

## **Comments of the Aarhus Convention Compliance Committee**

### **on the draft law of the Republic of Belarus to introduce amendments and additions to certain laws of the Republic of Belarus with regard to public participation in making environmentally significant decisions and public access to environmental information**

#### **Disclaimer**

1. These comments are provided as a assistance to support the Republic of Belarus in its efforts to meet its obligations under the Convention, but do not preclude the Compliance Committee from examining the compliance of the draft law, once eventually adopted, with the provisions of the Convention.

#### **Scope of comments**

2. The current comments are based on the text of the draft law (Russian and English versions) submitted to the Aarhus Convention Compliance Committee by the Republic of Belarus.
3. The comments are focused on the amendments and additions to the Law on Environmental Protection (article 1 of the draft law).
4. The comments do not pretend to provide a comprehensive review of the draft provisions and their place in the entire regulatory framework to implement the Aarhus Convention in Belarus. Furthermore, the comments are limited to certain issues of concern and should not be considered as endorsing the remainder of the text.

#### **General comments**

5. The draft law seems to be focused on providing a general framework for the implementation of the Aarhus Convention in Belarus while leaving many important issues to other legal acts, existing or planned ones.
6. In particular, the draft law does not seem to address most of the issues raised in the context of communications related to Belarus (ACCC/C/2009/37 and ACCC/2009/44) where legislative reform was recommended.
7. The provisions of the draft law are rather difficult to precisely refer to as the text of the articles is not divided into clearly separated and numbered paragraphs and subparagraphs. This would seem not to contribute to the clarity of the legal scheme or legal certainty, or thus to the rule of law.
8. The drafters might have benefitted in following the draft Recommendations on Public Participation in Decision-making in Environmental Matters elaborated under the auspices of the Task Force on Public Participation.<sup>1</sup>

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<sup>1</sup> The final unedited version of the draft Recommendations on Public Participation in Decision-making is available at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/recommendations/Draft\\_Recommendations\\_on\\_PPDM\\_final\\_unedited\\_version\\_18.02.2014\\_clean.doc](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/recommendations/Draft_Recommendations_on_PPDM_final_unedited_version_18.02.2014_clean.doc)

## Specific comments

### Activities subject to public participation

9. The draft law relates public participation to “environmentally significant decisions” which are defined as “decisions initiated and (or) made by public authorities, other state organisations, legal entities, organisations which are not legal entities, authorised officials, sole traders in relation to: planned business and other activities which may have an environmental impact, draft conceptual frameworks, state, regional and sectoral programmes, spatial planning and development programmes, draft legislation and draft official decisions, the application of which may have an environmental impact”.
10. The term “environmentally significant decisions” seems to be intended to cover all decisions subject to articles 6, 7 and 8 of the Aarhus Convention. It defines all of them by reference to their environmental impact. It may be a proper reference in case of decisions subject to article 6 and article 8 but it is too limited in case of decisions subject to article 7 which covers all plans, programmes and policies “relating to the environment”.
11. The fact that article 7 refers to plans, programmes and policies “relating to the environment”, rather than plans, programmes and policies potentially affecting the environment means, as underlined in Aarhus Convention Implementation Guide, “a slightly higher standard” (Aarhus Convention: An Implementation Guide, second edition (2013), page 182).<sup>2</sup>
12. The key issue is that the concepts of “impact” and “significance” which delimit the scope of application of strategic environmental assessment (SEA) do not apply to defining the scope of application of article 7 of the Aarhus Convention, which is much broader.
13. Bearing the above in mind, the Aarhus Convention Implementation Guide indicates the following types of plans, programmes and policies as “relating to the environment”:<sup>3</sup>
  - a. those which “may have a significant effect on the environment” and require strategic environmental assessment (SEA);
  - b. those which “may have a significant effect on the environment” but do not require SEA, for example, those that do not set a framework for development consent;
  - c. those which “may have an effect on the environment” but where this effect is not “significant”, for example, those that determine the use of small areas;
  - d. those aiming to help protecting the environment.
14. Thus, applying the international standards (for example, the criteria for determining significant effects in Annex III to the UNECE Protocol on Strategic Environmental Assessment) to the definition proposed in the Belarus draft law, some strategic decisions (for example, a plan for ecological education, or a program for environmental inspections) would not be considered to have environmental impact and thus not subject to public participation under Belarus’ draft law, while clearly they “relate to the environment” and would require public participation under article 7 of the Aarhus Convention.

### Subject of rights

15. Proposed article 13 (Article 13. Citizen’s rights and responsibilities in the field of environmental protection) grants various rights, including the right to environmental information and the right to participate, to “citizens” (граждане) while under the Aarhus

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<sup>2</sup> The advance text only version is available at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus\\_Implementation\\_Guide\\_second\\_edition\\_-\\_text\\_only.pdf](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf)

<sup>3</sup> Ibid, page 182-183

Convention such rights should be granted to the public (i.e. any natural or legal person)<sup>4</sup> without discrimination as to citizenship.

16. Furthermore, it is not clear if, by granting these rights to citizens, the proposed article 13 could be interpreted to exclude NGOs from the ambit of these rights. That this may be the case seems to be confirmed, for example, by the title of proposed article 14 in the Law on Environmental Protection (Article 14. Guaranteeing the right of citizens and public environmental associations to environmental information) and proposed article 14-1 (Article 14-1. Guaranteeing the right of citizens and public environmental associations to participate in making environmentally significant decisions) which imply that the term “citizens” would not cover NGOs.

#### **Public ecological review/expertiza**

17. Proposed article 14-1 (Article 14-1. Guaranteeing the right of citizens and public environmental associations to participate in making environmentally significant decisions) provides that public ecological review/expertiza is one of the forms of public participation.
18. The above provision does not seem to reflect the clear statement of the Aarhus Convention Compliance Committee in its findings on ACCC/C/2009/37 in which it found that “public environmental *expertiza* is not a mandatory part of the decision-making, and therefore it cannot be considered as a primary tool to ensure implementation with the provisions of article 6 of the Convention” (para 76).

#### **Responsibility for public participation**

19. The draft law (for example, proposed article 14-1) seems to still envisage that the responsibility for organising public participation may be put not only on the public authorities but also on other persons, including private companies.
20. The above provision does not seem to reflect the clear statements of the Aarhus Convention Compliance Committee which found that “reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention” (Committee’s findings on ACCC/C/2006/16 (Lithuania), para. 78 and on ACCC/C/2009/37 (Belarus), para 80).

#### **Access to all relevant documentation**

21. Proposed article 14-1 lists obligations placed on those responsible for organising public participation (so called “organizers”) who are responsible inter alia for assuring access to draft decision – but there is no mention of access to all relevant documentation as required under article 6(6) and article 7 of the Aarhus Convention.

#### **Public participation in case of transboundary impact**

22. Proposed article 14-1 addresses the issue of public participation in case of transboundary impact by requiring that it must “comply with the legislation, inter alia with international environmental protection agreements entered into by the Republic of Belarus” without providing any details as to who is responsible for what.
23. Mere reference to direct applicability of international treaties without corresponding domestic legislation have been constantly held by both Aarhus Convention Compliance Committee<sup>5</sup> and Espoo Convention Implementation Committee as not sufficient for the implementation of either Convention.

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<sup>4</sup> Article 2(4) of the Aarhus Convention defines “the public” to mean “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.

<sup>5</sup> For example, the Aarhus Convention Compliance Committee’s findings on ACCC/C/2004/5 (Turkmenistan), para. 23.

**Public participation in case of military and defence installations**

24. Proposed article 14-1 allows public authorities “to limit public participation in making environmentally significant decisions that relate to military and defence installations”.
  
25. Under article 6(1)(c) of the Aarhus Convention, such a possibility is provided only in case of activities subject to article 6 and is limited by the requirement that it can only be used if the application of the provisions of article 6 would have an adverse effect on national defence purposes (i.e. the mere fact that an activity “relates to” defence is not enough to limit public participation).