

COMMON POSITION (EC) No 41/2002**adopted by the Council on 25 April 2002**

with a view to the adoption of a Directive 2002/.../EC of the European Parliament and of the Council of ... 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

(2002/C 170 E/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having regard to the opinion of the Committee of the Regions ⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽⁴⁾,

Whereas:

- (1) Community legislation in the field of the environment aims to contribute to preserving, protecting and improving the quality of the environment and protecting human health.
- (2) Community environmental legislation includes provisions for public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.
- (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.
- (4) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered.

⁽¹⁾ OJ C 154 E, 29.5.2001, p. 123.

⁽²⁾ OJ C 221, 7.8.2001, p. 65.

⁽³⁾ OJ C 357, 14.12.2001, p. 58.

⁽⁴⁾ Opinion of the European Parliament of 23 October 2001 (OJ C 112 E, 9.5.2002, p. 125), Council Common Position of 25 April 2002, and Decision of the European Parliament of ... (not yet published in the Official Journal).

(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Århus Convention'). Community law should be properly aligned with that Convention with a view to its ratification by the Community.

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

(7) Article 6 of the Århus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(8) Article 7 of the Århus Convention provides for public participation concerning plans and programmes relating to the environment.

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

(10) Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Århus Convention, in particular Article 7 thereof.

(11) 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⁾, and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ⁽⁶⁾ should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Articles 6 and 9(2) and (4) thereof.

⁽⁵⁾ OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).

⁽⁶⁾ OJ L 257, 10.10.1996, p. 26.

(12) Since the objective of the proposed action, namely to contribute to the implementation of the obligations arising under the Århus Convention, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective

The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

- (a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;
- (b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

Article 2

Public participation concerning plans and programmes

1. For the purposes of this Article, 'the public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.
2. Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.

To that end, Member States shall ensure that:

- (a) the public is informed, whether by public notices or other appropriate means such as electronic media where available, about any proposals for such plans or programmes or for their modification or review and that relevant information about such proposals is made available to the public including *inter alia* information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted;
- (b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made;
- (c) in making those decisions, due account shall be taken of the results of the public participation;
- (d) 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.

3. Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.

The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate effectively.

Reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation required by this Article.

4. This Article shall not apply to plans and programmes designed for the sole purpose of serving national defence or taken in case of civil emergencies.

5. This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under 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 ⁽¹⁾ or under 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 ⁽²⁾.

Article 3

Amendment of Directive 85/337/EEC

Directive 85/337/EEC is amended as follows:

1. in Article 1(2), the following definitions shall be added:

"the public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.;

2. in Article 6, paragraphs 2 and 3 shall be replaced by the following paragraphs:

'2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;
- (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

⁽¹⁾ OJ L 197, 21.7.2001, p. 30.

⁽²⁾ OJ L 327, 22.12.2000, p. 1. Directive as amended by Decision No 2455/2001/EC (OJ L 331, 15.12.2001, p. 1).

- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- (d) the nature of possible decisions or, where there is one, the draft decision;
- (e) an indication of the availability of the information gathered pursuant to Article 5;
- (f) an indication of the times and places where and means by which the relevant information will be made available;
- (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
- (c) in accordance with the provisions of Directive 2002/.../EC of the European Parliament and of the Council of ... concerning public access to environmental information (*), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames shall be provided, allowing sufficient time for each of the different stages provided for in this Article.

(*) OJ ...;

3. Article 7 shall be amended as follows:

(a) paragraphs 1 and 2 shall be replaced by the following:

'1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, *inter alia*:

- (a) a description of the project, together with any available information on its possible transboundary impact;
- (b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).';

(b) paragraph 5 shall be replaced by the following:

'5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.';

4. in Article 9, paragraph 2 shall be replaced by the following:

'2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.';

5. the following Article shall be inserted:

'Article 10a

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively,

- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that information is made available to the public on access to administrative and judicial review procedures.;

6. in Annex I, the following point shall be added:

‘22. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.’;

7. in Annex II, point 13, first indent, the following shall be added at the end:

‘(change or extension not included in Annex I)’.

Article 4

Amendment of Directive 96/61/EC

Directive 96/61/EC is amended as follows:

1. Article 2 shall be amended as follows:

- (a) the following sentence shall be added to point 10(b):

‘For the purposes of this definition, any change to or extension of an operation shall be deemed to be

substantial if the change or extension in itself meets the thresholds, if any, set out in Annex I.’;

- (b) the following points shall be added:

‘13. “the public” shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

14. “the public concerned” shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’;

2. in Article 6(1), first subparagraph, the following indent shall be added:

‘— the main alternatives, if any, studied by the applicant in outline.’;

3. Article 15 shall be amended as follows:

- (a) paragraph 1 shall be replaced by the following:

‘1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

- issuing a permit for new installations,
- issuing a permit for any substantial change in the operation of an installation,
- 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 procedure set out in Annex V shall apply for the purposes of such participation.’;

- (b) the following paragraph shall be added:

‘5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

- (a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and
- (b) the reasons and considerations on which the decision is based.’;

4. the following Article shall be inserted:

'Article 15a

Access to justice

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that information is made available to the public on access to administrative and judicial review procedures.;

5. Article 17 shall be amended as follows:

- (a) paragraph 1 shall be replaced by the following:

'1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 12(2) was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex V at the same time as

it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between the two Member States on a reciprocal and equivalent basis.;

- (b) the following paragraphs shall be added:

'3. The results of any consultations pursuant to paragraphs 1 and 2 must be taken into consideration when the competent authority reaches a decision on the application.

4. The competent authority shall inform any Member State, which has been consulted pursuant to paragraph 1, of the decision reached on the application and shall forward to it the information referred to in Article 15(5). That Member State shall take the measures necessary to ensure that that information is made available in an appropriate manner to the public concerned in its own territory.;

- 6. an Annex V shall be added, as set out in Annex II to this Directive.

Article 5

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... (**) at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 6

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 7

Addressees

This Directive is addressed to the Member States.

Done at ...

For the European Parliament
The President

For the Council
The President

(**) Two years after the date of entry into force of this Directive.

ANNEX I

PROVISIONS FOR PLANS AND PROGRAMMES REFERRED TO IN ARTICLE 2

- (a) Article 7(1) of Council Directive 75/442/EEC of 15 July 1975 on waste ⁽¹⁾.
 - (b) Article 6 of Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances ⁽²⁾.
 - (c) Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ⁽³⁾.
 - (d) Article 6(1) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ⁽⁴⁾.
 - (e) Article 14 of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste ⁽⁵⁾.
 - (f) Article 8(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management ⁽⁶⁾.
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⁽¹⁾ OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC (OJ L 135, 6.6.1996, p. 32).

⁽²⁾ OJ L 78, 26.3.1991, p. 38. Directive as last amended by Commission Directive 98/101/EC (OJ L 1, 5.1.1999, p. 1).

⁽³⁾ OJ L 375, 31.12.1991, p. 1.

⁽⁴⁾ OJ L 377, 31.12.1991, p. 20. Directive as last amended by Directive 94/31/EC (OJ L 168, 2.7.1994, p. 28).

⁽⁵⁾ OJ L 365, 31.12.1994, p. 10.

⁽⁶⁾ OJ L 296, 21.11.1996, p. 55.

ANNEX II

In Directive 96/61/EC, the following Annex shall be added:

'ANNEX V

PUBLIC PARTICIPATION IN DECISION-MAKING

1. The public shall be informed (by public notices or other appropriate means such as electronic media where available) of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:
 - (a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 15(1), including the description of the elements listed in Article 6(1);
 - (b) where applicable, the fact that a decision is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 17;
 - (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
 - (d) the nature of possible decisions or, where there is one, the draft decision;
 - (e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;
 - (f) an indication of the times and places where, or means by which, the relevant information will be made available;
 - (g) details of the arrangements for public participation and consultation made pursuant to point 5.
2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:
 - (a) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;
 - (b) in accordance with the provisions of Directive 2002/. . ./EC of the European Parliament and of the Council of . . . concerning public access to environmental information ⁽¹⁾, information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.
3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.
4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.
5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames shall be provided allowing sufficient time for each of the different stages provided for in this Annex.

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STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 19 January 2001, the Commission sent the Council a proposal for a European Parliament and Council Directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC ⁽¹⁾, based on Article 175(1) of the EC Treaty (co-decision procedure).
2. The European Parliament delivered its opinion at first reading on 23 October 2001 ⁽²⁾. The Economic and Social Committee issued its opinion on 30 May 2001 ⁽³⁾. The Committee of the Regions gave its opinion on 14 June 2001 ⁽⁴⁾.
3. Following these opinions, the Commission forwarded its amended proposal to the Council on 13 December 2001 ⁽⁵⁾.
4. On 25 April 2002, the Council adopted its Common Position in accordance with Article 251(2) of the Treaty.

II. OBJECTIVE

5. The proposal aims to contribute to the implementation of the obligations arising from the second pillar, on public participation, of the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Århus Convention'). This Convention was signed by all Member States and by the Community, entered into force on 30 October 2001 and has already been ratified by Denmark and Italy.

According to the Århus Convention, the public must be enabled to participate in the taking of decisions regarding certain activities having a significant effect on the environment and in the establishment of plans, programmes and projects relating to the environment. Such participation contains the following stages:

- the public is informed of the intended plans, programmes and projects at an early stage,
- the public concerned is given an opportunity to express comments and opinions,
- the authorities take due account of the results of the public consultation in their decisions,
- the public concerned is informed of the decisions,
- concerning projects that are subject to public participation provisions, the public concerned is also granted a right to challenge the legality of the decisions, acts and omissions.

6. The purpose of the draft directive is to introduce or to improve this type of public participation in relation to:

- certain plans and programmes in the environmental field referred to in Annex I to the draft Directive,

⁽¹⁾ OJ C 154 E, 29.5.2001, p. 123.

⁽²⁾ OJ C 112 E, 9.5.2002, p. 125.

⁽³⁾ OJ C 221, 7.8.2001, p. 65.

⁽⁴⁾ OJ C 357, 14.12.2001, p. 58.

⁽⁵⁾ OJ C ...

- the projects referred to in Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (the 'EIA Directive') ⁽¹⁾.
- the permits for large industrial activities regulated by Council Directive 96/61/EC on integrated pollution prevention and control (the 'IPPC Directive') ⁽²⁾.

The latter two Directives are also the subject of provisions on access to justice.

7. It is expected that such public participation will contribute to the protection of the right to live in an environment which is adequate for personal health and well-being by increasing the accountability and transparency of the decision-making process.
8. The Commission proposal is a further step in addition to the draft Directive on public access to environmental information and repealing Council Directive 90/313/EEC, which concerns the 'information' pillar of the Århus Convention. Parliament received the Council's Common Position on 6 February 2002 ⁽³⁾.

III. ANALYSIS OF THE COMMON POSITION

9. The Council's Common Position maintains the approach proposed by the Commission, while clarifying its provisions or making them more practicable. Many modifications aim at reinstating the original text of the Århus Convention.
10. Article 1 was inserted by the Council and describes the overall objectives of the Directive.
11. Article 2 provides for public participation in the establishment of the plans and programmes in the environmental field required to be drawn up under the Directives concerning waste management, batteries and accumulators, protection of waters against nitrate pollution and air quality management enumerated in Annex I. The Council inserted a new paragraph 5 which grants exemption from applying the Directive when a public participation procedure is carried out under Directive 2001/42/EEC on the assessment of plans and programmes or under Directive 2000/60/EC on Community action in the field of the water policy, as these directives already contain procedures meeting the requirements of the Århus Convention.
12. Article 3 aims at complementing Directive 85/337/EEC on the assessment of the environmental impact of certain public and private projects on the environment (EIA), which already contains some provisions on public participation in relation to the issuing of a consent for the development of large construction works and interventions in the landscape. In particular, the draft inserts a definition of 'public concerned' which includes non-governmental organisations promoting environmental protection. The new Article 6 on informing and consulting the authorities and the public specifies certain matters which were left to the discretion of the national authorities under the old Directive, such as the type of information to be given and basic procedural arrangements for informing and consulting the public. The amended Article 7 adapts the procedures for transborder consultations to the requirements of the Århus Convention so that affected Member States may participate not only in the environment impact assessment procedures but also in the environmental decision-making procedures referred to in Article 2(2). Article 8 on taking into account the results of the consultations needed no amendment. Article 9 on informing the public of the decisions taken was modified in order to inform the public in a Member State affected by a project having transboundary implications. A new Article 10a opens a judicial review against decisions, acts or omissions subject to public participation. Regarding Annex I to Directive 85/337/EEC, which enumerates the activities covered by the Directive, a new paragraph 22 broadens the scope of the Directive to cover changes or extensions to existing installations that in themselves meet the thresholds fixed by the other parts of that Annex.

⁽¹⁾ OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).

⁽²⁾ OJ L 257, 10.10.1996, p. 26.

⁽³⁾ 11878/1/01 ENV 441 INF 114 Codec 882 REV. 2 + ADD 1 REV. 1.

13. Article 4 aims at complementing Directive 96/61/EC (IPPC) concerning integrated pollution prevention and control of large industrial activities. An amendment to Article 2(10) clarifies that changes or extensions of existing installations that in themselves meet the thresholds, if any, are deemed to be 'substantial'. A definition of 'public concerned' has been introduced. Article 15, which provided for a summary information of the public, is amended and completed by an Annex V providing for a detailed information and consultation of the public. A new Article 15a opens a judicial review against decisions, acts or omissions subject to public participation. Article 17 on activities having transboundary effects is replaced by a new text that requires the Member State where the activities take place to provide the information in Annex V to the affected Member State so that the latter's public concerned may be in a position to express its comments.
14. The Directive only concerns existing Directives. The Commission intends to include provisions on public participation to environmental decision-making in all its future proposals on environmental plans and programmes.
15. In a public statement for the minutes, the Council and the Commission agree to undertake steps in order to apply the second pillar of the Århus Convention within the Community institutions as well.

IV. AMENDMENTS BY THE EUROPEAN PARLIAMENT ACCEPTED BY THE COUNCIL

16. The Council accepted, in a slightly different form ('such as electronic media where available'), the proposal of Parliament that *the public should be informed 'using electronic media'*, contained in *Amendment 9/10/33* relating to Article 1(2)(a) (Article 2(2)(a) of the Common Position), in *Amendments 34/15/16* relating to new Article 6(3) of Directive 85/337/EEC (Article 6(2) in the Common Position) and in *Amendment 27/28/29* relating to new Annex V(1) to Directive 96/61/EC. The Commission had also accepted these amendments in a different form.
17. The Council integrated in Article 2(a) *in fine*, the part of *Amendment 9/10/33* specifying that the public must receive, *inter alia*, information about the right to participate in decision-making and the competent authority, and which was also accepted by the Commission.
18. Following a suggestion by the Commission, the Council accepted, though in a formulation taken from the Århus Convention ('when all options are open'), the idea that *the public must be entitled to express comments 'without prejudice to any options'* contained in *Amendment 9/10/33* concerning Article 1(2)(b) (Article 2(2)(b) of the Common Position) and in *Amendment 34/15/16* relating to new Article 6(4) of Directive 85/337/EEC.
19. Like the Commission, the Council accepted in principle *Amendment 9/10/33*, adding a new Article 1(3a) according to which the competent authority shall make reasonable efforts to reply to the public individually or collectively. This idea led the Council to insert a new Article 2(2)(d) according to which the competent authority makes reasonable efforts to *inform the public about the decisions taken* and the reasons and considerations therefore.

Amendment 34/15/16 proposes inserting a similar provision in a new Article 6(5a) of Directive 85/337 and *Amendment 35* proposes the same for a new Article 15(4a) of Directive 96/61/EC. The Commission and the Council felt these amendments not to be necessary because their ideas are already contained in Article 9(1) of Directive 85/337/EEC and in Article 15(5)(b) of Directive 96/61/EC.

20. A part of *Amendment 14* relating to a new Article 2(3)(b) *in fine* of Directive 85/337/EEC, as well as *Amendment 20/21* for a new Article 9(a) of Directive 85/337/EEC proposed that Member States must issue *practical directions for judicial review* pursuant to the new Articles 10a and 15a. These amendments inspired the Council to introduce, at the end of Article 10a of Directive 85/337/EEC and at the end of Article 15a of Directive 96/61/EC, a sentence taken from the Århus Convention Article 9(5) obliging Member States to provide the public with information on administrative and judicial review procedures.

21. The Council accepted *Amendments 31 and 32/23* relating to *judicial review* in the new Article 10a of Directive 85/337/EEC and in the new Article 15a of Directive 96/61/EC. At the same time, the Council inserted into subparagraphs 3, 4 and 6 of the new Articles 10a and 15a other parts of Article 9 of the Århus Convention in order, in particular, to clarify the position of NGOs.

V. AMENDMENTS BY PARLIAMENT NOT ACCEPTED BY THE COUNCIL

22. The Council and the Commission did not agree to *Amendment 1*, the second part of *Amendment 2* and the last part of *Amendment 5* aiming at clarifying, in recitals 1, 2 and 6, that the Community aims at protecting '*individual and public health*' instead of '*human health*' or '*personal health*': the suggested expression is unknown in EC-terminology and the Council text conforms to Article 174 of the Treaty and the sixth environmental action programme, which refer to '*human health*'.

23. The Council and the Commission did not accept the first part of *Amendment 2* on recital 2, *Amendment 3* for a new recital 2a, the first part of *Amendment 5* to recital 6, *Amendment 8* to recital 10 and *Amendment 26* for a new Annex I, point (ga) that aim at extending public participation to *Community legislation and plans and programmes that do not directly concern the environment*, but which have a significant effect on the environment, health and well-being: Community legislation is not subject to the Directive; the extension to plans and programmes would give a huge scope to the Directive; and '*significant effect*' is not well defined.

24. *Amendment 4* to recital 3, on replacing the terms '*public awareness of environmental issues*' by *public support for the decisions taken* was accepted as an addition by the Commission, but was rejected by the Council, as '*awareness*' appears in recital 9 of the Århus Convention and as public participation does not necessarily guarantee public support.

25. The Council and the Commission rejected:

— *Amendments 6 and 7* which motivate the Directive by a reference to Article 8 of the Århus Convention, which encourages public participation for the preparation of executive regulations and general binding rules and, implicitly, to the last sentence of Article 7 of the Århus Convention, which encourage parties to promote public participation for the preparation of policies relating to the environment,

— *Amendment 9/10/39* to the title and to paragraph 2, subparagraph 2(a) and (b) of Article 2, (Article 1 of the Commission proposal), and *Amendment 25* to the title of Annex I which propose that the Directive also cover *policies set up under Community legislation*:

Under the last sentence of Article 7 and the opening sentence of Article 8 of the Århus Convention, public participation in the preparation of legislation and policies is only subject to a 'best endeavours' clause which only applies to the extent appropriate. Policies are in any case subject to the democratic control of representative bodies such as parliaments, communal councils, etc. For that same reason, the Council deleted the word 'policies' from recital 8 in the Commission proposal.

26. Parliament proposed, in *Amendment 9/10/33* relating to Article 1(2) (Article 2(2) of the Common Position), in *Amendment 34/15/16* to the new Article 6(4) of Directive 85/337/EEC (Article 6(6) of the Common Position) and in *Amendment 35* relating to the new Article 15(1) of Directive 96/61/EC, to provide for *public participation in 'the different stages'* of decision-making.

The Council and the Commission did not accept this amendment as Article 2(2) of the Common Position, the new Article 6(4) (introductory sentence) of Directive 85/337/EEC, the new Article 15(1) of Directive 96/61/EC and Article 6(4) of the Århus Convention already provide for an 'early and effective' public participation. Adding public participation at all stages of decision-making is not foreseen in the Århus Convention and would make decision-making very lengthy and burdensome.

27. The Council and the Commission did not accept the penultimate part of *Amendment 9/10/33* aiming at inserting into Article 1(3) (Article 2(3) of the Common Position) a new subparagraph inspired by the Århus Convention Article 3(3) and stating that arrangements for public participation may include *educating the public about such decision-making*. The Council believes that this Directive on public participation is not the right place for educational actions. In addition, the suggested wording is rather vague and does not explain what exactly the Member States are supposed to do.
28. In *Amendment 30* for a new Article 1(3b), it is proposed that a *judicial review* similar to that of new Article 10a of Directive 85/337/EEC and Article 15a of Directive 96/61/EC be given *for the plans and programmes* covered by Article 1 (Article 2 of the Common Position) and Annex I.

The Council and the Commission did not accept this amendment, as Article 9(2) of the Århus Convention only imposes access to justice in relation to the concrete projects in Article 6 and Annex I to that Convention and not in relation to the plans, programmes and policies in Articles 7 and 8.

29. The Council did not accept *Amendment 13* which aims at modifying Article 1(4) of Directive 85/337/EEC 'Projects serving *national defence* purposes are not covered by this Directive' with a view to making that provision optional (amendment accepted by the Commission).
30. The Council also did not see any merit in *Amendment 14*, which aims at adding to Article 2(3)(a) of Directive 85/337/EEC (whereby a Member State that exempts a specific project from the environmental impact assessment divulges the information relating to the exemption and to the reasons for granting it) that the Member State should also disseminate the *information relating to the consideration of the appropriateness of another form of assessment*. The Commission had accepted that part subject to some redrafting.
31. The part of *Amendment 34/15/16* for a modification of the introductory phrase and subparagraph (a) of Article 6(3) of Directive 85/337/EEC (Article 6(2) in the Common Position) with a view to extending public participation to *the review of the development consent procedure*, was not felt to be necessary as any change of an existing installation requiring an environmental impact assessment does already require a development consent under the provisions of Article 2 of Directive 85/337/EEC and is therefore subject to public participation.
32. The Council and the Commission did not accept *Amendment 34/15/16* aiming at inserting, at the end of Article 6(3) of Directive 85/337/EEC (Article 6(4) in the Common Position), a sentence indicating that *account has to be taken of the results of the public participation*, as this is already contained in Article 8.

33. The part of *Amendment 34/15/16* regarding Article 6(5) *in fine* of Directive 85/337/EEC and the part of *Amendment 27/28/29* on Annex V(4) (paragraph 5 in the Common Position) aiming at specifying that *sufficient time should be left for the public to prepare and to participate* (accepted by the Commission) was felt to be already covered by the expression 'allowing sufficient time for each of the different stages'.

34. At the end of *Amendment 20/21* relating to Article 9(2) of Directive 85/337/EEC and in *Amendment 24* concerning Article 17(4) of Directive 96/61/EC, Parliament proposed that, in case of participation of the public in another Member State, the consulted Member State will ensure that *information is made available* to the public in the consulting Member State *in the latter's language*. The Council and the Commission did not want to impose such a burden taking into account the enormous cost, effort and time it may take to translate all documentation. Translation is also left for the Member States under the subsidiarity principle.

The Council however included in the text the terms 'in an appropriate manner' proposed in these amendments.

35. The Council and the Commission did not accept the proposal in *Amendment 32/23* to state at the end of the new Article 15a of Directive 96/61/EC, that *the review procedures should be 'either free or cheap'* instead of 'not prohibitively expensive' as the latter expression appears in the Århus Convention. The Council also replaced the whole sentence proposed by the Commission by Article 9(4) of the Århus Convention.

36. The Council and the Commission did not accept the part of *Amendment 27/28/29* which aimed at extending, through a modification in Annex V(1)(a) to Directive 96/61/EC, the information of the public to proposals for the *reconsideration of permits*, as reconsideration is normally an internal administrative act without consequences for the permit. Should there be such consequences, the consideration would fall within the category of 'updating' and be eligible for public participation.

The proposal aiming at specifying, in Annex V(2), that the public will be entitled to *comment in writing or at a hearing* (agreed by the Commission) was rejected by Council as it would limit the freedom of the Member States to choose other and better ways and means for consulting the public. The two modes of comment suggested by Parliament were however quoted in paragraph 5 of the Common Position as examples for detailed arrangements for consulting the public.

The Council also accepted Parliament's proposal on inserting 'duly' in paragraph 3, while using the expression '*due account*' to reflect Article 6(8) of the Århus Convention.

VI. OTHER AMENDMENTS INTRODUCED BY THE COUNCIL

Title and preamble

37. The Council made a few drafting changes in the title and in recital 10 and reformulated recital 12 on subsidiarity and proportionality using the standard formula.

Article 1 on the objectives

38. Article 1 was inserted by the Council and summarises the Directive.

Article 2 on plans and programmes

39. The Council added to the paragraph 2, opening sentence and (a), the words 'modification or' which also appears in Directive 2001/42/EC on plans and programmes (SEA). It added the words 'meeting any requirements imposed under national law' to paragraph 3. The end of the same paragraph was modified in order to include the words of the Århus Convention Article 6(3) 'enable the public to prepare and participate effectively'. Paragraph 4 exempting national defence or civil emergencies is new and is inspired by Article 3(8) of Directive 2001/42/EC on plans and programmes quoted in paragraph 5. Paragraph 5 is also new (see paragraph 11).

Article 3 on Directive 85/337/EEC

40. The Council replaced the expression 'development consent procedure' by 'the environmental decision-making procedures in Article 2(2)' in order to take into account the different manners in which the Member States can organise public participation under Directive 85/337/EEC.
41. The Council deleted the new Article 6(2) on early and effective participation of the Commission proposal and transferred its content to paragraph 4 of the Common Position where it has a more chronological place.
42. Regarding the new paragraph 2 (paragraph 3 of the Commission proposal) of the amended Article 6, the Council added the word 'reasonably' to the introductory sentence and amended subparagraph (c) in order to clarify that the public must be informed of details concerning each of the three quoted authorities.

The Council noted that paragraph 2 essentially concerns information that is available at the time of the initial request for development consent. It created a new paragraph 3, which concerns information that is made available to the public after the initial request, and transferred to that paragraph to subparagraphs (e) and (f) of the Commission's paragraph 2. This reflects the sequences in Article 6(2) and (6) of the Århus Convention.

The same was done to the new *Annex V*, to Directive 96/61/EC, where subparagraph (1)(f) of the Commission proposal was moved to a new paragraph 2.

43. The last sentence of paragraph 5 of the Commission text became a new paragraph 6 in order to generalise the requirement of reasonable timeframes.
44. Regarding Article 7(1), the Council inserted the whole of paragraph 1 of the basic Directive and introduced in it a modified version of the amendment proposed by the Commission.
45. The end of Article 7(2), was adapted to the splitting up of Article 6(3) of the Commission proposal (see paragraph 42).
46. Article 3(6) of the Directive concerning Annex I(22) integrates Annex II to the Commission proposal. The words 'the appropriate criteria' were deleted as they did not add anything to the expression 'thresholds', that covers all relevant points.
47. Article 3(7) contains a clarification of Annex II to Directive 85/337/EEC and repeats an expression used in that Annex.

Article 4 concerning Directive 96/61/EC

48. The Council deleted from the addition to Article 2(10)(b) the words 'appropriate criteria or' for the same reasons as under paragraph 46.
49. The Council modified the proposed Article 15(1) in order to clarify that the public must be consulted where a permit is issued for a new installation or for a substantial change as defined in Article 2(10)(b).

The third indent also provides for public participation in the updating of a permit under Article 13 of Directive 96/61/EC in the cases where the emission limit values need to be significantly changed. The Commission disagreed with this restriction, which excludes important categories of updates referred to in Article 13 such as updates for imposing new techniques, for improving the operational safety and for applying new legislation, being of the opinion that Article 6(10) of the Århus Convention requires, as a principle, a public participation in all updating of permits. The Council however believes that there need not be public participation for minor increases in emission limit values nor for tightening the rules on the operation of an installation and notes that the Århus Convention only requires covering updates 'where appropriate'.

50. Regarding the amendment of Article 17(1), the Council added the existing unmodified second sentence to the end of the paragraph.
51. Regarding Article 5 of the Directive, the Council modified the date for implementation.
52. On Annex I(f), the Council was confronted with the choice of quoting all 'daughter' directives adopted on the basis of Directive 96/62/EC or none of them and chose the latter option. Subparagraph (g) was deleted as Article 14 of the landfill Directive 1999/31/EC lays down detailed requirements and procedures for operators that present a conditioning plan for an existing landfill, leaving little room for public participation. The creation of a new landfill is subject to the waste management plans and the public participation foreseen by Directive 75/442/EEC on waste referred to in point (a) of Annex I.

VII. CONCLUSION

53. The Common Position aims at giving the public the widest possible access to environmental decisions leaving enough flexibility for practical arrangements at the level of the Member States and for integrating smoothly the requirements of public participation into daily administrative practice. The Common Position also reverts in many cases to the wording of the Convention of Århus, while leaving out its non-compulsory parts.

The Commission accepted the Common Position except for the part referred to in paragraph 49.
