



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.10.2002
COM(2002) 586 final

2000/0331 (COD)

OPINION OF THE COMMISSION

**pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the
proposal for 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**

**AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 250 (2) of the EC Treaty**

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1. INTRODUCTION

Article 251(2), third subparagraph, point (c) of the EC Treaty provides that the Commission is to deliver an opinion on the amendments proposed by the European Parliament at second reading. The Commission sets out its opinion below on the 19 amendments proposed by Parliament.

2. BACKGROUND

- Date of transmission of the proposal to the European Parliament and Council (COM(2000) 839 final – 2000/0331 (COD)): 18 January 2001
- Date on which the European Parliament gave its opinion at First Reading: 23 October 2001
- Date on which the Economic and Social Committee adopted its opinion: 30 May 2001
- Date on which the Committee of the Regions adopted its opinion: 14 June 2001
- Date on which the Commission adopted its amended proposal (COM(2001) 779 final – 2000/0331 (COD)): 12 December 2001
- Date on which the Council adopted the Common Position: 25 April 2002
- Date on which the Common Position was received by the European Parliament: 30 May 2002
- Date on which the Commission communicated its view on the Common Position: 27 May 2002

On 5 September 2002 the European Parliament at its Second Reading adopted 19 amendments. The majority of the amendments aim at extending the scope and content of public participation and, in part, related access to justice, as compared to the Common Position. In some parts, the amendments aim to reinforce the Commission proposal, and to better reflect the Aarhus Convention. Other parts go beyond the Aarhus Convention, or would duplicate existing provisions in other legislation.

3. PURPOSE OF THE PROPOSAL

The Directive, once adopted, will contribute to implementing the Aarhus Convention¹, as far as its 'second pillar' on public participation in environmental decision-making is concerned. In addition, other recent Community legislation already incorporates the principles of the Aarhus Convention regarding public participation and the proposal on access to environmental information is presently under conciliation. The remaining proposals, to fully implement the third pillar and concerning the application of the Aarhus Convention to Community institutions, are under preparation within the Commission services.

The proposed directive completes, or amends, a number of existing Directives, introducing the public participation requirements of the Aarhus Convention. It aims to ensure that the basic procedures are consistent in all Member States, and in cases with a transboundary dimension. In line with the subsidiarity principle, the proposal leaves procedural details and the implementation of 'soft law' provisions of the Aarhus Convention to the Member States.

In more detail, the proposal:

- formulates requirements for public participation in the preparation of certain *plans and programmes* to be adopted by Member States under Directives in the environmental field, notably related to waste, air quality management and water pollution from nitrates (*Article 2 and Annex I*). This contributes to giving effect to *Article 7* of the Aarhus Convention, regarding public participation in the preparation of plans and programmes relating to the environment. For the future, relevant new legislative proposals will take up the Aarhus requirements from the outset. Other recently adopted legal instruments already provide for public participation in the establishment of respective plans or programmes, such as Directive 2001/42/EC on Strategic Environmental Assessment (*the 'SEA Directive'*)² and the Water Framework Directive 2000/60/EC³. The text of the common position clarifies that, to the extent public participation is foreseen by those Directives, their provisions will apply.

¹ UN/ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, signed by the Community and the Member States in June 1998, and entered into force in October 2001

² Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

³ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy

- amends Council Directive 85/337/EEC on environmental impact assessment (*the ‘EIA Directive’*)⁴ and Council Directive 96/61/EC on integrated pollution prevention and control (*the ‘IPPC Directive’*)⁵, to fully integrate the public participation requirements of Article 6 of the Aarhus Convention (*‘public participation in decisions on specific activities which may have a significant impact on the environment’*). Both Directives cover activities listed in Annex I to the Aarhus Convention, which may have a significant effect on the environment. The draft Directive also includes provisions on access to justice with respect to decisions, acts and omissions subject to the public participation provisions in relation to those projects, to implement Article 9 (2) of the Convention.

4. OPINION OF THE COMMISSION ON THE AMENDMENTS BY THE EUROPEAN PARLIAMENT

On 5 September 2002, the European Parliament adopted 19 amendments. 2 amendments can be accepted by the Commission in full [amendments 15 and 19]. 4 amendments can be accepted in principle [amendments 3, 4, 11 and 12], subject to rewording. The remaining amendments cannot be accepted by the Commission [amendments 1, 2, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18].

4.1. Amendments accepted by the Commission

The Commission accepts amendment **15**. This amendment relates to Article 4, point 3 of the common position, which modifies Article 15 of the IPPC Directive. The amendment provides for wider public participation in the *updating* of IPPC permits than the common position. The Commission did not agree on this item in the common position, given that its wording on permit updates creates legal uncertainty. It leaves a wide discretion to the Member States and, lastly, the competent authorities in charge of updating permits. This will lead to widely diverging practice and potentially result in public participation to take place in only few cases of permit updates rather than being the rule. Amendment **15** makes public participation an obligation for at least the most relevant cases of permit updates, which are the ones covered by Article 13 of the IPPC Directive. While the Commission proposal included permit updates as such, the amendment is still in line with Article 6(10) of the Aarhus Convention.

The Commission accepts amendment **19** on Annex II. The amendment adds wording to the new Annex V to the IPPC Directive, making explicit the stages of public participation.

4.2. Amendments accepted in principle by the Commission

The Commission accepts in principle amendment **3** to Recital 3, mentioning that effective public participation contributes to “*public support for the decisions taken*”. The Commission accepts that this reference be *added* to the wording. It should read:

⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment

⁵ Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control

Recital 3

Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to **public awareness of environmental issues and support for the decisions taken.**

The Commission accepts in principle amendment 4 on Recital 6. Among the objectives of the Aarhus Convention, the amendment refers to “the desire to guarantee rights of public participation in decision-making *which affects the environment*”. It would replace “... to guarantee rights of public participation *in certain kinds of environmental decision-making*”, in the common position. The Commission accepts re-wording in line with text on ‘objectives’ of Article 1 of the Convention. This would then read:

Recital 6

Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in **decision-making in environmental matters** in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

Amendment 11 can be accepted in principle, subject to rewording. It alters the exception, in the EIA Directive 85/337/EEC, for projects serving national defence purposes from a general one to one to be decided by Member States on a case-by-case basis. The amendment intends to reflect Article 6(1)(c) of the Aarhus Convention, which is relevant as the activities covered by the EIA Directive are activities referred to in Article 6(1)(a) and Annex I of the Aarhus Convention. For the Commission to accept the amendment, it needs to be partially reworded to correctly refer to the EIA Directive and to better reflect the Convention wording in the context of this Directive. The appropriate wording suggested would be:

Article 3, paragraph 1a (new)

(Article 1, paragraph 4 (Directive 85/337/EEC))

In article 1, **paragraph 4 shall be replaced by the following:** “Member States may decide, on a case-by-case basis [...], not to apply this Directive to projects serving national defence purposes if **they deem that** such application would have an adverse **effect on these purposes.**”

The Commission accepts in principle amendment 12 adding a new paragraph 1b) to Article 3. This amendment requires information to be provided also where another form of assessment has been undertaken when exempting a specific project from the EIA Directive. However, the amendment would need to be reworded. The following wording would be more appropriate:

Article 3, paragraph 1b (new)

(Article 2, paragraph 3 (Directive 85/337/EEC))

1b) In Article 2(3), points (a) and (b) are replaced by the following:

“(a) consider whether another form of assessment would be appropriate;

(b) make available to the public **concerned** the information obtained **under other forms of assessment** referred to in point (a), the information relating to the exemption decision [...] and **the reasons for granting it.**”

4.3. Amendments rejected by the Commission

The Commission cannot accept amendment **1** introducing new text in Recital 2. The Recital as reworded does not correspond to the articles of the Directive.

For the same reason, amendment **2** cannot be accepted. It introduces a new Recital, which, while being of general relevance, is not required to justify the text of the Directive.

Amendment **5**, to Recital 9 on access to justice, refers not only to Article 6 of the Aarhus Convention, but also to “*other relevant articles*”. The Commission cannot accept this amendment, given that the articles on access to justice only relate to decision-making on projects covered by Article 6 of the Aarhus Convention.

The Commission cannot accept amendment **6**, modifying Recital 10 on public participation in the preparation of plans and programmes in the environmental field. The amendment does not reflect the articles of the proposed Directive, which relate to plans and programmes to be drawn up under certain directives in the environmental field.

The Commission cannot accept amendments **7** and **13**. These amendments require public authorities “*having examined the concerns and opinions expressed by the public*” to make “*reasonable efforts to reply to the public individually or collectively, explaining the possible effects of public participation in the matter concerned*”, both in relation to *plans and programmes* (amendment 7 on Article 2) and to environmentally significant projects under the EIA Directive 85/337/EEC (amendment 13 on Article 3). In relation to plans and programmes (amendment 7), the Commission accepted in principle a parallel amendment in First Reading, and related text is incorporated in the common position. Hence, according to the common position, the competent authority is to make “*reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based*”. In relation to amendment 13, this is already provided for under Article 9 of the EIA Directive. Requiring more would constitute a disproportionate administrative burden and duplicate requirements.

The Commission cannot accept amendment **8** according to which the arrangements for public participation to be set by the Member States under Article 2, “*may include educating the public about decision-making or the funding of such education.*” Such reference does not fit within the text of Article 2, where the ‘detailed arrangements’ are meant to be of a practical nature. In addition, wording as “may include” has no added value in the context of a Directive.

Amendment **9**, to Article 2 paragraph 4, concerns a possible exemption from the public participation requirement for plans and programmes “*serving national defence purposes*”. While the common position is worded in terms of a generalised exemption, the amendment leaves it to the Member States to decide, “*on a case-by-case basis, not to apply this Article to plans and programmes serving national defence purposes if such an application would have an adverse impact on such plans and programmes or to decisions taken in case of civil emergencies*”. The Commission cannot accept this amendment. While its wording is inspired by Article 6(1)(c) of the Aarhus Convention, that provision relates to environmentally significant projects. The common position provision is drafted in parallel to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (‘the *SEA Directive*’). It is to be maintained for the sake of coherence between both Directives dealing with ‘*plans and programmes*’. Also, as regards exempted ‘plans and programmes’, the wording is more restrictive, aiming at those “*designed for the sole purpose*

of national defence”. Furthermore, it should be noted that, given the nature of the plans and programmes covered by the present proposal, the provision is of very limited potential practical relevance.

The Commission cannot accept amendment **10**, adding a new paragraph 5a to Article 2. This would introduce access to justice in relation to *plans and programmes* subject to public participation under the proposed Directive. The common position provides for access to justice in relation to environmentally significant *projects*. For *plans and programmes*, access to justice is not explicitly required under the Aarhus Convention, nor is it provided for under the SEA Directive. Requiring access to justice for a limited number of plans and programmes covered by the present Directive would create a legally incoherent situation. The Commission services are preparing a legislative proposal to fully address the third pillar of the Aarhus Convention, in the frame of which the content of the amendment could be addressed in a horizontal way.

The Commission cannot accept amendments **14** and **16**. These amendments require that the information about a decision taken under the EIA (amendment 14) and the IPPC (amendment 16) Directive respectively also encompasses “*practical direction about the procedure for seeking review ...*”. The amendments were also tabled in First Reading, and the Commission agreed in principle. Consequently, the common position already requires Member States “*to ensure that information is made available to the public on access to administrative and judicial review procedures*” (in Article 10a of the EIA and 15a of the IPPC Directive), a wording taken from the Aarhus Convention. In the light of these changes already made, amendments 14 and 16 are superfluous and potentially give rise to confusion.

The Commission cannot accept amendment **17**, which would shorten the delay for implementation from 2 years to 12 months from entry into force of the Directive. Integrating the public participation requirements into administrative processes might imply amending existing rules concerning several levels of government and procedure. The 12 months proposed are therefore considered too short. As a comparison, under the SEA Directive, 3 years are foreseen.

The Commission cannot accept amendment **18**, which adds an additional point to Annex I, on plans and programmes covered by the Directive. The amendment considerably extends the scope of the Directive, by including “*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 the wording refers to public participation in the preparation of Community legislation, the present Directive is not the correct legal instrument. In addition, public participation in the preparation of legislation is worded as ‘soft law’ under the Aarhus Convention. As far as ‘*plans and programmes*’ are concerned, the amendment would considerably deviate from the original approach to cover clearly identified plans and programmes in the environmental field. It does not provide for sufficient legal certainty which plans and programmes are covered. In addition, it would potentially duplicate measures in different pieces of legislation. In particular, under the SEA Directive 2001/42/EC, public participation in line with the Aarhus Convention is provided for in relation to the plans and programmes covered.

5. CONCLUSION

Pursuant to Article 250(2) of the EC Treaty, the Commission amends its proposal as set out above.