



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Directive of the European
Parliament and of the Council providing for public participation in respect of the
drawing up of certain plans and programmes relating to the environment and amending
with regard to public participation and access to justice Council Directives 85/337/EEC
and 96/61/EC**

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1- BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2000) 839 final – 2000/0331(COD)):	18 January 2001
Date of the opinion of the Economic and Social Committee:	30 May 2001
Date of the opinion of the European Parliament, first reading:	23 October 2001
Date of transmission of the amended proposal:	12 December 2001
Date of adoption of the common position:	25 April 2002

2- OBJECTIVE OF THE COMMISSION PROPOSAL

The proposal aims to enhance public participation in environmental decision-making and to ensure that basic procedures are consistent in all Member States and in cases with a transboundary dimension. Once adopted, it will contribute to implementing the UN/ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (“the Århus Convention”) signed by the Community and the Member States in June 1998.

The proposal for a single Directive completes, or amends, relevant Community legislation, to fully introduce the requirements of the Århus ‘second pillar’ on public participation in environmental decision-making. Recently adopted legislation already contains requirements, such as Directive 2001/42/EC of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment (the “SEA Directive”) and European Parliament and Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy. In relation to the Convention’s first pillar, a common position was adopted in January 2002 on the proposed Directive on the freedom of access to information relating to the environment.

The proposed Directive provides for public participation in the preparation of plans and programmes under Directives in the environmental field (Article 1). This gives effect to Article 7 of the Århus Convention. The plans and programmes concerned (Annex I) are notably in the waste area, relating to air quality management and water protection from nitrates.

Furthermore, it is proposed to amend Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (“the EIA Directive”) and Council Directive 96/61/EC concerning integrated pollution prevention and control (“the IPPC Directive”). The relevant provisions (Articles 2 and 3 respectively) provide for public participation in the permitting procedures for the projects covered in line with the Århus Convention (Article 6). The proposal establishes obligations and details of information to be provided to the public, and of the requirement to enable the “public concerned” to participate. It makes provision for access to justice, to enable the public concerned to challenge the substantive or procedural legality of the project-related decisions subject to public participation. This would give effect to Article 9(2) of the Århus Convention.

3- COMMENTS ON THE COMMON POSITION

3.1 General comments

The Commission accepted totally, in part or in principle 13 amendments of the 21 amendments proposed by the European Parliament on 23 October 2001. In general, the Commission accepted a number of those amendments aiming to reflect more fully the text of the Århus Convention. Other amendments, which are considered to bring useful clarification and details to the text of the proposal, were accepted in part or in principle.

The Commission did not accept those amendments that go beyond the *legally binding* requirements under the Århus Convention. Furthermore it did not accept amendments that would duplicate, or interfere with, procedures already in place under existing legislation, thus lastly going counter efficient participation of the public.

3.2 Detailed comments

3.2.1. Parliamentary amendments accepted by the Commission and incorporated in full or in part in the common position

The Commission accepted in part amendment 9/10/33, with the Common Position incorporating the parts accepted. As a result, “*electronic media*” are mentioned in Article 2, paragraph 2(a) as possible means for informing the public, and information to be made available includes “*inter alia information about the right to participate in decision-making and about the competent authority to which comments and questions may be submitted*”. In paragraph 2(b), “*when all options are open*” is added. This wording follows the Århus Convention and reformulates “*without prejudice to any options*” proposed by the European Parliament. Accepting in principle another item proposed by the Parliament, a new point (d) is added: “*the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based*”.

The Commission accepted in part amendment 34/15/16 on Article 3, point 2 of the proposal, which amends Article 6 of the EIA Directive. Here too, the Common Position takes up “*electronic media*” (Article 6(2) EIA Directive). In Article 6(4) of the EIA Directive, “*when all options are open*” is added in relation to participation of the public concerned in

environmental decision-making.

On access to justice, amendment 31/rev was accepted in part, and reflected insofar in the Common Position, by adding in Article 10a EIA Directive the qualification “*independent and impartial*” as concerns the “*body established by law*” (Article 3, point 5). The same applies to amendments 32/rev/23 concerning the new Article 15a IPPC Directive (Article 4, point 4). While the remainder of the text proposed in the amendments is incorporated in the Common Position, it is to be stressed that the Commission could not accept the changes proposed by the European Parliament as such, but only with the related text of the Århus Convention being fully reproduced. This is the case for the Common Position, which also takes over the Århus text as concerns the clarification of the ‘*sufficient interest*’ and ‘*maintaining impairment of a right*’ for non-governmental organizations. Furthermore, the wording ‘*Any such procedure shall be fair, equitable, timely and not prohibitively expensive*’ taken from the Århus Convention is in the Common Position.

Amendment 20/21 was accepted in part. The idea that the public concerned should also be informed about possibilities for seeking review was accepted in principle and taken over by the Common Position. It is now situated at the end of the new Article 10a EIA Directive (Article 3, point 5), in line with the Århus text: “*In order to further the effectiveness of this article, Member States shall ensure that information is made available to the public on access to administrative and judicial review procedures.*”

The same applies in relation to the IPPC Directive: amendment 35 was accepted in part, as the Commission agreed in principle to add a reference concerning information about review procedures. This reference is however better placed at the end of the new Article 15a on access to justice (Article 4, point 4).

Amendment 27/28/29 on the new Annex V to the IPPC Directive was accepted in part by the Commission and the Council. The Common Position, in point 1, takes up the reference to electronic media (as in Articles 2 and 3), reworded as follows: “*or other appropriate means such as electronic media where available*”. Furthermore, the new wording of point 4 (“*The results of the consultations ... must be taken into due account in the taking of a decision.*”) in principle takes up the related amendment.

3.2.2. Parliamentary amendments accepted by the Commission but not incorporated in the common position

Amendment 13 sought to bring into line with Article 6 (1)(c) of the Århus Convention the exclusion from the Directive 85/337/EEC of projects serving national defence purposes, by allowing Member States to decide on a case-by-case basis rather than a generalised exemption. This was acceptable to the Commission but the Council did not agree to the wording being modified at this respect.

The Commission accepted in principle part of amendments 2 and 5 aiming to replace, in Recitals 2 and 6, “*personal health and well-being*”. The terminology acceptable to the Commission is “*human health and well-being*”, which is in line with the wording used in Article 174 of the Treaty, however not “*individual and public health and well-being*”. This was not taken on board in the Common Position, as the Council considered that this was not in the spirit of the amendment. Furthermore, the Common Position did not take on board the remaining part of amendment 5 on Recital 6 to which the Commission had agreed in principle. The Commission had agreed to refer to an objective of the Århus Convention being the “*desire to guarantee rights of public participation in decision-making in environmental*”

matters, instead of “*in certain kinds of environmental decision-making*” as originally proposed.

The Commission accepted in principle amendment 4, to add the text proposed by the Parliament “*and support for the decisions taken*” at the end of Recital 3. The Council did not agree to such text being added.

The Commission accepted in principle amendment 14, subject to point (b) being redrafted. This amendment would provide for public participation also in relation to the possible exemption of a specific project from the EIA Directive. In line with that Directive and the rest of the proposal, the Commission could accept point (b), worded as follows: “*make available to the public concerned the information obtained in the manner referred to in point (a), the information relating to the exemption decision and the reasons for granting it.*” The Council did not accept this.

Concerning amendment 34/15/16, further to the parts incorporated in the Common Position, the Commission accepted re-wording the new Article 6(5) of the EIA Directive. (“*Reasonable time-frames shall be provided for each of the different stages, allowing sufficient time for informing the public and for the public to prepare and participate effectively as provided for in this Article.*”) The Council did not accept this.

The same applies in relation to amendment 27/28/29, relating to the new Annex V to the IPPC Directive. The Commission could accept the re-wording of points 2 and 4 of its proposal. This was however not accepted by the Council.

3.2.3. Parliamentary amendments rejected by the Commission and the Council and not incorporated in the common position

Amendment 1, which aimed at replacing the terminology “*human health*” by “*individual and public health*” (see also above 3.2.2), was rejected as being not in conformity with the wording used in Article 174 EC Treaty.

The first part of amendment 2, i.e. to replace the reference to “*Community environmental legislation* in Recital 1 by a reference to “*Community legislation, plans and programmes relating to other fields of policy*” was not acceptable for the Commission and the Council. The same applies to amendments 3 and 8 on related rewording of the Recitals, and to amendment 26. This amendment proposed a new point to Annex I, which is not well-defined and potentially extremely broad (“*other Community legislation, plans and programmes, which may have a significant effect on the environment or on individual and public health and well-being, the implementation of which is required to take account of Article 6 of the Treaty.*”). To the extent it refers to “*other Community legislation*”, the present proposal for a Directive is not the correct legal instrument. For the rest, adding such general reference is likely to create duplication as to the applicable instrument.

Commission and Council did not accept amendment 6 which would have introduced a recital referring to Article 8 of the Århus Convention, on public participation in the preparation of executive regulations and other generally applicable legally binding rules. No substantive provision at this respect is taken up in the articles.

Amendments 7 and 30/rev providing for access to justice in relation to plans, programmes and policies were rejected. Such obligation is not explicitly provided for under Article 9(2) of the Convention. Furthermore, the SEA Directive does not provide for access to justice, and

introducing it in the framework of the present proposal would have create a situation of legal incoherence.

In relation to amendment 9/10/33 and amendment 25, it was not acceptable for the Commission and the Council to provide for public participation in the preparation of *policies*. Under the Århus Convention, this is foreseen by a ‘best endeavour clause’ (see 3.1). Furthermore, the reference in that amendment to public participation “*in the different stages*” of the preparation and review of the plans and programmes was not acceptable, such wording not being explicitly required to implement the Århus Convention. While the value of educating the public in relation to possibilities of participation is fully shared, inclusion of the phrase “*These arrangements may include educating the public about decision-making, or the funding about such education*” was not acceptable in the present context. The “*detailed arrangements*” to be made by the Member States are meant to be practical modalities for the consultation.

Concerning amendment 34/15/16, Commission and Council did not accept to also mention the *review* procedure as being subject to public participation. This would contradict the EIA directive where this is already covered. The Commission and Council rejected adding the words “*due account shall be taken of the results of public participation.*” This is already provided for under Article 8 of the EIA Directive. Furthermore, as concerns the wording proposed by Parliament under paragraph 5a (“... *the competent authority makes reasonable efforts to reply to the public*”), Article 9(1) of the EIA Directive already obliges the competent authorities to inform about the main reasons and considerations on which the decision is based. Requiring more would be imposing an unnecessary administrative burden. The same applies to the proposed paragraph 4a under amendment 35 in relation to the IPPC Directive (see new Article 15(5)(b)). The part of amendment 35 introducing “*different stages*” of the decision-making procedure was not acceptable, as it does not reflect the IPPC permitting procedure and provision is already made for “*early and effective participation*”.

On amendments 20/21 and amendment 24 relating to projects/installations with transboundary implications, the Commission and Council did not accept that the consulted Member States have to ensure the information to be provided to the public concerned is made available *in their own language*. In line with the principle of subsidiarity, these practical arrangements are left to the Member States.

Council and Commission did not accept the part of amendment 27/28/29, which would extend public participation also to the *reconsideration* of permits under the IPPC Directive (new Annex V). Such reconsideration is in many cases an internal administrative action. To the extent that it leads to changes of the permit, public participation in relation to permit updates is foreseen (see however below on Article 4).

3.2.4. Additional changes made by the Council to the proposal

Title and recitals

The Council slightly changed the title to clarify that Directives 85/337/EEC and 96/61/EC are amended with regard to public participation and access to justice. Recital 8 was changed, eliminating the reference to policies. This is coherent with the approach not to cover policies in the present Directive. Recital 9 now also refers to ‘decisions’ subject to the access to justice provisions. This reflects the substance of the proposed Directive and the Århus Convention. Additional wording for Recital 10 seeks to clarify that the plans and programmes covered are those “*which do not contain sufficient provisions on public participation*”. The Commission

considers that this is already implied with the remainder of the recital. Recital 12 is changed to reflect standard wording on subsidiarity and proportionality.

Article 1 (objective)

Article 1 on the objectives of the Directive was inserted by the Council to enhance clarity. This is a useful addition.

Article 2 (public participation in the preparation of plans and programmes)

The Common Position adds to the opening sentence of paragraph 2 and to point (a), the wording “modification”. This makes the Article coherent with the SEA Directive that also applies to modifications of the plans and programmes covered. Furthermore, in relation to the NGOs entitled to participate, the Common Position adds the words “*meeting any requirements imposed under national law*”, in paragraph 3. This is coherent with the Århus Convention (definition of “the public concerned”), and with the rest of the proposal. In the following sentence the wording “*so as to secure a wide participation by the public*” has been replaced by “*so as to enable the public to prepare and participate effectively*”, a wording taken from Article 6(3) of the Århus Convention.

A new paragraph 4 has been added exempting from the requirements of this Article “*plans and programmes designed for the sole purpose of serving national defence or taken in the case of civil emergencies*”. This is drafted in parallel to Article 3(8) of the SEA Directive and is hence a coherent change.

Finally, paragraph 5 has been added to clarify the relationship with the SEA Directive, which provides for public participation in conformity with the Århus Convention during the preparation of certain plans and programmes likely to have significant environmental effects. It is now set out that the provisions of Article 2 do not apply to plans and programmes for which a public participation procedure is carried out under the SEA Directive. The SEA Directive having been adopted after the present proposal, this clarification had become necessary and the Commission agreed to it.

Article 3 (amendment of the EIA Directive 85/337/EEC, as concerns public participation and access to justice)

As concerns the procedure subject to public participation, the Common Position replaced the expression “*development consent procedure*” by “*the environmental decision-making procedures referred to in Article 2(2)*” (of the EIA Directive). The Commission agreed to this change which takes account of different possibilities of organising, and integrating public participation, provided for under the EIA Directive. The term “environmental decision-making procedures” comes from the Århus Convention.

The content of the new Article 6 paragraph 2 of the EIA Directive as proposed by the Commission was moved to paragraph 4 of the Common Position. The Commission accepted this change in drafting, which more clearly reflects the sequence of public participation.

In the new Article 6 (2) of the EIA Directive, the Council added “*reasonably*” to the introductory sentence, concerning the moment when the public is to be informed. Subparagraph (c) was reworded in part, to set out more clearly the information to be provided in relation to the authorities involved. The Commission agreed.

The Common Position split up the information to be provided to the public. Article 6(2) contains the information to be provided initially, and the new paragraph 3 sets out further elements of information to be made available to the public concerned (earlier in paragraph 2 as proposed by the Commission): information gathered under the environmental impact assessment and the main reports and advice issued to the competent authority. Information other than that under paragraph 2, which only becomes available after the time the public concerned was first informed, is to be made available in accordance with the provisions of the Directive concerning public access to environmental information (on which a common position was reached in January 2002). A parallel change was made in relation to Directive 96/61/EC. In its new Annex V, point 1(f) was moved to a new point 2(a), and an item (b) was added on other relevant information to be made available. The changes reflect the structure of the Århus Convention (Articles 6(2) and 6(6)), and were done with the intention to avoid putting a too heavy burden on the authorities. The Commission accepted these changes, considering however that there was no need for splitting up the information to be provided/made available.

The last sentence of Article 6(5) as proposed by the Commission became a new paragraph 6 in order to generalise the requirement of reasonable time-frames. The Commission agreed.

Regarding Article 7 on cases with transboundary implications, the Common Position reproduces the entire text of paragraph 1 as in Directive 85/337/EEC, replacing “*development consent procedure*” as proposed by the Commission by “*environmental decision-making procedures referred to in Article 2(2)*”. The end of Article 7(2) was adapted to reflect the splitting up of Article 6(3) of the Commission proposal. In the new Article 7(5), “*development consent procedure*” is replaced by “*environmental decision-making procedures referred to in Article 2(2)*”. These changes are consequent to those made earlier.

In the new Article 10a on access to justice, the Common Position takes over wording from Article 9(2) of the Århus Convention concerning the requirements of a “*sufficient interest*” and “*maintaining the impairment of a right*”, and the legal standing of non-governmental organizations (see above 3.2.1). The Commission agreed to this. Furthermore, a phrase was added after the first sentence: “*Member States shall determine at what stage the decisions, acts or omissions may be challenged*”. This was to take account of the possible national requirements, which can be established in accordance with the Århus Convention. At this respect, the Commission underlined that it is crucial the provisions of the Århus Convention are not limited in effect by procedural provisions of the Member States. It considered that the reference “*in accordance with the relevant national legal systems*” is sufficient to respond to the particularities of Member States, and that the addition was unnecessary. The same changes and considerations apply to the new Article 15a of Directive 96/61/EC.

Article 3(6) of the Common Position concerning Annex I/22 of Directive 85/337/EEC integrates Annex II of the Commission proposal. The words “*the appropriate criteria*” were deleted, as they are considered not to add anything to the expression “*thresholds*”, and the words “*if any*” were added in relation to thresholds. The Commission agreed to the changes, considering however that the “*if any*” was not necessary. The new Article 3(7) of the Common Position adds an indent to Annex II of Directive 85/337/EEC. This is in line with the amendment made to Annex I through Article 3(6), and the Commission agreed.

Article 4 (amendment of the IPPC Directive 96/61/EC, as concerns public participation and access to justice)

In relation to the amendment to Article 2(10) of the IPPC Directive, the Council made changes parallel to those of Annex I/22 of the EIA Directive. The words “*the appropriate criteria*” were deleted, adding “*if any*” in relation to thresholds (see above).

Concerning the indent to be added to Article 6(1), first subparagraph, the Common Position adds “*if any*” in relation to alternatives possibly studied by the applicant. This is a minor change and not in contradiction with what was meant; the Commission however considers it is not necessary.

The Council modified the proposed Article 15(1), as regards the decisions under Directive 96/61/EC subject to public participation. While the Commission proposal provided for public participation in the decision-making procedure concerning the *issuing or the updating of a permit or permit conditions*, the Council restricted this scope. According to the text of the Common Position, the public concerned shall participate in the procedure for issuing a permit for new installations, for any substantial change in the operation of an installation and for “*updating of a permit or permit conditions for an installation in accordance with Article 13, if its environmental impact is of such significance that the existing emission limit values of the permit need to be significantly changed*”. The Commission did not agree to this restriction in relation to permit updates, which it considers not to be in line with the Århus Convention. According to Article 6(10) of the Convention, provisions on public participation are to be applied to permit updates “*mutatis mutandis, and where appropriate*”. The Commission considers that, as a principle, permit updates are to be included. While the “where appropriate” can be understood in a sense that in particular ‘purely formal’ updates would not require public participation, it cannot justify to exclude important categories of permit updates. In particular, under the Common Position, both the issuing of permits and updates for existing installations would only require public participation under the conditions set out, which leave a wide margin of appreciation. Furthermore, updates for reasons of operational safety, changes in best available techniques and in legislation would under the Common Position not be subject to public participation. The Commission made a statement to the Council Minutes that it cannot support the wording in the Common Position of Article 4, section (3)(a), third indent. (Annex).

Regarding the amendment of Article 17(1), the common position adds the unmodified second sentence to the end of the paragraph, which is clearer presentation.

Article 5 (Implementation)

The wording was adapted to reflect standard wording, and the date for implementation was changed from a fixed date to “*2 years after the entry into force of the Directive*”. This corresponds to the time frame foreseen in the Commission proposal.

Article 6 (Entry into force)

The wording was adapted providing for entry into force of the Directive on the day of its publication, and not on the twentieth day following publication.

Annex I

In subparagraph (f), the Council deleted the reference to Council Directive 1999/30/EC, the first “daughter Directive” adopted under Council Directive 96/62/EC on ambient air quality assessment and management (*Air Quality Framework Directive*). The Commission agreed to this change, given that the basic obligation to draw up air quality plans or programmes is set out in the Air Quality Framework Directive, and will concern all daughter Directives adopted on its basis.

The Council deleted subparagraph (g), which had included conditioning plans to be provided by the operator of existing landfills among the plans and programmes subject to public participation. The Council considered that there was no scope for public participation in relation to these specific plans, given that the landfill Directive 1999/31/EC lays down the requirements to be fulfilled, and procedures to be followed. The possible creation and siting of new landfills would be subject to a waste management plan under Directive 75/442/EEC, on which public participation is foreseen.

4- CONCLUSION

The Commission considers that the Common Position does not alter the objectives and the basic approach of its proposal and that it actually clarifies some aspects thereof. However, there are some aspects where the proposal has been weakened, in particular relating to the scope of public participation under the IPPC Directive. The Commission is also concerned that the access to justice provisions should not be given a narrow interpretation. The Commission can broadly support the Common Position, with the exception of the limitation of public participation in relation to permit updates under Council Directive 96/61/EC.

5- DECLARATIONS

The declarations made by the Commission and by the Council and the Commission jointly are reproduced in annex to this Communication.

Annex

Re Article 4

“The Commission declares that it cannot support the wording in the Council text of Article 4 section (3)(a), third indent in relation to public participation in the updating of a permit under Council Directive 96/61/EC.

It considers that this formulation is legally unclear, as it refers on one hand to the criteria of Article 13 of the IPPC Directive, which it then severely restricts by supplementary conditions in its second part. The Commission considers that this formulation is not in accordance with Article 6(10) of the Århus Convention according to which, as a principle, permit updates are to be made subject to public participation. The Commission does not consider that the “where appropriate” in that Article allows such far-reaching restrictions as made by the Council text.

Hence, the Commission reserves its right to come back to this question during the second reading of this proposal.”

Re implementation of the Convention of Århus by the Community

“The Council underlines that the Member States and the Community should be able to implement the second pillar of the Århus Convention concerning Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, preferably before mid-2003.

In particular, it must however also be ensured that the relevant provisions of the Convention are applied by the Community Institutions. The Council therefore calls upon the Commission to present as soon as possible an appropriate proposal containing the measures necessary for the implementation of the second pillar of the Convention by the Community Institutions.

The Commission declares that it is at present working at possible options to align the provisions that deal with the Convention’s three pillars with regard to Community Institutions. In relation to access to environmental information, Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents already covers most of the aspects. It will need to be completed, also with a view to the second and third pillar.”