboundary procedure in the context of non-discrimination clause in the Aarhus Convention (art.3.9)
- Elements of the procedure
 - Informing (notifying) the public– art. 6.2 and 6.5
 - Making available relevant information – art. 6.3
 - Possibility to submit comments and opinions– art. 6.4 and 6.5
 - Taking into consideration the results of public participation – art. 8
 - Informing the public on the decision and its availability (together with the reasons and considerations on which the decision is based) – art. 9.1

Who is obliged

- Obligations related to access to information and public participation put on public authorities
 - Broad definition in Aarhus Convention
 - Public authority vs competent authority
- Possible delegation of tasks (see Maastricht Recommendations)
- Problems in countries with developers responsible for public participation in EIA

Role of private actors

- Private actors involved in public participation
 - EIA consultants
 - NGOs
 - Specialised private firms (negotiators)
- Pros
 - Expert knowledge
 - Experience with public participation
- Cons
 - Approach often depends on who hires them

Project proponents/developers in public participation – issues of concern

- Interested in promoting the project – therefore by definition not objective!
- Experience
 - Manipulations with defining „the public concerned”
 - Inaccurate performance of procedural obligations
 - Biased approach towards public comments
- Special situation with public authorities
 - Being developers
 - Being promoters

Opinions of ACC and Espoo IC

- “it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6)” and therefore “reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention” (Aarhus CC - ECE/MP.PP/2008/5/Add.6, para. 78; see also ECE/MP.PP/2011/11/Add.2, para. 77)
- “the organization of public participation under the Convention was the responsibility of the competent authority⁶ and not of the proponent” (Espo IC - (ECE/MP.EIA/IC/2010/4, para. 19 (b))

Practical solutions

- Criteria for delegating responsibility
 - Impartiality
 - Not representing any interests related to the decision
 - Specialisation or vast experience with public participation
 - Proximity to public concerned
- Role of developers
 - Paying for costs of public participation
 - Involvement into some activities under the control of competent authority

UNECE Maastricht Recommendations

- Delegating tasks in a public participation procedure - paragraphs 27–36
- Encouraging developers to engage with the public concerned before applying for a permit (article 6, paragraph 5) - paragraphs 82–84
- Annex - table

Public and public concerned

- Definitions from Aarhus – now included to other conventions
- Public
 - One or more
 - Natural or legal persons
 - in accordance with national legislation or practice, their associations, organisations or groups
- Public concerned
 - Affected or likely to be affected, or
 - Having an interest
 - Including NGOs:
 - Promoting environmental protection
 - Meeting any requirements under national law

Public concerned - key issues

- Obligation to identify public concerned
- Affected or likely to be affected
 - Relation to impact
 - described in EIA/SEA documentation
 - technical guidance with assumed range of impact
 - Criteria for identifying range of impact
 - Not only routine impact but also impact related to accidents
- Approach to „having interests”
 - Not only legal or factual interests
 - Everyone who shows interest

General rule – „early public participation”

- Each Party shall provide for early public participation, when all options are open and effective public participation can take place” (Art.6.4)
- Does „early...when all options are open”
 - relates to sequence of decisions (Delena Wells case)?
 - relates to particular decision (scoping in EIA)?
 - both?
- Can public participation after construction is finished be considered „early” (ACC/C/17 – EC case)
- Relation to „tiered decision-making”

General rule – reasonable time-frames

- 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” (Art.6.3)
- Phases
 - Notification
 - Inspection of relevant documents
 - Submission of comments
 - Consideration of comments (ACC/C/3 Ukraine)
- Fixed vs diversified time frames (CCC/C/16 Lithuania)
- Timing
 - traditional holiday season (ACC/C/24 Spain)

Reasonable timeframes -change of approach

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

Public participation procedure

- Notification –art 6.2
- Access to information – art.6.6
- Possibility to submit comments – art.6.7
- Due account taken of public comments – art.6.8
- Decision taken notified and accessible to the public- art.6.9

Notification (art.6.2)

- Public notice or individually (case C-15 Romania)
- Early in decision-making
- Content regulated in detail
- Manner:
 - Adequate
 - Timely
 - Effective

Notifying the public in EIA Directive

- Form
 - public notices or by other appropriate means such as electronic media where available,
 - bill posting within a certain radius
 - publication in local newspapers
- Detailed content of the notification
- Relation to art. 6 Aarhus Convention
 - public vs public concerned
 - timely, effective and adequate manner of informing

Mandatory form of notifying the public in Poland and Estonia

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

Mandatory form of notifying the public in UK

- On the webpage of competent authority
- By individual notice to interested persons
- By public notice
 - for at least two successive weeks in one or more local newspapers circulating in the vicinity in which the proposed development would be situated;
 - once in a national newspaper
 - -once in the London Gazette and, if land in Scotland is affected, the Edinburgh Gazette; and
 - -where the proposed application relates to offshore development
 - once in Lloyd's List; and
 - once in an appropriate fishing trade journal.

Art.6.6 - making available relevant information

- Free of charge
- As soon as available
- Exemption from general rules on access to information under art.4
- Relation to art 6.2

Art 6.6 - content of relevant information

- All information relevant to decision-making
 - Description of site, effects and measures
 - Non-technical summary
 - Outline of main alternatives
 - Reports and advice
- Problematic issues
 - EIA Documentation and copyright (case ACC/C/15 Romania)
 - Raw data (*ACC/53/UK*)
- Exemptions
 - Confidentiality of proceedings (*ACC/51/Romania*)
 - Internal communications (*ACC/51/Romania*)
- Need for restrictive interpretation of exemptions and balancing of interests (*ACC/51/Romania*)

Possibility to submit comments – art.6.7

- Two equal methods
 - In writing
 - In public hearing
 - as appropriate
- Any comments - no need to be motivated (ACC/C/16 Lithuania)

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
- Any comments vs „reasoned or motivated comments”
- Sufficient time for authorities to consider comments ((ACC/C/3 Ukraine)

Publicising 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
 - considerations