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UDELEŽBA JAVNOSTI V OKVIRU AARHUŠKE KONVENCIJE

Povzetek Namen referata je predstaviti glavna pravna vprašanja, ki se nanašajo na izvajanje določb Aarhuške konvencije o udeležbi javnosti. V ta namen na kratko predstavi sestavo Aarhuške konvencije, njeno področje uporabe in pravno naravo ustreznih določb. Sledi predstavitev nekaterih glavnih horizontalnih vprašanj, ki zadevajo steber udeležbe celotne javnosti, to je zahtev o zagotavljanju »udeležbe javnosti že na začetku odločanja« in »ustreznih časovnih obdobij«. Na koncu referat na kratko predstavi glavne elemente postopka udeležbe javnosti, kot jih zahteva Konvencija, in sicer obveščanje, zagotavljanje ustreznih informacij, možnost za predložitev pripomb, ustrezno upoštevanje pripomb in obveščanje javnosti o odločitvi.

Referat se osredotoča na izbrane teme, ki se nanašajo predvsem na vprašanja, na katera je bil opozorjen Odbor za izvajanje Aarhuške konvencije. Razprava je zato ponazorjena z ustreznimi mnenji Odbora za izvajanje, ki so včasih celo njen temelj. Zaradi omejenega prostora, ki je na voljo, referat ne skuša izčrpno obravnavati vseh potencialno vključenih vprašanj.

Ključne besede Udeležba javnosti – okolje – Aarhuška konvencija – Odbor za izvajanje Aarhuške konvencije

I. AARHUŠKA KONVENCIJA – SESTAVA KONVENCIJE IN NJENIH TREH STEBROV TER MEHANIZEM ZA PREGLED SKLADNOSTI

Konvencija o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah je bila sprejeta na četrti ministrski konferenci »Okolje za Evropo« v Aarhusu na Danskem junija 1998, kjer je bila podpisana v okviru Ekonomske komisije OZN za Evropo (UNECE). Aarhuška konvencija je prvi zavezujoči mednarodni instrument, ki skuša izčrpno in izključno obravnavati vprašanja pravic državljanov v okoljskih zadevah.[1] Konvencija temelji na treh stebrih, od katerih ima vsak svoj precedens v izjavi iz leta 1992 – dostop do informacij (4. in 5. člen), udeležba javnosti pri odločanju (6.–8. člen) in dostop do pravnega varstva (9. člen). Ozadje vseh treh stebrov so prav tako cilj iz 1. člena, preambula in 2. člen (pomen izrazov) ter 3. člen (splošne določbe). Določbe Konvencije zagotavljajo merilo za ocenjevanje celotnega okvira udeležbe javnosti ali posameznih

[1] Glej J. Jendroska in S. Stec, Aarhuška konvencija: Towards a New Era in Environmental Democracy, Environmental Liability, Zvezek 9, 3. izdaja, junij 2001, str. 148.

primerov njenega delovanja v praksi. Konvencija omogoča postopek za izpolnjevanje skladnosti, s katerim se sproži ocenjevanje, in poseben organ (Odbor za izvajanje), ustanovljen izrecno za to.[2]

II. Steber udeležbe javnosti – pravna narava obveznosti ter obseg dejavnosti in vključenih odločitev

Podroben pravni režim, ki zadeva udeležbo javnosti pri odločanju o posebnih dejavnostih, je predstavljen v 6. členu. Konvencija ne opredeljuje pojma »odločitve o posebnih dejavnostih«. Poleg tega ponazarja obseg uporabe določb iz 6. člena na dvojen način. Najprej vsaka pogodbenica izvaja določbe iz 6. člena pri »odločanju o dovoljenju za predlagane dejavnosti, naštete v Prilogi I« (čl. 6.1a), vendar »v skladu s svojo notranjo zakonodajo« uporablja določbe tega člena tudi »pri odločanju o predlaganih dejavnostih, ki niso naštete v Prilogi I in bi lahko pomembno vplivale na okolje« (čl. 6.1b).

Člen 7 vključuje udeležbo javnosti pri načrtih, programih in politikah v zvezi z okoljem. Vključuje dva ločena pravna režima. Del, ki zadeva načrte in programe, je dokaj podrobno izdelan in vse ustrezne obveznosti so jasno izražene z uporabo besedice »shall« v angleški različici. Nobenega dvoma ni, da so pravno zavezujoče, čeprav področje uporabe pravnih obveznosti ni popolnoma jasno.

Pravni načrt politik je razmeroma skromen. Konvencija določa, da »si pogodbenica primerno prizadeva zagotoviti možnosti za udeležbo javnosti pri pripravi politik, ki se nanašajo na okolje«. Kljub uporabi besedice »shall« v angleški različici, je celotna obveznost izražena precej medlo. Od pogodbenic se zahteva samo, da »si prizadevajo«, in še to le »primerno«. Ti izrazi so značilni za tako imenovane »nezavezujoče« obveznosti.

Člen 8 obsega udeležbo javnosti pri pripravi izvršilnih predpisov in/ali splošno veljavnih pravno obvezujočih normativnih aktov.
Člen je v primerjavi z obveznostjo, ki zadeva politike, precej bolj izdelan glede zagotavljanja nekaterih postopkovnih podrobnosti. Narava osnovne pravne obveznosti v prvem stavku 8. člena je zelo podobna obveznosti, ki se nanaša na politike. Ta zahteva, da »si pogodbenica prizadeva spodbuditi učinkovito udeležbo javnosti«, kar pomeni, da je kljub uporabi besedice »shall« v angleški različici celotna obveznost izražena precej neizrazito.

III. SPLOŠNA PRAVILA

Zahteva o udeležbi javnosti že na začetku odločanja

Člen 6.4 določa, da »pogodbenica zagotovi udeležbo javnosti že na začetku odločanja, ko so še vse možnosti odprte in lahko javnost učinkovito sodeluje«. Ta zahteva velja tudi za načrte in programe, kajti 7. člen v sklicevanju na 6. člen jasno navaja zahtevo po uporabi te določbe. Člen 8 vključuje podobno določbo, čeprav izraženo bolj kot priporočilo, in za to uporablja nekoliko drugačen jezik (»na ustrezni stopnji« in »ko so možnosti še odprte«).

V večini držav je vsako odločanje, ki se nanaša na okolje, sestavljeno iz številnih zaporednih odločitev, ki imajo različno pravno naravo. Tako je glavno vprašanje v razpravi o pravnem pomenu obveznosti o zagotavljanju »udeležbe javnosti že na začetku odločanja« najprej, ali se ta zahteva nanaša na

[2] Glej na primer V. Koester, Review of Compliance under the Aarhus Convention: a rather Unique Compliance Mechanism, Journal for European Environmental & Planning Law, Zvezek 2, št. 1 (JEEPL 1/2005).

celotno verigo odločanja ali na vsako posamezno odločitev, ki predstavlja zaporedno stopnjo te verige, ali mogoče na oboje. Tukaj se postavlja vprašanje, ali ta zahteva določa, da morajo biti na vsaki stopnji odločanja odprte še vse možnosti. Odbor za izvajanje je zgoraj navedena vprašanja obravnaval ob številnih priložnostih.

V primeru ACC/C/16/Litva je Odbor izrazil splošno mnenje glede tega vprašanja v izjavi »Zahtevo po 'udeležbi javnosti že na začetku odločanja, ko so vse možnosti še odprte,' je treba naprej obravnavati po načelu stopenjskega odločanja, pri katerem bi bila na vsaki stopnji odločanja javnost udeležena pri obravnavi in izbiri določenih možnosti ter bi se na vsaki zaporedni stopnji odločanja obravnavala le vprašanja znotraj možnosti, ki je bila že izbrana na predhodni stopnji[3].«

Odbor je v istem primeru poleg tega pojasnil, da »... ob upoštevanju posebnih potreb določene države in predmeta odločanja pogodbenica lahko sama presoja o naboru možnosti, ki jih bo obravnavala na posamezni stopnji odločanja. Take stopnje lahko vključujejo različne zaporedne strateške odločitve v skladu s 7. členom Konvencije (politike, načrte in programe) in različne posamične odločitve v skladu s 6. členom Konvencije, ki dovoljujejo osnovne parametre in kraj določene dejavnosti, njene tehnične značilnosti in tehnološke podrobnosti ...«[4].

Ključno vprašanje pri pregledu skladnosti z obveznostjo o zagotavljanju »udeležbe javnosti že na začetku odločanja« je torej preveriti, ali je bila udeležba javnosti zagotovljena na predhodnih stopnjah. V primeru Litve je Odbor ugotovil, da »litovska zakonodaja predvideva udeležbo javnosti pri odločanju o načrtih in programih. Ob upoštevanju tega in sestave zaporednega odločanja ter pravnega učinka različnih odločitev v Litvi se zdi, da dejstvo, da so bile nekatere odločitve sprejete, potem ko so bile določene možnosti že izbrane (npr. odlagališče ali sežigalnice odpadkov), in je razprava potekala le o dveh možnih lokacijah, ne presega zgoraj navedenih omejitev pristojnosti.«[5]

Zahteva o zagotavljanju ustreznih časovnih obdobij

Člen 6.3 Konvencije določa, da je treba zagotoviti »ustrezno časovno obdobje za posamezne faze pri udeležbi javnosti, da je tako na voljo dovolj časa za obveščanje javnosti v skladu z drugim odstavkom tega člena ter da se javnost lahko pripravi in učinkovito sodeluje pri okoljskem odločanju«. Ta zahteva velja tudi za načrte in programe, kajti 7. člen v sklicevanju na 6. člen jasno navaja zahtevo po uporabi te določbe. Člen 8 vključuje podobno določbo, čeprav izraženo bolj kot priporočilo in z uporabo malce drugačnega jezika (»dovolj dolga«, namesto »ustrezna« časovna obdobja).

Odbor za izvajanje je v svojem poročilu na sestanku pogodbenic Aarhuške konvencije v Rigi leta 2008 ugotovil: »V časovnih obdobjih, ki so v državnih zakonskih okvirih predvideni za seznanitev javnosti z dokumentacijo in predložitev pripomb, obstajajo precejšnje razlike. Zahteva o zagotovitvi 'ustreznega časovnega obdobja' v tretjem odstavku 6. člena pomeni, da mora imeti javnost na voljo dovolj časa, da se seznani z dokumentacijo in predloži pripombe, pri čemer se upoštevajo med drugim narava, zahtevnost in obseg predlagane dejavnosti. Časovno obdobje, ki je sicer lahko ustrezno za majhen, preprost projekt, ki ima le lokalni vpliv, morda ni primerno za večji, zahtevnejši projekt.[6]

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[3] EKE/MP.PP/2008/5/Add.6, 71. odstavek.
[4] Ibidem.
[5] Ibidem, 72. odstavek.
[6] Splošno poročilo, 60. odstavek.

Čeprav se zdi, da Odbor za izvajanje v zgornji razlagi predlaga, da bi bilo treba časovna obdobja razlikovati glede na lastnosti zadevnega postopka – ne pojasni, ali naj bi bilo tako razlikovanje kategorično ali na ad hoc podlagi. V večini držav EU so časovna obdobja določena, do (morebitnih) razlik po navadi prihaja med velikimi projekti z velikim vplivom (običajno projekt iz Priloge I po direktivi o PVO) in manjšimi projekti z lokalnim vplivom (navadno projekt iz Priloge I po direktivi o PVO). Časovna obdobja, ki se nanašajo na načrte in programe, so navadno precej daljša.

Če upoštevamo, da so časovna obdobja po navadi že zakonsko določena, številni dejavniki odločilno vplivajo na to, ali so ta obdobja »ustrezna« ali »neustrezna«. Prvi in najočitnejši dejavnik je število dni, določenih za udeležbo javnosti.

V primeru **ACCC/C/16 Litva, ki zadeva odločanje o uvedbi odlagališča v kraju Kazokiskes,** je Odbor poudaril, da »časovno obdobje samo desetih delovnih dni, ki ga litovski zakon o VPO določa za seznanitev z dokumentacijo, vključno s poročilom VPO, in za pripravo na udeležbo v postopku odločanja o velikem odlagališču, ne izpolnjuje zahteve o ustreznem časovnem obdobju iz tretjega odstavka 6. člena«.

Medtem ko se zdi, da je obdobje desetih dni v spodnjem delu spektra (po mnenju Odbora pod mejo »ustreznega«), je drug primer razkril popolnoma drugačen pristop. V primeru ACCC/22 Francija je bil Odbor prepričan, da je določba o »zagotavljanju obdobja približno šestih tednov, v katerem bi javnost pregledala dokumente in se pripravila na javno anketo«, da bi »uveljavila svoje pravice iz šestega odstavka 6. člena«, ter določba o »45 dneh za udeležbo javnosti in predložitev pripomb, informacij, analiz ali mnenj, ki se nanašajo na predlagano dejavnost« v skladu s sedmim odstavkom 6. člena »v tem primeru izpolnjujeta zahteve v teh določbah v zvezi s tretjim odstavkom 6. člena Konvencije«.

Zgornja dva primera se ne razlikujeta samo v številu dni, predvidenih za udeležbo javnosti, ampak tudi v dejstvu, da zgoraj navedeni francoski pristop k določanju časovnih obdobij ne omogoča samo zadostnega časa, ampak tudi jasno označuje obdobje za pregled dokumentov in obdobje za pripombe[7]. Čeprav Konvencija takega razlikovanja ne zahteva izrecno, se zdi zelo primerno. V mnogih državah pa časovno obdobje, ki je namenjeno pripombam, vključuje tudi obdobje za pregled ustrezne dokumentacije.

Drugo pomembno vprašanje je pristop k določitvi prvega dne, od katerega se izračuna časovno obdobje (ne glede na to, ali je to določeno stalno ali posamično). V mnogih državah se šteje, da se to obdobje začne takoj po javni objavi. Do težav prihaja v primerih, kjer zakon zahteva več različnih načinov javne objave. Na primer na Poljskem, kjer je tak primer, sta obvestilo na oglasni deski uradov državnih organov in obvestilo na njihovi spletni strani navadno objavljena pred objavami v bližini kraja zadevnega projekta in v tisku. V tem primeru sodišča zahtevajo, da časovna obdobja ustrezajo različnim datumom objave[8]. Navadno se prvi dan časovnega obdobja (ki za projekte stalno določa 21 dni) določi tako, da omogoča približno teden dni za objavo po vseh načinih, ki jih zahteva zakon. Taka praksa lahko delno nadomesti stalno določeno (in pri bolj zapletenih projektih dejansko precej kratko) 21-dnevno obdobje, ki ga predvideva poljski zakon za pregled dokumentov in tudi za predložitev pripomb.

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[7] Ne da bi posegali v razpravo o drugih značilnostih francoske pravne podlage za udeležbo javnosti, ki jo kritizirajo francoski NVO in akademiki.
[8] IV SA/Wa 442/06.

Drugo vprašanje je izbira pravega trenutka za udeležbo javnosti. Določena obdobja v javnem življenju so tradicionalno prazniki, ko se ne pričakujejo posebni dogodki. V večini držav EU sta to avgust in božični čas (obdobje med 22. decembrom in 6. januarjem je pogosto čas božičnih praznikov kljub dejstvu, da uradno mnogi uradi v tem času delajo). Človek lahko pričakuje, da javna objava 22. decembra, ki za udeležbo javnosti določa tritedensko časovno obdobje s takojšnjim začetkom, verjetno ne bi bila smiselna, ne glede na zapletenost projekta, saj javnosti ne bi omogočila priprave in učinkovitega sodelovanja.

IV. POSTOPEK JAVNE UDELEŽBE

Objava

Člen 6.2 Konvencije določa, da je treba vključeno javnost na začetku postopka okoljskega odločanja obvestiti o predlagani dejavnosti in postopku z javno objavo ali vsakogar posebej, če je to primerno, na ustrezen, pravočasen in učinkovit način.

V glavnem mora javna objava predlagane dejavnosti izpolniti dva cilja. Prvič, zagotoviti mora popolno in razumljivo informacijo o dejavnosti in postopku za predložitev pripomb. Obvestilo naj bi nestrokovnjakom omogočilo razumeti, kakšen učinek bi lahko imel projekt nanje in kako lahko agenciji sporočijo svoja stališča ali ugovore.

Drugič, obvestilo mora biti objavljeno tako, da doseže najširšo možno javnost. Javna udeležba pri odločanju je nesmiselna, če javnost ni seznanjena s predlagano dejavnostjo in ustreznim postopkom, takrat ko še lahko vpliva na izid odločanja.

Obvestilo mora dati jasno razlago o tem, kako lahko javnost izve več o predlagani dejavnosti in kako lahko svoja stališča sporoči pristojnemu organu.

V obvestilu morajo biti opredeljeni ustrezni dokumenti in kraj, kjer bodo ti dostopni javnosti zaradi vpogleda, navedeno mora biti tudi, kje, kdaj in kako lahko javnost vloži svoje pripombe o predlagani dejavnosti, ter seznam imen in naslovov oseb v agenciji, pristojnih za postopek. Opremljeni s temi informacijami bodo člani javnosti lahko predložili svoja stališča ustreznim posameznikom v agenciji v roku, ki je za to določen.

Člen 6.2 Aarhuške konvencije določa, da mora biti ta informacija objavljena »na ustrezen, pravočasen in učinkovit način«. Take jasne obveznosti so lahko zelo pomembne pri praktičnem izvajanju Konvencije.

Da bi ponazorili možne težave, si lahko ogledamo praktični primer na Poljskem. Zakon zahteva obveščanje javnosti med drugim z »zagotavljanjem informacij na ustaljen način na sedežu organa, ki je pristojen za zadevo«, »razobešanjem obvestil v bližini predlaganega projekta« in z objavo informacije na svetovnem spletu na domači strani organa, pristojnega za sprejetje odločitve.

Tak način se odlično obnese pri projektih, ki potekajo v velikih mestih ali urbanih okoljih na premožnejših območjih. Kjer pa projekt poteka zunaj naselij, na revnejših območjih, kjer večina ljudi nima dostopa do medmrežja, in je sedež pristojnega organa v mestu, oddaljenem več kot 15 kilometrov od zadevnega območja, je položaj lahko drugačen. Ključno vprašanje je, kako opredeliti zvezo »bližina projekta«.

Če bi »bližino projekta« razumeli dobesedno, bi bila zakonska obveznost izpolnjena, če bi obvestilo razobesili sredi podeželja. V takem primeru in čeprav je bila informacija objavljena »pravočasno«, v praksi noben član lokalne javnosti ne bi imel niti možnosti izvedeti o projektu in tako tudi ne sodelovati pri odločanju. Bo torej vse v skladu z zahtevami direktive VPO in tudi s poljskimi določbami, ki jo uvajajo, kajti nobena od njih jasno ne zahteva obveščanja javnosti o predlagani dejavnosti na »ustrezen« in »učinkovit« način? Ampak Aarhuška konvencija to zahteva – in v tem je razlika. Da bi bila taka zahteva izpolnjena, mora biti obvestilo objavljeno na mestih, kjer jo lahko vključena javnost vidi. Taka jasna pravna zahteva vključuje določeno stopnjo aktivnega premisleka s strani organov, ki morajo skrbno pretehtati, kateri način obveščanja javnosti bi bil »ustrezen« in »učinkovit«. V različnih okoliščinah se ti načini lahko razlikujejo, vendar so vedno predmet sodnega nadzora.

Ob upoštevanju tega dejstva zgornje zahteve, ki niso izrecno navedene v nacionalni zakonodaji, lahko štejejo za hujšo pomanjkljivost pri izvajanju Aarhuške konvencije.

Obvestilo mora biti pripravljeno tako, da doseže široko javnost. Če potencialno zainteresirane osebe niso seznanjene s predlaganim projektom, ne bodo mogle izraziti svojih stališč o projektu in udeležba javnosti pri odločanju bo dejansko onemogočena.

Dostop do ustreznih informacij

Člen 6.6 Konvencije zahteva, da »pristojni organi javne oblasti vključeni javnosti omogočijo dostop do vseh informacij, pomembnih za odločanje (…), da jih lahko preveri (…), brezplačno in takoj, ko so na razpolago med postopkom za udeležbo javnosti«. Namen te določbe je zagotoviti določene izjeme od splošnih pravil glede dostopa do informacij iz 4. člena Konvencije. Ta zahteva, da morajo biti nekatere informacije, ki so koristne pri učinkovitem sodelovanju javnosti, javnosti na voljo brez določenih omejitev, predvidenih v 4. členu. Sem so vključene zlasti časovne omejitve (člen 4.2) in možnost zaračunavanja posredovanja informacij (člen 4.8). Dopušča samo izjeme, predvidene v členih 4.3 in 4.4 (»brez poseganja v pravico pogodbenic, da zavrnejo razkritje določenih informacij v skladu s tretjim in četrtim odstavkom 4. člena«).

V členu 6.2 je navedena obveznost o aktivnem obveščanju javnosti o začetku postopka in podrobnostih predlaganega postopka, zlasti o obveščanju javnosti o tem, kje se ustrezne informacije hranijo (člen 6.2.d) iv)), medtem ko člen 6.6. dopolnjuje to določbo z jasno zahtevo po tem, da morajo biti take »ustrezne« informacije dejansko na razpolago (na podlagi zahtevka, kjer se ta zahteva), in v členu 6.6, odstavki a)–f) navaja kratek seznam informacij, ki morajo biti vanje vključene.

Predložitev pripomb

V sedmem odstavku 6. člena Konvencija zahteva, da »morajo postopki za udeležbo javnosti omogočiti, da predloži … vse pripombe, informacije, analize ali mnenja«.

Sprejetje pisnih vlog se lahko dopolni z možnostmi za ustno komunikacijo z agencijo (kot so javna srečanja z osebjem agencije), kajti nekateri posamezniki težko izrazijo svoja stališča v pisni obliki.

Odbor je ugotovil, »da litovska zakonodaja omejuje pravico *vključene javnosti* do predložitve pripomb in da morajo biti te pripombe 'utemeljeni predlogi', tj. vključevati morajo tehtno argumentacijo. V

tem pogledu litovski zakon ne zagotavlja popolnega obsega pravic, ki jih predvideva Konvencija« (ACCC/C/16/Litva – ECE/MP.PP/2008/5/Dodatek 6, 80. odstavek).

Ustrezno se upošteva izid udeležbe javnosti

Člen 6.8 določa, da se »pri odločitvah ustrezno upošteva izid udeležbe javnosti«. Ta določba velja tudi za načrte in programe, kajti 7. člen se v zvezi s tem jasno in neposredno sklicuje na člen 6.8. Obveznost se pojavi tudi v 8. členu, čeprav se uporablja nekoliko drugačna formulacija.

Pravni pomen obveznosti o »ustreznem upoštevanju« je predmet različnih razlag in si ga je treba ogledati z različnih strani. Najpomembnejše vprašanje je, ali je njegov namen omogočiti javnosti odločilno vlogo pri odločanju.

V zvezi s tem je treba zapisati mnenje Odbora za izvajanje Aarhuške konvencije, ki je izjavil, da zahteva iz člena 6.8 Konvencije, da se pri odločitvah ustrezno upošteva izid udeležbe javnosti, ne pomeni priznavanja pravice veta javnosti, še zlasti pa te določbe ne bi smeli razumeti kot zahteve, da ima lokalna skupnost, ki živi v bližini projekta, zadnjo besedo glede pomena in načrta projekta ter da je njeno odobravanje projekta vedno nujno[9].

Poleg tega je popolnoma jasno, da obveznosti, da se pri odločitvi ustrezno upošteva izid udeležbe javnosti, ni mogoče šteti kot zahtevo za sprejetje vseh predloženih pripomb, pridržkov ali mnenj. Očiten razlog za to je, da se mnenja javnosti zelo pogosto razhajajo. Neredko se dogaja, zlasti v primeru velikih infrastrukturnih projektov, kot so letališča, odlagališča ali čistilne naprave za odpadne vode, da tisti, ki živijo v bližini projekta, temu odločno nasprotujejo, medtem ko širša javnost podpira tak projekt, katerega namen je na splošno izboljšati njihove življenjske razmere. Obe strani po navadi zastopata svoje zasebne interese, do česar imata vso pravico. Nevladne okoljske organizacije, ki naj bi ščitile nepristranske interese okolja, pa zastopajo še dodatno stališče.[10]

Čeprav je nemogoče sprejeti bistvo, ki je pogosto nasprotujoče, vseh predloženih pripomb, mora pristojni organ resno preučiti vse prejete pripombe, ne glede na to, ali je njihov namen zaščititi zasebni ali javni interes, ter ne glede na to, ali so utemeljene. Poleg tega je mogoče posamezne določbe zaradi načina priprave njihovega osnutka razlagati kot zahtevo, da organi »ustrezno upoštevajo« predložene pripombe ne glede na to, ali se nanašajo na okoljska vprašanja, dokler te ostajajo v obsegu ustrezne odločitve ali pristojnosti ustreznega javnega organa.

Kot je upravičeno ugotovljeno v Priročniku za izvajanje Aarhuške konvencije 2000, je treba obveznost o »ustreznem upoštevanju« iz člena 6.7 upoštevati v skladu z zahtevo iz člena 6.9, da je treba »javnosti omogočiti dostop do besedila odločitve skupaj z razlogi in utemeljitvami, na podlagi katerih je bila odločitev sprejeta«.Zato Priročnik predlaga, da je v državah, kjer splošno upravno pravo že določa, da morajo biti odločitve utemeljene in predložene v pisni obliki, »ustrezno upoštevanje izida

[9] Poročilo Odbora za izvajanje s 24. konference EKE/MP.PP/C.1/2009/4, 28. odstavek.

[10] Take razmere so bile v primeru odlagališča, za katerega je Odbor za izvajanje zapisal, »da so bile postopku odločanja o zadevnem odlagališču naklonjene nekatere vsedržavne litovske okoljske nevladne organizacije in ga navajale kot dober primer izvajanja postopkov javne udeležbe« (ACCC/C/16/Litva – EKE/MP.PP/2008/5/Add.6, 60. odstavek).

javne udeležbe mogoče razumeti kot zahtevo, da pisno utemeljene odločitve vključujejo tudi razpravo o načinu upoštevanja udeležbe javnosti«.[11]

Zgornja razlaga pravnega pomena obveznosti o »ustreznem upoštevanju« ne sme voditi k zmanjšanju uporabe te obveznosti zgolj na proceduralno zahtevo. Priročnik jasno določa, da je »ustrezni organ na zadnji stopnji odgovoren za odločitev na podlagi vseh informacij, vključno s prejetimi pripombami, in da mora biti sposoben pojasniti, zakaj je bila določena pripomba zavrnjena na podlagi konkretnih razlogov«.[12]

Sporočilo o odločitvi in dostopnost odločitve za javnost

Potem ko agencija preuči pripombe javnosti in določi končno različico odločitve, končno odločitev objavi. To vključuje obvestilo javnosti o sprejetju odločitve in krajih, na katerih je odločitev dostopna za javnost.

Poleg ponovnega tiskanja celotnega besedila končne odločitve mora agencija dati kratko pisno izjavo, v kateri pojasni pravne in dejanske razloge ter razloge politike za odločitev.

Izjava povzema vse pripombe, ki jih je predložila javnost, in pojasni razloge za sprejetje ali zavrnitev pripomb. Izjava pomaga javnosti razumeti, zakaj je bil projekt sprejet, prav tako agencijo prisili, da skrbno preuči prejete pripombe in odločitev še enkrat preuči v luči teh pripomb.

[11] Priročnik za izvajanje Aarhuške konvencije 2000, str. 109.
[12] Priročnik za izvajanje Aarhuške konvencije 2000, str. 109.

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PUBLIC PARTICIPATION UNDER THE AARHUS CONVENTION

Abstract The paper aims to present the main legal issues related to implementation of the public participation provisions of the Aarhus Convention. To this end it briefly presents the structure of the Aarhus Convention and the scope and legal nature of its relevant provisions. This is followed by the presentation of some main horizontal issues concerning the entire public participation pillar i.e requirements for providing "early public participation" and "reasonable time-frames". Finally, the paper presents briefly the main elements of the public participation procedure as required by the Convention, namely: notification, provision of relevant information, possibility for submitting comments, taking due account of comments and informing the public about the decision.

The paper is focused on selected topics, mostly related to issues brought to the attention of the Aarhus Compliance Committee. The discussion is therefore illustrated by, and sometimes even based on, the relevant opinions of the Compliance Committee. The paper, due to the limited space available, does not attempt to provide a comprehensive coverage of all the issues potentially involved.

Keywords Public participation - Environment - Aarhus Convention - Aarhus Compliance Committee

I. Aarhus Convention - structure of the Convention and its 3 pillars and monitoring compliance mechanism

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention was adopted at the Fourth Ministerial 'Environment for Europe' Conference, held in the Danish city of Aarhus in June 1998, where it was signed within the framework of UN Economic Commission for Europe (UNECE). Aarhus Convention represents the first binding international instrument attempting to comprehensively and exclusively address issues of citizens' environmental rights[13]. The Convention rests on three pillars, each of which has its precedent in the 1992 declaration - access to information (Articles 4 and 5), public participation in decision-making (Articles 6-8), and access to justice (Article 9). Besides, the objective in Article 1 and the Preamble, as well as Article 2 (definitions) and Article 3 (General Provisions) provide the

[13] See J. Jendroska and S. Stec, The Aarhus Convention: Towards a New Era in Environmental Democracy, Environmental Liability, Vol 9 Issue 3, June 2001, p. 148.

background to all three pillars. The provisions of the Convention provide a benchmark against which the entire framework for public participation or particular instances of its operation in practice can be assessed. The Convention offers a compliance procedure to trigger such assessment and a special body (Compliance Committee) that is specifically established for the purpose[14].

II. Public participation pillar - legal nature of obligations and scope of activities and decisions covered

The most detailed legal regime of public participation is envisaged in Article 6, concerned with public participation in decision-making on specific activities. The Convention does not define the concept of "decisions of specific activities". Moreover, the scope of application of the provisions of Article 6 is expressed in twofold way. First of all, each Party shall apply the provisions of Article 6 to 'decisions on whether to permit proposed activities listed in Annex I' (Art. 6.1a), but also 'shall, in accordance with its national law' apply these provisions to 'decisions on proposed activities not listed in Annex I which may have a significant effect on the environment' (Art.6.1b).

Article 7 covers public participation concerning plans, programs and policies relating to the environment. It includes two distinct legal regimes. The part concerning plans and programs is quite elaborated and all the respective obligations are expressed by the term "shall". There is no doubt that they have a binding legal nature although the scope of legal obligations is not that clear.

The legal scheme for policies is rather modest. The Conventions requires that "to the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment". Despite using the word "shall" the entire obligation is designed in a rather weak form. Parties are requested only to 'endeavour' and only 'to the extent appropriate'. These expressions are characteristic for the so called 'soft law' obligations.

Article 8 covers public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments. It is much more elaborated, as compared with the obligation concerning policies, in terms of providing some procedural details. The nature of the basic legal obligation included in the first sentence of Article 8 is however very similar to the obligation concerning policies. It requires that 'each Party shall strive to promote effective public participation' which means that despite using the word 'shall' the entire obligation is designed in a rather weak form.

III. General rules

Requirement for providing early public participation

[14] see for example V. Koester, Review of Compliance under the Aarhus Convention: a rather Unique Compliance Mechanism, Journal for European Environmental & Planning Law, Vol 2 Number 1 (JEEPL 1/2005)

Article 6.4 stipulates that 'Each Party shall provide for early public participation, when all options are open and effective public participation can take place'. This requirement applies also to plans and programmes because Article 7, when making a cross-reference to Article 6, clearly mentions this provision to be applied. Article 8 includes a similar provision albeit in a rather recommendatory form and using slightly different language ('at an appropriate stage' and 'while options are still open').

In most countries any decision-making related to the environment consist of a number of consecutive decisions having different legal nature. Thus, the key issue in discussing the legal meaning of the obligation to provide 'early public participation' is first of all whether this requirement is related to the entire chain of decision-making or rather to each and every of the decisions constituting consecutive stages of this chain, or maybe to both. The particular issue here is whether this obligation requires that at each stage of decision-making all options should still be open. The Compliance Committee adressed the above questions on several occasions.

In case ACC/C/16/Lithuania the Committee made a general opinion on the issue stating that 'The requirement for "early public participation when all options are open" should be seen first of all within a concept of tiered decision-making whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage.'[15]

Furthermore, in the same case the Committee made it clear that '...taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programs) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details...'[16].

The key issue when examining compliance with the obligation to provide 'early public participation' is then to check if public participation was provided at the previous stages. In the Lithuanian case the Committe noted that 'Lithuanian law envisages public participation in decision-making on plans and programmes. With this in mind and considering the structure of the consecutive decision-making and the legal effect of the different decisions in Lithuania, the fact that certain decisions took place when certain options were already decided upon (e.g. landfill or waste incinerator) and when only two possible locations were discussed does not seem to exceed the above limits of discretion'[17].

Requirement for providing reasonable time-frames

Article 6. 3 of the Convention requires that the 'public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making'. This requirement applies also to palns and programmes beacuse Article 7 when making a cross-reference to Article 6 clearly mentions this provision to be

[15] ECE/MP.PP/2008/5/Add.6, para 71
[16] ibidem
[17] ibidem para 72

aplied. Article 8 includes a similar provision albeit in a rather recomendatory form i using slightly different langauge ('sufficient' insted of 'reasonable' time-frames).

As noted by the Compliance Committee in its Report to the Meeting of the Parties of the Aarhus Convention held in Riga in 2008: 'there are considerable differences in time frames provided in national legal frameworks for the public to get acquainted with the documentation and to submit comments. The requirement to provide 'reasonable time frames' in article 6, paragraph 3, implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. Thus a time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project. [18].

While the above interpretation of the Compliance Committee seems to be suggesting that the time-frames should be differentatied depending on the characteristics of the procedure in question - it does not however make it clear whether such differentiation should be categorical or on a ad hoc basis. In most EU countries the time-frames are fixed and the only diferentiation (if any) is usually between the large projects with bigger impact (usually Anex I project according to EIA Directive) and smaller projects with local impact (usually Anex I project according to EIA Directive). In relation to plans and programmes usally the time-frames are much longer.

Bearing in mind that the time-frames are usually fixed alredy in the legislation, a number of factors have decisie role in making them 'reasonable' or 'not reasonable'. The first and most obvious such factor is the number of days fixed for public participation.

In case ACCC/C/16 Lithuania concerning decision-making on establishment of a landfill in Kazokiskes, the Committee stated that the '"ime frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3."

While the time span of 10 days seems to be at the lower level of the spectrum (in fact below the limit of being 'reasonable' in the view of the Committee) quite another approach was revealed on the occasion of another case. In case ACCC/22/ France the Committee was convinced that the provision of 'a period of approximately six weeks for the public to inspect the documents and prepare itself for the public inquiry' in order to 'to exercise its rights under article 6, paragraph 6" and provision of "45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity' under Article 6 paragraph 7 'in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention'.

The difference between the two above examples is not only in the number of days envisaged for public participation but also in the fact that in the above quoted French approach to setting the time-frames is not only sufficient time span but also a clear indication of the period of inspecting the documents and period for commenting[19]. The Convention does not clearly require such a differentiation but it seems to be very appropriate. In many countries however, the time-frame set for the commenting includes the time-frame for inspecting the relevant documentation.

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[18] General report para 60

[19] Without entering into discussion about the other features of the French legal framework of public participation which is sometimes criticized by French NGOs and academics

Another important issue is the approach to setting the initial day from which the time-frame (whether fixed or set individually) is to be calculated. In many countries it is deemed to start immediately following the public notice. Here the problem arises in situation in which the law requires several diferent means of making a public notice. For example in Poland, where this is the case, usually a notice on a notice board in the office of public authorities as well as a notice on their webpage, are both being put earlier than announcements in the vicinity of the location of the project in question and in the press. In this situation the courts require that the time-frames correspond to different dates of the notice[20]. Usually the initial date of the time-frame (which for projects is fixed at 21-days) is set to allow about a week to make sure the notice is published in all the methods required by the law. This practice may compensate partially the fixed (and rather short indeed in case of more complicated projects) the 21-days time frame envisaged by Polish law for both inspecting the documents and submitting comments.

Yet another issue is the very timing of the public participation. There are certain periods in public life which are traditionally considered as holidays and not much is expected to happen. In most of EU countries this is August and Christmas time (the period between 22 December and 6 January is often considered as Christmas Holiday Season despite the fact that officially many offices work during that time). One can expect that making a public notice on 22 December setting the 3 weeks time-frame for public participation with an immediate starting date would probably be not considered reasonable regardless of how complicated the project is because it would not allow the public to prepare and participate effectively.

IV Public participation procedure

Notification

Article 6.2 of the Convention requires that the public concerned shall be informed about proposed activity and procedure and that this information shall be done either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner

Public notice of a proposed activity should generally accomplish two objectives. First, it should provide complete and comprehensible information about the activity and the process for submitting comments. Notice should enable non-experts to understand how the project might affect them, and how they may communicate their views or objections to the agency.

Second, notice should be published in a manner that reaches the widest possible audience. Public participation in decisionmaking is a meaningless exercise unless the public is made aware of a proposed activity and the relevant procedure at a time when they can still affect its outcome.

The notice should provide a clear explanation of how the public can find out more about the proposed activity and how they can communicate their views to the competent authority.

The notice should identify the relevant documents and place where they will be open for public inspection and also should indicate where, when, and how the public may submit comments on the proposed activity, and should list the names and addresses of the persons within the agency who are

[20] IV SA/Wa 442/06

responsible for the procedure. Equipped with this information, members of the public will be able to submit their views to the appropriate individuals in the agency within the time period specified.

Article 6.2 of the Aarhus Convention requires that this information shall be done in “an adequate, timely and effective manner” And such clear obligations may be of utmost importance in practical implementation of the Convention.

To illustrate the possible problem one can have a look at a practical example in Poland. The law requires the public to be informed, inter alia by “provision of information in a customary manner at the seat of the authority which is competent in the matter” and by “bill-posting in the vicinity of the proposed project” and also by placing of the information on the www homepage of the authority competent for making the decision.

This will work perfectly in case of a project located in big cities or urban areas in well-off regions. In case however of a project located well outside human settlements, in a poor region where most people have no access to Internet, and with the seat of competent authority being in a town located 15 km from the respective area the situation may look differently. The key issue would be how to interpret the phrase “vicinity of the project”. If the “vicinity of the project’ were interpreted literally - the legal obligation would be met by bill-posting in the middle of countryside. In such case, even if the information was put “timely” , in practice no one from the local public would have a chance to ever learn about the project and thus - to participate in decision-making. And this will all be in line with the requirements of both the EIA Directive and Polish provisions transposing it, which both do not require clearly that the public is informed about the proposed activity in “adequate” and ‘effective” manner? But the Aarhus convention does - and this makes a difference. In order to meet such requirement the notice would have to be put in places where the public concerned would be able to see it. Such a clear legal requirement involve some degree of active consideration on the part of authorities which should carefully consider which means of notifying the public would be ‘adequate’ and “effective”. In different situation such means can be different but always subject to judicial control.

Bearing this in mind lack of the above requirements clearly mentioned in a national legislation may well be treated as significant deficiency in implementing the Aarhus Convention.

Notification should be designed to reach a wide public audience. Unless potentially interested persons are made aware of a proposed project, they will be unable to express their views on it, and public participation in the decisionmaking will be effectively defeated

Making available relevant information

Article 6.6 of the Convention. requires “the competent public authorities to give the public concerned access for examination (...) free of charge and as soon as it becomes available, to all information relevant to the decision-making (...) that is available at the time of the public participation procedure”. This provision is meant to provide a certain exemption from general rules of access to information in Article 4 of the Convention. It requires that certain information useful for the public to participate effectively should be made available to it without applying certain limitations envisaged in Article 4: this includes in particular time limits (Article 4.2) and possibility to charge for supplying information (Article 4.8). It allows only to apply exemptions envisaged in Article 4.3 and 4.4 (“ without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4”).

In Article 6.2 there is an obligation to actively inform the public about commencement of the procedure and details of envisaged procedure, in particular to inform the public where it can inspect the relevant information (Article 6.2.d) iv), while Article 6.6 supplements this provision with clear obligation to actually make available (upon request where so required) such "relevant information" and provides a minimum list that such information should contain in Articles 6.6 letters a)-f).

Submission of comments

The Convention requires in article 6, paragraph 7, that "public participation procedures shall allow the public to submit … any comments, information, analyses or opinions"

Acceptance of written submissions may be supplemented by opportunities for oral communication with the agency (such as public meetings with agency personnel), because some individuals may find it difficult toexpress their views in writing.

The Committee noted that 'Whereas, Lithuanian legislation limits the right to submit comments to the *public concerned*, and these comments are required to be "motivated proposals", i.e. containing reasoned argumentation. In this respect, Lithuanian law fails to guarantee the full scope of the rights envisaged by the Convention' ((ACCC/C/16/Lithuania - ECE/MP.PP/2008/5/Add.6, para 80)

Due account is taken of the outcome of public participation

Article 6.8 requires that 'in the decision due acount is taken of the outcome of the public participation' This provision is also applicable to plans and programmes because Article 7 makes in this respect a clear and direct reference to Article 6.8. Finally, the obligation is also present in Article 8 albeit it uses a slightly different formulation.

The legal meaning of the obligation 'to take due account' is subject to different interpretations and should be seen from different angles. The most important question is whether it is meant to give the public a decisive role in the decision-making?

In this respect one should note the opinion of the Aarhus Compliance Committee who observed that the requirement in Article 6.8 of the Convention that due account in the decision is taken of the outcome of the public participation does not amount to the right of veto accorded to the public, in particular this provision should not be read as requiring that the final word as to the faith and design of the project rests with the local community living nearby the project and their acceptance is always needed[21].

Furthermore, it is quite clear that the obligation to take due account in the decision of the outcome of the public participation can not be considered as a requirement to accept all the comments, reservations or the opinions submitted. The obvious reason for this is that quite often opinions of the public differ. It is not uncommon, especially in case of large infrastructure projects like airports, landfils or wastewater treatment plants, that while those living in the vicinity vigorously oppose the project the general public support such a project which is meant generally to improve the conditions of their life. Both sides usually represent their own private interests and they have the right for doing

[21] Report of the 24 meeting of the Compliance Committee ECE/MP.PP/C.1/2009/4, paragraph 28

so. Yet another point of view is represented by environmental NGOs who are suppossed to protect the objective interest of the environment[22].

While it is impossible to accept the substance, quite often opposite, of all the comments submitted - the relevant authority must seriously consider all the comments received regardless of whether their purpose is to protect private or public interest and regardless of whether they are motivated. Moreover, the way the respective provisions are drafted can be interpreted as requiring authorities to 'take due account' of the comments submitted regardless of whether they are related to environmental concerns, as long as they remain within the ambit of the relevant decision and competence of the relevant public authority.

As rightly observed in the Aarhus Convention Implementation Guide 2000 the obligation to 'take due account' under Article 6.7 should be seen in the light of the obligation under Article 6.9 to 'make accesible to the public the text of the decision along with the reasons and considerations on which the decision is based'. Therefore the Guide suggests that in the countries where general administrative law already requires decisions to be reasoned and given in writing 'taking due account of the outcome of the public participation might be interpreted to require the written reasoned decision to include a discussion of how the public participation was taken into account'[23].

The above interpretation of the legal meaning of the obligation to 'take due account' should not however lead to narrowing down the scope of this obligation only to the procedural requirement. The Guide makes it clear that 'the relevant authority is ultimately responsible for the decision based on all information, including comments received, and should be able to show why a particular comment was rejected on substantive grounds'[24].

Decision notified and made available to the public

After the agency has considered comments by the public and has decided on the final version of the decision, it publicize the final decision. This involves notifying the public about taking the decision and about places wher the decison is made available for the public.

In addition to reprinting the full text of the final decision, the agency should provide a concise written statement explaining the legal, factual and policy reasons for the decision.

The statement shall summarize the comments submitted by the public, and explain why the comments were either accepted or rejected. This statement helps the public understand why the project was accepted and it also forces the agency to examine carefully the comments it receives, and reconsider the decision in light of those comments.

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[22] Such situation happened in case of Kazokiski landfil whereby the Compliance Committee noted 'that the decision-making procedure concerning the landfill in question was appreciated by some nationwide Lithuanian environmental NGOs and cited as being a good example of carrying out public participation procedures (ACCC/C/16/Lithuania - ECE/MP.PP/2008/5/Add.6, para 60)

[23] The Aarhus Convention Implementation Guide 2000 p 109

[24] The Aarhus Convention Implementation Guide 2000 p 109