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## **Gaps in the Public Participation requirements of the EU Directive on GMOs as compared with the Aarhus Convention: A comparative analysis**

### **1. Introduction**

European Community (EC) legislation on GMOs and the UNECE<sup>1</sup> Aarhus Convention (AC) both contain provisions for public participation in decision-making. Currently, Paragraph 6.11 of the AC exempts GMO-related activities from its public participation requirements, leaving it to governments to make their own rules.

However, the First Meeting of Parties to the Convention (October 2002) agreed that the legally binding requirement for public participation should be extended to decisions relating to GMOs. Since then, the European Commission and several Member States started to dispute this decision, arguing that the EU Directive on GMOs of 2001 deals sufficiently with this topic. The European ECO-Forum disagrees with this position, not only because in this way non-EU countries would have no binding obligations at all, but also because the Directive is very poor compared with the Convention on rights for citizens.

*This analysis aims to describe the weaknesses of the Directive as compared to the Convention [in Annex see the relevant parts of both the Convention and the Directive].*

### **2. EC legislation: Public participation in decision-making on GMO activities is a legally binding requirement, but defined in general terms only.**

Directive 2001/18 introduces legally binding provisions on public participation in decision-making on GMO-related activities.

It aims to establish a comprehensive and transparent legislative framework and considers it “*necessary to ensure that the public is consulted by either the Commission or the Member States during the preparation of measures and that they are informed of the measures taken during the implementation of this Directive*”.<sup>2</sup>

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<sup>1</sup> United Nations Economic Commission for Europe

<sup>2</sup> Par. (10) Preamble EC Directive 2001/18

The EC Directive is broader, in principle, than the AC, in referring to "*the public*", rather than "*the public concerned*", which is the only advantage of the Directive over the AC. However, amending the AC on GMOs will not replace the Directive where it is more demanding, so this broader requirement will maintain for all countries that are obliged to implement the Directive.

### *2.1 Public participation on deliberate releases of GMOs for purposes other than for placing on the market*

Directive 2001/18 requires Member States to consult the public before permitting a deliberate release into the environment.<sup>3</sup> Member states are also required to establish procedures for this consultation, including a reasonable time period, in order to give the public or groups the opportunity to express an opinion.

While this provision clearly establishes a legally binding requirement for public consultation, it does not specify the manner in which the public should be consulted. Member States are required to guarantee consultation with the public on deliberate releases under Part B of the Directive, but they have a broad range of options to implement that obligation in their national frameworks.

### *2.2 Public participation for placing on the Market of GMOs.*

Directive 2001/18 gives the public the possibility to make comments to the European Commission on the summary dossier of the notifications for a GMO or a combination of GMOs to be placed on the market.

The notification is the initial stage of the authorization procedure. Anyone wishing to introduce a GMO into the environment of the EU must submit a notification to the competent authority of any Member State where such a GMO is to be placed on the market for the first time. The competent authority is required to forward the summary of the dossier to the competent authorities of the other Member States and the European Commission.<sup>4</sup> Then, the European Commission is required to make available to the public the summary of the dossier of the notification, and the public assessment reports in the case referred to in Article 14(3)(a).<sup>5</sup> On the basis of the information, the public may make comments to the Commission within 30 days. It is unclear if 30 days represents a "*reasonable time frame*" for the purposes of the AC's Article 6.3.

The main provisions of the Directive do not further develop this provision on public participation, and therefore leave a wide margin of discretion to the Commission on how to take into account comments from the public. Nevertheless, a recommendation in the Preamble of the Directive states that "*comments by the public should be taken into consideration in the drafts of measures submitted to the Regulatory Committee*". Despite this not being a

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<sup>3</sup> Article 9, EC Directive 2001/18

<sup>4</sup> Article 13.1 EC Directive 2001/18.

<sup>5</sup> Article 24 (1), EC Directive 2001/18

legally binding provision, the Commission should ensure that public comments are adequately taken into consideration in the draft measures submitted to the Regulatory Committee for a decision on whether or not to authorise a GMO.

It is important to underline, that in the case of placing on the market there is no compulsory obligation for public participation, addressed directly to the Member States. Nevertheless the Commission is required to forward immediately any public comments received on the summary of the notification dossier and the public assessment reports to the national competent authorities.<sup>6</sup>

### **3. The Aarhus Convention has a more comprehensive approach towards public participation**

The Aarhus Convention is a UN legal instrument whose objective is to guarantee the public rights of access to information, participation in decision-making, and access to justice in environmental matters. The Aarhus Convention has a set of comprehensive provisions on public participation which apply to a broad range of activities which can have an impact on the environment in the sectors of energy, production and processing of metals, mineral industry, chemical industry, waste management, etc.

**The AC obliges Public Authorities to actively seek public involvement (art. 3).**

**Also, it includes environmental organisations automatically into the scope of "the public concerned".**

Moreover, paragraphs 1 to 10 of Article 6 contain detailed provisions on how public participation should be ensured. For example, the public concerned needs to be informed appropriately, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.<sup>7</sup> The AC provides a list of elements that need to be provided to the public concerned in order to enable them to participate effectively in the environmental decision-making process.<sup>8</sup> This includes information to be provided on measures to prevent and/or reduce effects<sup>9</sup> and information on alternatives.<sup>10</sup> Directive 2001/18 fails to meet all these requirements.

The procedures for public participation allow the public to send comments, information, analyses or opinions. This can be done by sending written submissions, or participate at public hearings or enquiries with the applicants.<sup>11</sup> The Parties have to ensure that the outcome of the public

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<sup>6</sup> See Article 24 (1), EC Directive 2001/18

<sup>7</sup> Article 6(2), Aarhus Convention

<sup>8</sup> Article 6(2), (3), (6), AC.

<sup>9</sup> Article 6 (6) (c)

<sup>10</sup> Article 6 (6) (e)

<sup>11</sup> Article 6(7), AC.

participation is duly taken into account in the decision and have to explain the involved public on how it came to its decision.<sup>12</sup>

Finally, it gives the public concerned the right to challenge both the "substantive and procedural legality of any decision, act or omission" in case this decision is related to specific activities covered by article 6.

The procedure for public participation established in Article 6 of AC needs to be applied to decisions on whether or not to permit activities, listed in the Annex of the AC. All Article 6 provisions must be applied to a list of activities described in the Annex of the AC, which include chemical installations, incineration facilities, landfills, industrial plants for the production of pulp from timber, etc.

### **Until now, GMO related decisions are exempted**

Activities involving GMOs were not included in the list of activities which are subject to the public participation requirements of Article 6. And Paragraph 6.11 explicitly excludes GMO activities from the legally binding obligations of the public participation provisions of the AC, by deferring them to national legislation.<sup>13</sup> This exclusion was an anomaly, as acknowledged by the Guidelines on applying the AC provisions to GMOs.

## **5. Conclusion: Inclusion of GMOs into the Aarhus Convention would lead to better public participation rights and practices, also in the EU.**

While the EU legislation on GMOs does contain legally binding provisions for public participation in decision making on some GMO related activities, like deliberate release and placing on the market, it does not elaborate on how the consultation of the public has to be conducted on deliberate releases. The implementation of those provisions is based on the principle of subsidiarity: thus the Member States are responsible for establishing procedures to guarantee public consultation. Moreover, there are no detailed legally binding provisions on public participation requirements for GMOs to be placed on the market.

The Aarhus Convention, on the other hand, contains detailed provisions on how public participation procedures in decision-making on environmental matters should be conducted, but excludes GMO related activities from the scope of those procedures. This situation is paradoxical, particularly if we compare the AC with the EU and some Eastern European legal frameworks on GMOs today, where the rights to legally binding public participation are clearly enshrined.

The AC is key to fostering adequate access to information and public participation in Europe, and is a leading instrument in promoting public participation in environmental decision-making throughout Europe. While the need to have public participation in GMO decision-making is clearly

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<sup>12</sup> Article 6(8), AC.

<sup>13</sup> Article 6.11: "Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment".

recognised in the European Union, and other Eastern European Member States, the AC does not reflect this European reality.

The principle of legally binding public participation on GMOs needs to be reflected in the AC. Furthermore, the Aarhus Convention provisions on public participation should be the reference framework to implement the binding provisions of GMO public participation in the EU, and other European legal frameworks. The AC should be the motor to foster and improve public participation on GMOs, and not lag behind today's European reality.

**The AC needs urgent modifications, in order to resolve this situation. Today it has become obvious that Article 6.11 is obsolete and incoherent with respect to the current European debate on GMOs, and should be deleted. GMO activities should be included in the public participation procedures of the AC.**

## **AARHUS RELEVANT PARAGRAPHS**

### **DEFINITIONS**

2.5. “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision—making; 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.

### **GENERAL PROVISIONS**

3.2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision—making and in seeking access to justice in environmental matters.

3.3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

3.9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision—making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

### **PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES**

6.2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision—making procedure, and in an adequate, timely and effective manner, *inter alia*. of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
  - (i) The commencement of the procedure;
  - (ii) The opportunities for the public to participate;
  - (iii) The time and venue of any envisaged public hearing;
  - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
  - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

- (vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

6.3. 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.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
- (b) A description of the significant effects of the proposed activity on the environment;
- (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
- (d) A non—technical summary of the above;
- (e) An outline of the main alternatives studied by the applicant; and
- (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the

public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

### **ACCESS TO JUSTICE**

9.2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest  
or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non—governmental organisation meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 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.

6.4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

6.5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

## **RELEVANT PARTS FROM DIRECTIVE 2001/18 ON DELIBERATE RELEASE INTO THE ENVIRONMENT OF GENETICALLY MODIFIED ORGANISMS**

### Article 9 Consultation of and information to the public

1. Member States shall, without prejudice to the provisions of Articles 7 and 25, consult the public and, where appropriate, groups on the proposed deliberate release. In doing so, Member States shall lay down arrangements for this consultation, including a reasonable time-period, in order to give the public or groups the opportunity to express an opinion.
2. Without prejudice to the provisions of Article 25:
  - Member States shall make available to the public information on all part B releases of GMOs in their territory;
  - the Commission shall make available to the public the information contained in the system of exchange of information pursuant to Article 11.

### Article 24 Information to the public

1. Without prejudice to Article 25, upon receipt of a notification in accordance with Article 13(1), the Commission shall immediately make available to the public the summary referred to in Article 13(2)(h). The Commission shall also make available to the public assessment reports in the case referred to in Article 14(3)(a). The public may make comments to the Commission within 30 days. The Commission shall immediately forward the comments to the competent authorities.