United Nations (Advance copy) ECE/MP.PP/2021/45

Economic and Social Council

Distr.: General
15 October 2021

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Seventh session
Geneva, Switzerland, 18–20 October 2021
Item 7 (b) of the provisional agenda
Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee on general issues of compliance*,**

Summary

The present document was prepared by the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters pursuant to the request of the Meeting of the Parties to the Convention (see ECE/MP.PP/2017/2/Add.1, decision VI/8, para. 21) and in accordance with the Committee's mandate set out in decision I/7 on review of compliance (ECE/MP.PP/2/Add.8, annex, paras. 13 (b), 14 and 35).

The document reports on general issues of compliance by Parties with the provisions of the Convention considered by the Committee during the period 19 June 2017 to 26 July 2021, being the respective deadlines for the Committee's reports to the fifth and sixth sessions of the Meeting of the Parties as set out in decision I/7.

* The present document is being issued without formal editing.
** This document was submitted late owing to additional time required for its finalization.

Contents

Introduction

1. During the period 19 June 2017 to 26 July 2021 (the reporting period),[1] the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted findings on 26 communications and one submission[2] and recommendations with regard to one request for advice by a Party.[3]

2. The present document reports on general issues of compliance with the provisions of the Convention considered by the Committee in its findings and advice on those 28 cases.

I. Definitions and general provisions

Article 2 (2) – definition of public authority – acting in a "legislative capacity"

3. Although the Convention does not set out exactly when a body or institution – be it central, regional or local – acts in a legislative capacity, it is clear that the Convention only excludes the body or institution when it acts in this specific capacity. Accordingly, a parliament may act as a public authority under the Convention when it is not acting in its legislative capacity, for example when authorizing an activity or project.[4] The Committee thus understands the expression "legislative capacity" to have a rather precise meaning, referring to the acts of the body when it is indeed legislating, that is to say, when it uses its legislative power, but not when it carries out other functions.[5]

4. The Committee thus concludes that the reference to bodies and institutions acting in their legislative capacity does not exclude public authorities, including the Government, when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation.[6]

Article 2 (3) (b) – definition of environmental information "used in environmental decision-making"

5. The Committee considers that the term "used in environmental decision-making" in the last clause of article 2 (3) (b) should not be read as requiring that such analyses and assumptions have already been used in environmental decision-making. Such a reading is inconsistent with the Convention. Rather, it should be understood to include information that may potentially be used in environmental decision-making. Moreover, "environmental decision-making" is to be understood in its broadest sense and so is not limited to decision-making under articles 6, 7 or 8 of the Convention.[7]

Article 3 (2) – assistance to the public in facilitating public participation

6. As a minimum, article 3 (2) requires that, before a public participation procedure takes place, Parties endeavour to ensure that their officials provide guidance to the public so that the public has an adequate understanding of the relevant law, the decision-making procedure and its opportunities to participate.[8] This obligation applies to each Party to the Convention, whether it be the Party of origin or the affected Party.[9]

[1] In accordance with the deadlines stipulated in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on the review of compliance (ECE/MP.PP/2/Add.8).

[2] See ECE/MP.PP/2021/44, paras. 38-64.

[3] Ibid., para. 71.

[4] See the Committee's findings on communication ACCC/C/2011/61 (United Kingdom), ECE/MP.PP/C.1/2013/13, para. 54, where the Committee held that Parliament did not act in a legislative capacity, but "rather as the 'public authority' authorizing a project".

[5] Findings on communication ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 98.

[6] Ibid., para. 100.

[7] Findings on communication ACCC/C/2014/112 (Ireland), ECE/MP.PP/C.1/2021/17, para. 134.

[8] Findings on submission ACCC/S/2015/2 (Belarus), ECE/MP.PP/C.1/2021/13, para. 158.

[9] Ibid., para. 159.

II. Access to environmental information

Article 4 (1) – environmental information already made publicly available in other documents

7. Article 4 (1) requires that, where requested, "copies of the actual documentation containing or comprising" the requested environmental information be made available to the public. Therefore, if copies of the documentation are requested, compliance with article 4 (1) cannot be achieved by "extracting" pieces or fragments of environmental information from those documents and making only the extracted environmental information available but not the underlying document. Nor can a request for a particular document containing environmental information be refused simply because another document that contains the same environmental information has already been made available to the public. Rather, the requested document itself, including all the environmental information contained therein, must be made available. This, of course, does not preclude the application of any relevant exceptions in article 4 (3) and (4) prior to the document being made available.[10]

Article 4 (3) (c) and (4) – exemptions from non-disclosure

Article 4 (3) (c) – materials in the course of completion

8. The mere status of something as a draft does not automatically bring it under the exception of "materials in the course of completion". The words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority. Once the requested documents are no longer "in the course of completion" they must be disclosed, even if they are still unfinished and even if the decision to which they pertain has not yet been taken. "In the course of completion" suggests that the document will have more work done on it within some reasonable time frame.[11]

Article 4 (3) (c) – internal communications

9. Communications between a public authority and a permit holder cannot be considered to be internal. Likewise, communications exchanged between a public authority and any persons acting on the permit holders' behalf cannot be internal either.[12]

Article 4 (3) (c) and (4) – confidentiality agreements

10. The inclusion of a clause in an agreement between a Party to the Convention and a third party that imposes a blanket prohibition on the disclosure of the terms of that agreement, and other information related thereto, has no effect on the Party's obligations to provide access to environmental information upon request under article 4.[13]

Article 4 (3) (c) and (4) – "official use only"

11. There is no exception in article 4 (3) and (4) for "official use only". The only grounds for non-disclosure for environmental information are those set out in article 4 (3) and (4).[14]

Article 4 (7) – "deemed refusal" and the requirement to state reasons for refusal of information

12. While, in cases where a public authority fails to respond to a request for environmental information, a system of "deemed refusal" enables applicants to engage the review procedures provided for in article 9 (1), a deemed refusal clearly cannot meet the requirements in article 4 (7) to provide the refusal in writing where the information request

[10] Findings on communication ACCC/C/2014/124 (Netherlands), ECE/MP.PP/C.1/2021/20, para. 93.
[11] Ibid., para. 107.
[12] Ibid., para. 101.
[13] Findings on communication ACCC/C/2014/118 (Ukraine), ECE/MP.PP/C.1/2021/18, para. 108.
[14] Ibid., para. 114.

was in writing, to state the reasons for the refusal, or to provide information on access to review procedures.[15]

Article 4 (8) – unreasonable costs for access to information

13. Given the importance of the right of access to environmental information to achieve the objective of the Convention and also the wording of article 4 (8), it is clear to the Committee that the presumption is that such information should be supplied free of charge, but Parties may allow charges provided that they do not exceed a reasonable amount. The Convention safeguards this requirement by obliging public authorities to make available to applicants a schedule of charges that may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.[16]

14. The preamble to the Convention acknowledges that public authorities hold environmental information in the public interest. The Convention does not permit any charge to be levied for simply having access to information and any charges for supplying environmental information must be calculated while recognizing and bearing in mind that such information is held in the public interest.[17]

15. When determining whether the amount of any charge under article 4 (8) is reasonable, account must be taken of the objective of access to environmental information as outlined above, the public interest in the protection of the environment, the recognition that public authorities hold environmental information in the public interest, the economic circumstances of the public in general and of the requester, and the justification given for the amount charged. It follows that any such charge should be duly explained, reasoned and justified and must not appear unreasonable to the public.[18]

16. Moreover, any charges for supplying environmental information must be based on a transparent calculation and, while they may include a contribution towards the material costs for supplying the environmental information, they must not include the cost of the initial production, collection or acquisition of the information itself or any other indirect cost. Thus, information held by public authorities should be provided for free or at no more than the reasonable material costs of supplying the requested information (e.g. postage or copying costs). Lastly, any charge must not have a deterrent effect on persons wishing to obtain information, effectively restricting their right of access to information.[19]

17. Even quoting charges at a clearly excessive level and without clear and consistent reasoning would have a deterrent effect on members of the public seeking to exercise their right to environmental information under the Convention.[20]

18. Furthermore, any legal framework allowing for charges must not be interpreted or applied in a way that may have a deterrent effect on persons wishing to obtain environmental information or that may restrict their right of access to environmental information, nor in any event be, or appear to the public to be, unreasonable.[21]

Article 5 (1) (a) – requirement to possess and update environmental information relevant to functions

19. The Committee considers that article 5 (1) (a) imposes an obligation on Parties to ensure that their public authorities possess and update at least the environmental information that they are required to collect and maintain under national law.[22]

[15] Findings on communication ACCC/C/2015/134 (Belgium), ECE/MP.PP/C.1/2021/24, para. 98.
[16] Findings on communication ACCC/C/2017/147 (Republic of Moldova), ECE/MP.PP/C.1/2021/30, para. 86.
[17] Ibid., para. 87.
[18] Ibid., para. 88.
[19] Ibid., para. 89.
[20] Ibid., para. 95.
[21] Ibid., para. 96.
[22] Findings on communication ACCC/C/2015/131 (United Kingdom), ECE/MP.PP/C.1/2021/23, para. 89.

20. Moreover, it is implicit in article 5 (1) (a) that the public authority possesses the required environmental information at the relevant time. For example, for a proposed activity subject to environmental impact assessment (EIA), article 5 (1) (a) requires that the decision-maker possesses the EIA report at the time it takes the decision to permit the activity.[23]

Article 5 (3) – environmental information made "progressively available" in "easily accessible" electronic databases

21. The word "progressively" in article 5 (3) must be construed in the context that more than two decades have passed since the Convention's adoption. Compared to the early, emerging state of electronic information tools at that time, the primary means through which environmental information is now disseminated by public authorities in most, if not all, Parties is through electronic means, namely public authorities' websites.[24]

22. The requirement that electronic databases be "easily accessible" has several components including that: access is free of charge; registration requirements, if any, are kept to a minimum without the need for personal identification; databases have a user-friendly interface with easy-to-use search functions including, where relevant, the possibility to easily identify all documents relevant to particular procedures; and the databases are systematically organized and well-structured.[25]

23. "Easily accessible" also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority's possession. Second, the information must be immediately retrievable when using the database. Information cannot be "easily accessible" from a website if the public effectively has to make an access-to-information request under article 4 of the Convention to gain access to the information in the database.[26]

24. Article 5 (3) (d) stipulates that information accessible in electronic databases should include "other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention", provided that such information is already available in electronic form. The Committee considers that this must include, as a minimum, the environmental information relevant to their functions that public authorities are required to possess and update in accordance with article 5 (1) (a).[27]

25. In those Parties where national law requires that all documents be submitted to public authorities in electronic form, those documents must be available promptly through electronic databases. However, the obligation in article 5 (3) (d) goes beyond that. In similar vein to the word "progressively" in article 5 (3), first sentence, the phrase "provided that such information is already available in electronic form" in the final clause of article 5 (3) must be read in the light of the general availability of electronic documentation and communication in the present day, more than two decades after the Convention's adoption. It is clear to the Committee that this reference should no longer constitute a valid reason for not making available all environmental information that is otherwise covered by article 5 (3) (d).[28]

Article 5 (7) (a) – publishing of facts and analyses of facts relevant and important in framing major environmental policy proposals

26. The Committee considers that the question of whether particular information "frames" a policy proposal depends on the stage of the decision-making and on the relevance of that information to the decision-making. Such "framing" information is usually mentioned in the explanatory memorandum or other official justification for the proposal, even if not in the text of the proposal itself.[29]

[23] Ibid., para. 90.
[24] Ibid., para. 101.
[25] Ibid., para. 102.
[26] Ibid., para. 103.
[27] Ibid., para. 104.
[28] Ibid., para. 105.
[29] Findings on communication ACCC/C/2014/112 (Ireland), ECE/MP.PP/C.1/2021/17, para. 141.

27. It is vital that a Party give the public all facts and analyses of facts it considers relevant and important in framing major environmental policy proposals, as well as when plans and programmes relating to the environment are being prepared and discussed. There is in this respect a key interrelationship between the requirements of articles 5 (7) (a) and 7 of the Convention, as the publication of facts and analyses of facts under the former helps to ensure that the public has the relevant information it needs to make its participation in the related decision-making under article 7 effective.[30]

28. In determining whether particular information "frames" a policy proposal, the Committee points out that "framing" refers to information that supports or underpins the decision-making on the policy proposal prior to that decision being taken. It does not refer to analyses or other environmental information generated as a result of that environmental policy proposal.[31]

III. Public participation in environmental decision-making

Article 6 (1) (b) – appropriate assessment

29. Article 6 (3) of the Habitats Directive requires any plan or project "likely to have a significant effect" on a Special Area of Conservation, either individually or in combination with other plans or projects, to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. The decision to carry out an appropriate assessment under article 6 (3) of the Habitats Directive is therefore a determination that an activity is likely to have a significant effect on the Special Area of Conservation. It is likewise a determination under article 6 (1) (b) that the activity is subject to the provisions of article 6 of the Convention. Importantly, it is not the outcome of the appropriate assessment that is the determination for the purposes of article 6 (1) (b), but the fact that it is determined that an appropriate assessment must be carried out.[32]

Article 6 (2) – notification of the public concerned

Content of the notice must be accurate

30. It goes without saying that the obligation in article 6 (2), to provide "adequate and effective" notice, requires that the information in the notice is correct. The public must be able to rely on this information and should not have to double-check that it is correct. Regardless of which entity carries out the notification, it is for the Party concerned to ensure that the public concerned is adequately and effectively, and by that correctly, notified.[33]

31. The Committee considers that adequate information under article 6 (2) (d) (iv) and (v) requires a specific contact point in the public authority to be named and preferably an email address to be provided.[34]

Means of notification

32. Whilst the fact that no members of the public participated in the hearing is significant, lack of attendance does not necessarily mean that the notice was ineffective. However, public authorities should take care to choose effective methods of notification, and if experience shows that the methods used do not result in the participation of the public concerned, they should be reconsidered.[35]

[30] Findings on communication ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 120.
[31] Ibid., para. 122.
[32] Findings on communication ACCC/C/2013/90 (United Kingdom), ECE/MP.PP/C.1/2021/14, para. 84.
[33] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 101.
[34] Findings on submission ACCC/S/2015/2 (Belarus), ECE/MP.PP/C.1/2021/13, para. 94.
[35] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 98.

Means of notification in transboundary context

33. The means of notification used to notify the public concerned in the Party of origin may not be sufficient to notify the public concerned in the transboundary context.[36]

34. As a general rule, the Committee considers it unreasonable to expect the public to proactively check websites in case there are any decision-making procedures of interest to them and therefore other means of notifying the public are also needed. In cases where the "relevant stakeholders" are clearly indicated it may be useful to notify the representatives of such stakeholders individually. This, however, must not preclude other members of the public from participating. [37]

Article 6 (4) – early public participation, when all options are open

35. Compliance with article 6 (4) requires not only that all options are legally open at the time of the public participation, it must also be apparent to the public concerned that they are open.[38]

36. The Committee considers that the requirements of article 6 (4) of the Convention would not be met if options were de jure and de facto still open but this was in no way apparent to members of the public participating in the decision-making procedure.[39]

37. When public participation is provided for, the permit authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making.[40]

38. In a tiered decision-making procedure, the requirement for "early public participation, when all options are open" refers to the availability of options at a given stage of the decision-making. It neither requires that all options must be studied nor indicates which options/alternatives must be studied and at which stage – this is within the discretion of the competent authorities. It merely precludes foreclosing any options without public participation. Nothing in article 6 (4) precludes the right of the competent authorities in the context of article 7 (or, in the case of article 6, of project proponents) to select their preferred option (or options) and promote it (or them); nor does it require that all options studied by the competent authorities, for example those considered in passing at an early exploratory stage, be presented to the public. However, it does imply that members of the public should be able in their comments to challenge the options put forward in the draft plan and to propose other options, including the zero option. This has a bearing on the obligation in article 6 (8) to take due account of the outcome of the public participation. This provision, seen in this context, requires the competent authorities to consider the option or options suggested by the public and provide reasons for not accepting them.[41]

39. For an activity likely to have a significant effect on the environment, such as the lagoons in the present case, it can never meet the requirement of article 6 (4) of the Convention for "early public participation, when all options are open" for the decision to permit the activity to be taken after the activity has already commenced or the construction has taken place.[42]

[36] Findings on submission ACCC/S/2015/2 (Belarus), ECE/MP.PP/C.1/2021/13, para. 97.

[37] Findings on communication ACCC/C/2013/96 (European Union), ECE/MP.PP/C.1/2021/3, para. 119.

[38] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 117.

[39] Findings on communication ACCC/C/2014/100 (United Kingdom), ECE/MP.PP/C.1/2019/6, para. 85.

[40] Findings on communication ACCC/C/2014/104 (Netherlands), ECE/MP.PP/C.1/2019/3, para. 76.

[41] Findings on communication ACCC/C/2014/100 (United Kingdom), ECE/MP.PP/C.1/2019/6, para. 84.

[42] Findings on ACCC/C/2013/90 (United Kingdom), ECE/MP.PP/C.1/2021/14, para. 94.

Article 6 (7) – opportunities for the public to comment in writing and at public hearings

Written comments to be submitted directly to the public authority

40. Establishing a system whereby comments submitted by the public during the EIA procedure are to be in the first instance submitted to an entity not required to be independent from the developer, and not to the competent public authority itself, is in non-compliance with article 6 (7).[43]

Expertise to answer the public's questions at the hearing

41. In selecting representatives to take part in a public hearing or other event with the public concerned, [the Party concerned] should have ensured that they had the necessary expertise to address the public's questions. For a complex project like a nuclear power plant (NPP), there may also be technical questions for which its representatives would need to provide further information in writing after the event.[44]

Article 6 (8) – taking due account of the public participation

Evaluation of comment by public authority

42. The obligation in article 6 (8) that the Party concerned shall ensure that, in the decision, due account is taken of the outcome of the public participation necessarily requires that the public's comments be considered by the competent public authority. Accordingly, it is incompatible with the Convention for the developer's consultant to prepare the responses to the comments received and the reasoned evaluation of the comments for the competent public authority. Moreover, it is not in compliance with the Convention for the competent public authority responsible for taking the decision to be provided only with the summary of the comments submitted by the public.[45]

43. It is fundamental for compliance with article 6 (8) that there should be a clear obligation in the legal framework for the competent public authority itself to take due account of the outcome of the public participation.[46]

Equal treatment of comments from the public

44. In the decision-making, equal account must be taken of comments submitted in writing and comments made during the virtual hearing.[47]

45. The Committee emphasizes that a system whereby only the comments of certain members of the public are duly taken into account, while others are disregarded or considered to be "count less" by the decision-making authorities, would not be consistent with the Convention.[48]

Taking due account in transparent and traceable way

46. In every public participation procedure under articles 6 and 7 of the Convention, the public must be able to see how their comments have been taken into account in the decision-making in a transparent, traceable way. This obligation applies equally to public participation carried out through virtual means.[49]

[43] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 137.
[44] Findings on submission ACCC/S/2015/2 (Belarus), ECE/MP.PP/C.1/2021/13, para. 134.
[45] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 138.
[46] Ibid., para. 139.
[47] Recommendations with regard to request for advice ACCC/A/2020/2 (Kazakhstan), ECE/MP.PP/C.1/2021/6, para. 44.
[48] Findings on communication ACCC/C/2013/96 (European Union), ECE/MP.PP/C.1/2021/3, para. 97.
[49] Recommendations with regard to request for advice ACCC/A/2020/2 (Kazakhstan), ECE/MP.PP/C.1/2021/6, para. 68.

Article 6 (9) – notification and access to the decision once taken

Prompt notification of decision once taken

47. What constitutes prompt notification of a decision depends on the specific circumstances (for example, the kind of decision, the type and size of the activity) and relevant provisions of the domestic legal system (for example, relevant appeal procedures and their timing).[50]

Statement of reasons to include how public participation taken into account

48. While writing individually to each member of the public who submitted comments may be an additional good practice, such individual "private" replies cannot meet the requirement in article 6 (9) to publicly show the reasons on which the decision is based, including how the public's comments have been taken into account.[51]

Article 6 (10) – reconsideration or update of operating conditions

"Operating conditions"

49. For the purposes of article 6 (10), an activity's "operating conditions" include all the conditions in the permit and not just the technical or functioning conditions affecting the production process.[52]

Mutatis mutandis

50. The reference in 6 (10) to "mutatis mutandis" simply means "with the necessary changes". Rather than conveying some discretion for the Parties on whether or not to apply these provisions, it refers to the changes necessary due to the nature of the given decision-making procedure.[53]

Meaning of "where appropriate"

51. "Where appropriate" does not imply complete discretion for a Party to determine whether or not it was appropriate to provide for public participation. Rather, the clause "where appropriate" introduces an objective criterion to be applied in line with the goals of the Convention. Most importantly, the clause "where appropriate" does not preclude a review by the Committee on whether the Party concerned should have provided for public participation in the particular case.[54]

52. This does not mean that public participation should be guaranteed in all cases where the public authority reconsiders or updates the operating conditions for activities listed in annex I to the Convention. The question is rather whether the Party concerned was within its margin of discretion as to what was "appropriate" when it decided not to provide for public participation with respect to the reconsideration and possible update of the permits' conditions.[55]

53. The Committee considers that, when determining whether it will be "appropriate", and thus required, to provide for public participation meeting the requirements of article 6 (2)–(9) when a public authority reconsiders or updates the operating conditions of an activity subject to article 6, some kind of significance test, to be applied to each such decision-making

[50] Findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 141.
[51] Ibid., para. 143.
[52] Findings on communication ACCC/C/2014/122 (Spain), ECE/MP.PP/C.1/2021/7, para. 73.
[53] Ibid., para. 75; see also findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 96; findings on communication ACCC/C/2014/104 (Netherlands), ECE/MP.PP/C.1/2019/3, para. 70; findings on communication ACCC/C/2016/143 (Czechia), ECE/MP.PP/C.1/2021/28, para. 102.
[54] Findings on communication ACCC/C/2014/122 (Spain), ECE/MP.PP/C.1/2021/7, para. 76; see also findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 97.
[55] Findings on communication ACCC/C/2014/122 (Spain), ECE/MP.PP/C.1/2021/7, para. 77.

procedure in question, is the most appropriate way to understand the requirements of the Convention.[56]

54. Accordingly, when a public authority reconsiders or updates the operating conditions for an activity subject to article 6 of the Convention, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate" and thus required. It would be for a Party to demonstrate to the Committee that any possible change in the activity's parameters would neither be capable of significantly changing the basic parameters of the activity nor address significant environmental aspects of the activity.[57]

55. There is nothing in the wording of article 6 (10) to limit its application only to reconsiderations or updates that are themselves subject to EIA. Rather, it is clear to the Committee that article 6 (10) applies to a reconsideration or update of the operating conditions for an activity subject to article 6 of the Convention, irrespective of whether the reconsideration or updating process is itself required to undergo an EIA.[58]

56. It is not the actual outcome of the reconsideration or the update that is determinative of whether public participation should be carried out. Rather, the key criterion is whether the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity. In this regard, the scope of when public participation is to be considered "appropriate" must be even more limited if the update of the operating conditions may itself have a significant effect on the environment. However, it is not decisive whether the operating conditions of the activity will indeed ultimately be updated or will in fact have significant environmental effects. Likewise, it is immaterial that, if the operating conditions are updated, the updated conditions could in some respects have a beneficial effect on the environment, human health and safety. The crucial point is whether the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity.[59]

Reconsideration of permitted duration

57. The permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions.[60]

58. Save in exceptional circumstances such as an extension of only very minimal duration, when extending the duration of a permit subject to article 6, it is "appropriate", and thus required, to provide for public participation.[61]

59. It is clear that the extension of an activity's permitted duration for more than two years is not just a minimal time.[62]

Developments in Best Available Techniques conclusions

60. The Committee considers that, where a public authority reconsiders and, if necessary, updates the operating conditions of an activity subject to article 6 of the Convention due to the publication of new Best Available Techniques (BAT) conclusions or developments in BATs, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental

[56] Ibid., para. 78; see also findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 99.

[57] Ibid., para. 82; findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 103.

[58] Findings on communication ACCC/C/2013/107 (Ireland), ECE/MP.PP/C.1/2019/9, para. 77.

[59] Findings on communication ACCC/C/2014/122 (Spain), ECE/MP.PP/C.1/2021/7, para. 83; findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, paras. 104 and 117.

[60] Findings on communication ACCC/C/2014/104 (Netherlands), ECE/MP.PP/C.1/2019/3, para. 65.

[61] Findings on communication ACCC/C/2013/107 (Ireland), ECE/MP.PP/C.1/2019/9, para. 90.

[62] Findings on communication ACCC/C/2014/122 (Spain), ECE/MP.PP/C.1/2021/7, para. 96.

aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate", and thus required.[63]

Operational safety requirements

61. Operational safety requirements are understood as intended to ensure the safe operation of an installation and serve to prevent impacts on humans and the surrounding environment. Accordingly, at least some of a facility's operational safety requirements will concern the facility's potential for having impacts on the environment, human health and safety.[64]

62. Based on the above, the Committee considers that where a public authority reconsiders and, where necessary, updates the operating conditions of an activity subject to article 6 of the Convention in order to meet operational safety requirements, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate", and thus required.[65]

Periodic safety reviews

63. The Committee considers that, because of the "regulatory review" stage, a periodic safety review (PSR) is a "reconsideration" of the NPP's operating conditions within the meaning of article 6 (10) of the Convention. Moreover, should the regulatory body's review of the PSR report find that certain measures should be applied, those measures will constitute an "update" of the NPP's operating conditions within the meaning of article 6 (10) too. Accordingly, the Party concerned is required by article 6 (10) to determine whether or not it is "appropriate" and thus required, to carry out public participation under article 6(2)–(9).[66]

64. The regulatory review stage of a PSR is accordingly "capable of changing the basic parameters" of the NPP, including determining whether the licensing basis and operating conditions for the NPP remain valid or should be changed. The Committee therefore considers it is "appropriate" and thus required, for the Party concerned to apply the provisions of article 6 (2)–(9) when carrying out the regulatory review of each 10-yearly periodic safety review.[67]

Special focus – public participation under article 6 during the COVID-19 pandemic

65. Even in the case of a crisis such as the pandemic, the binding rights set out in the Convention cannot be reduced or curtailed. Rather, if the usual modalities for ensuring effective public participation in decision-making cannot be used, any alternative means must fulfil the requirements of the Convention.[68]

66. The opportunities for the public to participate in the decision-making on a particular activity during the pandemic should be "consistent" with, that is in line with, the opportunities for the public to participate in normal times. This means that public authorities may need to make additional efforts to ensure that the public are, in practice, not disadvantaged.[69]

67. As a first step, since it may not be possible to apply the modalities typically deployed in public participation procedures in the Party concerned, a needs assessment should be carried out, at the time of preparing the relevant legal framework or on a case-by-case basis, to identify what modalities will, in practice, ensure effective opportunities for the public to participate in decision-making under the Convention during the pandemic. The needs assessment should identify any barriers to the participation of the public due to technology,

[63] Findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 108.
[64] Ibid., para. 110.
[65] Ibid., para. 111.
[66] Findings on communication ACCC/C/2016/143 (Czechia), ECE/MP.PP/C.1/2021/28, para. 118.
[67] Ibid., para. 123.
[68] Recommendations with regard to request for advice ACCC/A/2020/2 (Kazakhstan), ECE/MP.PP/C.1/2021/6, para. 16.
[69] Ibid., para. 23.

language, literacy or disability, as well as any particular obstacles to participation experienced by marginalized groups or by members of the public whose opportunities to participate may be limited due to their duties during the pandemic. This should also include an assessment of the portion of the public facing each such barrier. As a good practice, the needs assessment should be prepared in consultation with the public.[70]

68. As a good practice, the Party concerned should also, on an ongoing basis, evaluate the effectiveness of the modalities applied in public participation procedures under the Convention during the pandemic, including by inviting feedback on this point from the public. Bearing in mind the feedback received, the modalities may need to be adapted going forward in order to ensure that the opportunities for the public to participate are indeed effective in practice.[71]

69. Any alternative modalities for public participation applied during the pandemic should not result in any additional costs on the public who seek to participate. For example, toll-free phone numbers should be provided during the virtual public hearing in order that the public without access to the Internet may still participate without charge.[72]

70. Since the modalities for public participation will differ from those typically used in the Party concerned, officials and authorities will need to make additional efforts and allow more time to assist and provide guidance to explain to the public how they can participate in decision-making procedures on environmental matters carried out during the pandemic.[73]

71. Each Party will also need to provide training and additional resources to their authorities and officials to ensure that they are properly equipped to facilitate participation by the public in decision-making procedures under the Convention carried out during the pandemic.[74]

72. The obligation to ensure opportunities for the public to participate effectively is the fundamental standard against which all the aspects of a public participation procedure under the Convention should be measured. This applies equally to public participation procedures carried out during the pandemic.[75]

Article 6 (2) – timely, adequate and effective notice of the public concerned during the COVID-19 pandemic

Means of notification

73. Since members of the public may be required to stay in their homes, or may choose to do so for health reasons, it may not be adequate or effective to notify them only through physical notices posted in the vicinity of the proposed activity or on public noticeboards and, accordingly, additional means of notification should be used.[76]

Article 6 (3) – reasonable time frames for public participation during the COVID-19 pandemic

74. Since the public will not be able to prepare and to participate in the usual way, the standard time frames for each stage of the public participation procedure may need to be extended to enable the public to prepare and participate effectively. For example, the time frame for the public to prepare comments may need to be extended since it may take longer than usual for the public to access all information relevant to the decision-making.[77]

[70] Ibid., para. 26.
[71] Ibid., para. 27.
[72] Ibid., para. 28.
[73] Ibid., para. 29.
[74] Ibid., para. 30.
[75] Ibid., para. 22.
[76] Ibid., para. 33.
[77] Ibid., para. 38.

Article 6 (6) – alternative means to examine the information relevant to the decision-making during the COVID-19 pandemic

75. If, due to the restrictions in place during the pandemic, the public concerned will not be able to visit the premises of public authorities to examine the information relevant to the decision-making in person, it will be necessary to put in place alternative possibilities for the public to examine the relevant information.[78] A good practice would be to establish a user-friendly one-stop online portal where the public concerned can easily access all the relevant information.[79]

76. However, it must also be possible for those without access to the Internet to easily access that information. This may entail posting information packs containing all the relevant information to such persons. In accordance with article 6 (6), these information packs must be provided free of charge.[80]

Article 6 (7) – procedure for submission of comments during the COVID-19 pandemic

77. The Convention does not preclude public hearings on decision-making under the Convention being held through videoconferencing or other virtual means, provided that in practice all the requirements of the Convention are fully met.[81]

78. The public must, in every case, have the option to submit comments in writing. In the case of a virtual hearing, this should include the opportunity to submit written comments after the virtual hearing has taken place.[82]

79. As with hearings held in person, hearings held through videoconferencing or other virtual means should be open to anyone who wishes to take part, and not only by invitation.[83]

80. Also, as with hearings held in person, if a large number of members of the public wish to take part in the virtual hearing, in order to enable all members of the public wishing to speak to do so, more than one hearing may need to be held or the hearing may need to take place over more than one day.[84]

Technical barriers

81. Alternatives should be provided so that members of the public lacking access to technology or appropriate technical skills are still able to participate effectively.[85]

82. First, members of the public who do not have access to the Internet, or who experience technical difficulties, should still be able to participate in the hearing by calling a toll-free phone number to listen to the proceedings and to ask questions and make statements.[86]

83. Second, all members of the public should be entitled to submit written comments.[87]

Language barriers to participation

84. As for hearings held in person, appropriate interpretation should be provided on request in order to ensure the effective participation of the public. To that end, the notice of the virtual hearing to be published under article 6 (2) of the Convention should, as appropriate, indicate the language(s) in which the virtual hearing will be conducted and inform the public of the possibility to request interpretation, if required.[88]

Participation in the transboundary context

[78] Ibid., para. 40.
[79] Ibid., para. 41.
[80] Ibid., para. 42.
[81] Ibid., para. 17.
[82] Ibid., para. 43.
[83] Ibid., para. 45.
[84] Ibid., para. 46.
[85] Ibid., para. 49.
[86] Ibid., para. 50.
[87] Ibid., para. 51.
[88] Ibid., para. 55.

85. For proposed activities that may have potential transboundary impacts, the current status of the pandemic and the measures taken by public authorities in those areas should be borne in mind. Going forward, it may be that the public within the Party concerned are once again able to participate in person, but the foreign public are still under restrictions regarding their freedom of movement and can only participate in the decision-making procedure remotely. In such a situation, the Party concerned should put in place appropriate arrangements to enable the foreign public to nevertheless participate effectively.[89]

Technical support

86. The organizers of the public hearing should provide appropriate technical support to ensure the smooth running of the virtual hearing.[90] Contact details of the technical support personnel should be provided in the notification for the virtual hearing, together with instructions on the various means by which the public may join the hearing (for example, weblink, toll-free phone numbers, etc.).[91]

87. If the virtual hearing is affected by widespread technical problems, it should be postponed and rescheduled, at least for the parts of the hearing which were unable to proceed.[92]

88. The organizers of the virtual hearing should keep a record of any technical problems experienced during the hearing.[93]

Transparency

89. In accordance with the requirement in article 3 (1) for a transparent framework to implement the Convention, the public should be able to know the identity of all those participating in the virtual hearing and who they represent. This includes the identity of the organizers, officials and representatives of the developer or promoter of the proposed activity present at the hearing, as well as the other members of the public participating, and their affiliations (if any).[94]

90. In addition, and even more so than with hearings in person, appropriate controls should be put in place to prevent any entity or persons with an interest in promoting the proposed activity from paying, rewarding or putting pressure on members of the public to express support for the proposed activity during the hearing.[95]

91. The minutes or transcripts of the virtual hearing should be made publicly available so that all those who made oral submissions may verify that their comments have been transcribed accurately.[96]

Article 7 – public participation concerning plans and programmes relating to the environment

Scope of "plans" and "programmes" under article 7

92. The Committee points out that the scope of plans and programmes under article 7 is not limited to those "which are likely to have a significant impact on the environment" but instead includes any plan or programme "relating to the environment".[97]

A transparent and fair framework

93. The requirement in article 7 to make provisions for the public to participate within a "transparent and fair framework" covers both the transparency and fairness of the general

[89] Ibid., para. 58.
[90] Ibid., para. 59.
[91] Ibid., para. 60.
[92] Ibid., para. 62.
[93] Ibid., para. 63.
[94] Ibid., para. 65.
[95] Ibid., para. 66.
[96] Ibid., para. 67.
[97] Findings on communication ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 128.

framework of the Party concerned for public participation in plans and programmes and also the transparency and fairness of the public participation procedure carried out on a particular plan or programme.[98]

Identification and notification of public concerned

94. The obligation to identify the public which may participate must not be used by public authorities in a way that would restrict public participation, but rather as a way of making public participation more effective. However, simply designing the procedure so that anyone who may wish to participate can do so may not be enough. Even if the procedure is open to all, it is recommended that, bearing in mind, inter alia, the nature of the decision-making and its geographical scope, a wide range of interest groups be identified and encouraged to take part in the process. The bottom line is that the public participation procedure must be open to allow anyone affected by or with an interest in the decision to participate.[99]

Necessary information

95. The concept of plans and programmes "relating to the environment" is much broader and covers not only plans and programmes "which may have a significant effect on the environment" but also those which may have an effect on the environment without the effect being "significant" and those plans or programmes intended to promote environmental protection. [100]

96. Plans and programmes "which may have a significant effect on the environment" would normally be required under national law to undergo some form of strategic environmental assessment and for these plans and programmes the requirements of article 6 (6) could be applied mutatis mutandis. By contrast, for plans and programmes relating to the environment but not subject to strategic environmental assessment, in particular those intended to promote environmental protection (for example, an environmental education programme or an environmental inspection plan), some of the information listed in subparagraphs (a)–(f) of article 6 (6) may not be relevant.

97. The Committee considers that some of the requirements included in article 6 (6) should nonetheless be used as guidance as to what constitute elements of the obligation under article 7 to provide the public with "the necessary information". The first element is the obligation to provide "all information relevant to the decision-making that is available at the time of the public participation procedure". This would include, inter alia, the "main reports and advice issued to the public authority" available at the time when the public is informed in accordance with article 6 (2) (see article 6 (6) (f)). It would also include any available information on the effects of the proposed plan or programme on the environment (see article 6 (6) (b)). A second element is the obligation to provide an "outline of the main alternatives studied by the applicant", which, in the case of plans and programmes, would mean those studied by the competent authority responsible for the preparation of the given plan or programme.[101]

98. It is clear that "the necessary information" in article 7 includes the notice requirements in article 6 (2). These requirements are incorporated by virtue of the express reference in article 7 to article 6 (3), which in turn stipulates that notice is to be carried out in accordance with article 6 (2).[102]

99. In the light of the above observations, the Committee considers that the obligation in article 7 to provide "the necessary information to the public" includes requirements both:

[98] Findings on communication ACCC/C/2014/100 (United Kingdom), ECE/MP.PP/C.1/2019/6, para. 105.

[99] Findings on communication ACCC/C/2013/96 (European Union), ECE/MP.PP/C.1/2021/3, para. 115.

[100] Findings on communication ACCC/C/2014/100 (United Kingdom), ECE/MP.PP/C.1/2019/6, para. 93.

[101] Ibid., para. 93.

[102] Ibid., para. 88.

(a) To actively disseminate the information indicated in article 6 (2), including information about the opportunities to participate and availability of the relevant information; and

(b) To make available to the public all information that is in the possession of the competent authorities and is relevant to the decision-making and is to be used for that purpose. The relevant information under category (b) would normally include the following information:

(i) The main reports and advice issued to the competent authority;

(ii) Any information regarding possible environmental consequences and cost-benefit and other economic analyses and assumptions to be used in the decision-making;

(iii) An outline of the main alternatives studied by the competent authority.[103]

Taking due account

100. Whatever procedure is used, the Committee emphasizes that it is for the Party concerned to demonstrate that it has taken due account of the outcome of the public participation. The obligation to take due account has just as much force for plans, programmes and policies under article 7 as it has for projects under article 6.[104]

Article 7 – public participation on policies relating to the environment

101. It is evident from the wording of article 7, final sentence, that the obligation to provide for public participation in policies is somewhat "softer" than that regarding plans and programmes. The Convention does however impose certain minimum obligations with respect to the opportunities for the public to participate in the preparation of policies.[105]

102. First, article 7, final sentence, refers to "the public" in general. Thus, it would not suffice if the opportunities to participate in the preparation of a policy were only provided to selected stakeholders.[106]

103. Second, article 5 (7) (a) requires each Party to proactively disclose the facts and analyses of facts which it considers relevant and important in "framing" major environmental policy proposals.[107]

Article 8 – public participation during the preparation of generally applicable legally binding normative instruments

104. The Committee considers that there is nothing in the title or text of article 8 of the Convention to suggest that it does not include the preparation of legislation by executive bodies to be adopted by national parliaments. On the contrary, although the terms "legislation" and "laws" do not appear in the provision, the wording of article 8 and the ordinary meaning given to its terms nevertheless support the inclusion of legislation and other normative instruments of a similar character.[108]

105. First, article 8 refers to "generally applicable legally binding normative instruments", which is exactly what legislation is. The Committee understands this as a generic expression intended to cover different kinds of generally applicable legally binding normative instruments, which may be referred to in different ways in different jurisdictions. In addition to draft legislation prepared by executive bodies to be adopted by national parliaments, the provision also applies to the preparation by executive bodies of other generally applicable

[103] Ibid., para. 94.
[104] Findings on communication ACCC/C/2013/96 (European Union), ECE/MP.PP/C.1/2021/3, para. 128.
[105] Findings on communication ACCC/C/2014/105 (Hungary), ECE/MP.PP/C.1/2021/16, para. 139.
[106] Ibid., para. 140.
[107] Ibid., para. 142.
[108] Findings on communication ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 95.

legally binding normative instruments to be adopted by local or regional assemblies, whether or not the outcome is referred to as "legislation".[109]

106. Second, the term "generally applicable legally binding normative instruments" is included in addition to "executive regulations". If article 8 was only intended to apply to such regulations by the executive branch, then there would be no reason to add the reference to generally applicable legally binding normative instruments. In this context, the Committee recalls its findings on communication ACCC/C/2009/44 (Belarus), where it stressed that "the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment".[110] The Committee also notes that this view is supported by the *Maastricht Recommendations on Promoting Effective Public Participation in Decision-making on Environmental Matters*, which, on several occasions refer to "executive regulation or law" or similar expressions, where "law" is shorthand for "generally applicable legally binding normative instruments".[111] It is thus clear to the Committee that article 8 applies also to the preparation of legislation by executive bodies to be adopted by national parliaments.[112]

107. Based on the above, the Committee considers that article 8 applies also to the preparation of legislation by executive bodies to be adopted by national parliaments, and that public authorities, including Governments, do not act in a legislative capacity when engaged in preparing laws until the draft or proposal is submitted to the body or institution that adopts the legislation.[113]

IV. Access to justice in environmental matters

Article 9 (1) – review of information requests

Expeditious and free of charge or inexpensive review procedure

108. Article 9 (1) of the Convention provides Parties with a measure of discretion as to the overall structure and nature of the review procedures that must be provided in the domestic legal system. However, it is implicit in article 9 (1) that the domestic legal system must always make provision for the public to have access to a review procedure established by law that is expeditious and either free of charge or inexpensive. In other words, regardless of how a Party decides to structure its review procedures for the purpose of article 9 (1), there must always be at least one review procedure that is expeditious and either free of charge or inexpensive.[114]

Article 9 (2) – access to justice regarding decisions subject to article 6

Standing for non-governmental organizations

109. Any non-governmental organization (NGO) meeting the requirements of article 2 (5) is deemed to have standing under article 9 (2). To put it another way, a Party cannot exclude any NGO meeting the requirements of article 2 (5) from standing under article 9 (2).[115]

110. When examining the requirements set by a Party in its national law for an association, organization or group to constitute a "non-governmental organization promoting environmental protection" and "to be deemed to have an interest in the environmental decision-making" under article 2 (5) and thus to have standing under article 9 (2) comply with the Convention, the Committee pays particular attention to whether those requirements in national law:

[109] Findings on communication ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 96.
[110] ECE/MP.PP/C.1/2011/6/Add.1, para. 61.
[111] United Nations publication, Sales No. E.15.II.E.7, heading of section IV ("Public participation during the preparation of executive regulations and laws (article 8)") and paras. 184–187 and 190.
[112] Findings on communication ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, para. 97.
[113] Ibid., para. 101.
[114] Findings on communication ACCC/C/2015/134 (Belgium), ECE/MP.PP/C.1/2021/24, para. 102.
[115] Findings on communication ACCC/C/2016/137 (Germany), ECE/MP.PP/C.1/2021/25, para. 92.

(a) Are clearly defined;

(b) Are consistent with the objectives of the Convention, including the objective of giving the public concerned wide access to justice; and thus that they are not unreasonably exclusionary;

(c) Do not cause excessive burden on environmental NGOs.[116]

111. The burden of proof falls on the Party concerned to demonstrate that any requirements in national law are consistent with the above criteria.[117]

112. The Committee does not consider it appropriate that an organization should have to set up a separate legal entity or become a member of another association in order to have access to review procedures under article 9 of the Convention.[118]

Review of substantive legality

113. While recognizing that different legal systems may have differing approaches regarding the precise nature of the review procedure provided for the purpose of article 9 (2), article 9 (2) requires that a reviewing body must review all the facts, evidence and arguments before it and, based on that review, determine whether the contested decision is lawful. This requires the court to carry out its own assessment, in the light of all the evidence before it, as to whether the applicable legal requirements were met. The court must also clearly set out its reasoning when doing so.[119]

114. For example, in a challenge to the substantive legality of an EIA screening decision, the court must make its own assessment, based on all the evidence put before it, as to whether the proposed activity was likely to have a significant effect on the environment and thus to require an EIA. It would not be sufficient to merely check that the decision-maker carried out the correct procedural steps for determining whether a project was likely to have significant effects. Nor does it suffice for the court to check that the decision-maker had formally applied the correct legal test and that the decision-maker had convinced itself that that test was met in a particular case.[120]

115. To be clear, the Convention does not require the court to undertake a completely fresh analysis of all matters arising in the case and to substitute its decision for the decision taken by the competent authority. Nevertheless, the court must undertake its own assessment of all the evidence before it to determine whether the applicable legal requirements were met. The Committee considers that this requires the court to perform a review function over findings of fact and the weight to be given to evidence where those may have a direct impact on the determination as to whether the applicable legal test (for example, likely significant effects) has been met.[121] The Committee underlines that the court must clearly and demonstrably examine all the evidence before it and explain why it reaches the conclusion it does.[122]

Article 9 (4) – requirements for review procedures under article 9

Timely procedures and adequate and effective remedies regarding review of environmental information requests under article 9 (1)

116. Where the available review procedures are to be used sequentially, and not as alternatives, the requirements of article 9 (4) apply to each such review procedure.[123]

[116] Ibid., para. 100.
[117] Ibid., para. 101.
[118] Ibid., para. 116.
[119] Findings on communication ACCC/C/2013/90 (United Kingdom), ECE/MP.PP/C.1/2021/14, para. 119.
[120] Ibid., para. 120.
[121] Ibid., para. 121.
[122] Ibid., para. 138.
[123] Findings on communication ACCC/C/2016/141 (Ireland), ECE/MP.PP/C.1/2021/8, para. 99.

117. The rights set out in article 9 (4) apply not only to the review procedures under article 9 (1) initiated by the information requester, but also in the context of any challenge by other persons to set aside the outcome of those review procedures.[124]

118. Maintaining a system whereby courts may rule that information requests fall within the scope of the [Convention] without issuing any directions for their adequate and effective resolution thereafter, fails to comply with the requirement in article 9 (4) of the Convention to ensure adequate and effective remedies for the review of environmental information requests.[125]

Injunctive relief

119. Taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, it is of crucial importance that injunctive relief is granted whenever there is a risk of environmental damage and that situations in which development consent is granted prior to the completion of judicial proceedings related to the project should be prevented.[126]

120. The Committee does not consider that automatic suspensive effect is necessarily required to comply with article 9 (4) of the Convention, although it can be a very useful mechanism through which to prevent environmental damage. The Committee thus does not find the lack of automatic suspensive effect as such to amount to non-compliance with article 9 (4).[127]

Prohibitively expensive review procedures

Filing fees

121. When considering whether the filing fees for amending the original claim at first and second instance are prohibitively expensive, the Committee takes into account the typical character of environmental claims within the scope of article 9 (2) and (3) of the Convention. In this regard, time frames for filing such claims are often short. Moreover, unless the filing of claims has suspensive effect, work on the challenged activity may continue after the claim has been lodged, resulting in further matters that the claimant may wish to add to the initial claim. Lastly, important information about the actual or potential environmental impacts may only come to light after the original claim has been filed. These characteristics mean that, through no fault of the claimant, claims within the scope of article 9 (2) and (3) may need to be amended during the course of the procedure. Bearing this in mind, the Committee can see no justification for charging the full filing fee again for the addition of further arguments in cases within the scope of article 9 (2) and (3). Rather, in the view of the Committee, doing so is both unfair and may have a deterrent effect on environmental claimants presenting relevant aspects of their claim that, through no fault of their own, could not have been presented at an earlier stage.[128]

Costs orders against unsuccessful claimants

122. Parties are not expected to ensure that prospective litigants can predict their costs down to the last euro if their action fails: by definition, litigation involves a number of imponderables. Needless to say, the Committee attaches the utmost importance to the principles of fairness and equity, in keeping with the requirements of article 9 (4).[129]

123. Wide discretion conferred on the courts when deciding litigation costs leads to a lack of certainty and clarity regarding the costs that claimants will face when exercising their right to access to justice in environmental matters.[130]

[124] Ibid., para. 100.
[125] Ibid., para. 127.
[126] Findings on communication ACCC/C/2013/96 (European Union), ECE/MP.PP/C.1/2021/3, para. 115.
[127] Ibid., para. 113.
[128] Findings on communication ACCC/C/2015/130 (Italy), ECE/MP.PP/C.1/2021/22, para. 79.
[129] Ibid., para. 117.
[130] Ibid., para. 118.

124. Not ensuring that courts take into account the stage of the proceedings when calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention fails to comply with the requirement in article 9 (4) for such procedures to be fair, equitable and not prohibitively expensive.[131]

Punitive costs

125. When assessing whether the punitive costs provided for under the national legal framework are prohibitively expensive under the Convention, it does not matter whether, in fact, such costs have been applied in practice by the courts. The mere possibility that these costs could be imposed on claimants in environmental case may in itself have a deterrent effect and unfairly discourage members of the public from seeking access to justice with respect to environmental matters.[132]

Fair review procedures

Time frames to appeal

126. A rule that the time frame for the public to challenge a decision is calculated from the date the decision was taken, and not the date when the decision became known to the public, is manifestly unfair. Moreover, it may create an incentive for public authorities not to make decisions under article 6 of the Convention promptly available, knowing that there will then be less opportunity for those decisions to be challenged.[133]

Only developer entitled to full merits review

127. For a decision subject to article 6 of the Convention, if the developer is entitled to a full merits review of that decision, whereas other members of the public seeking to exercise their rights under article 9 (2) are not, this situation is clearly not fair within the meaning of article 9 (4).[134]

Orders to pay costs of third parties

128. It is unfair within the meaning of article 9 (4) to require claimants in cases within the scope of article 9 (2) and (3) to pay the costs of public authorities, developers or other entities who choose to join the proceeding of their own accord.[135]

Article 9 (5) – establishment of appropriate assistance mechanisms

129. Article 9 (5) requires Parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. To comply with this provision, it does not suffice for Parties merely to declare that they are considering, or intend to consider, introducing such mechanisms. Concrete and visible steps to consider such mechanisms must be taken.[136]

130. The Committee points out that this is a continuing obligation: even if a Party has reviewed its costs system in the past, that does not relieve it from the requirement to revisit the matter as needed.[137]

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[131] Findings on communication ACCC/C/2015/131 (United Kingdom), ECE/MP.PP/C.1/2021/23, para. 142.

[132] Findings on communication ACCC/C/2015/130 (Italy), ECE/MP.PP/C.1/2021/22, para. 104.

[133] Findings on communication ACCC/C/2015/131 (United Kingdom), ECE/MP.PP/C.1/2021/23, para. 129; see also findings on communication ACCC/C/2014/118 (Ukraine), ECE/MP.PP/C.1/2021/18, para. 143.

[134] Findings on communication ACCC/C/2013/90 (United Kingdom), ECE/MP.PP/C.1/2021/14, para. 145.

[135] Findings on communication ACCC/C/2015/130 (Italy), ECE/MP.PP/C.1/2021/22, para. 95; see also findings on communication ACCC/C/2013/98 (Lithuania), ECE/MP.PP/C.1/2021/15, para. 146.

[136] Findings on communication ACCC/C/2015/130 (Italy), ECE/MP.PP/C.1/2021/22, para. 106.

[137] Ibid., para. 107.