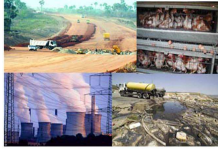


WORKSHOP ON EU LEGISLATION
ENVIRONMENTAL IMPACT ASSESSMENT



Public participation in EIA and SEA



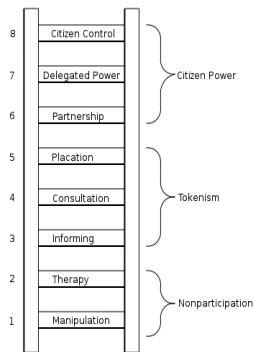
Public participation: Why bother?

- It ensures the EIA/SEA process is open and transparent (no "black box" effect);
- It provides a valuable source of information on key impacts, potential mitigation measures and possible alternatives;
- It is a way to ensure that projects meet citizens' needs;
- The project carries more legitimacy and conflicts can be addressed before the decision is taken;
- After the decision is taken, it ensures a better implementation;
- **It leads to a better decision** (but does it really?)

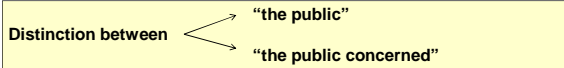


What kind of participation do EIA and SEA Directives require?

Ladder of Citizen Participation by Sherry R. Arnstein



Who shall participate?



Practical implications :

- Article 6 gives 'the public concerned' the right to access environmental information and to participate actively in the administrative procedure evaluating the project;
- Article 10a guarantees, under conditions, such persons access to the courts



Definition of "the public"

- No definition in the 1985 version of Directive 85/337. Introduced by Directive 2003/35 – definition "imported" from Aarhus Convention

- Definition common to Directive 2001/42 - article 2(d) - and Directive 85/337 as amended in 2003 – article 1(2):

"Public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.



Definition of "the public concerned"

"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 organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

(C-263/08, Djurgarden, §40)

Article 1(2) of Directive 85/337, as amended, draws a distinction between 'the public concerned' and 'the public' in order to differentiate between those who have a direct interest in whether or not an environmental project goes ahead and those who are not thus affected by the project.

gives NGOs a "special supervisory role" (Advocate General Sharpston on C-263/08, Djurgarden, §50)

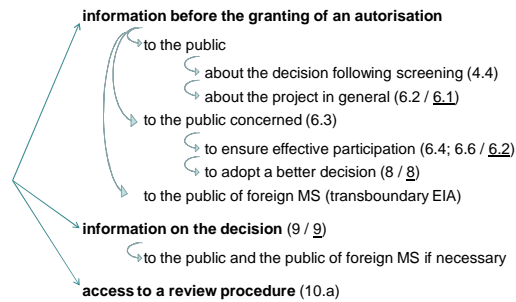


(C-427/07, EU Commission v. Ireland, §57)

56. In the light of the purpose of Article 3(1) of Directive 2003/35, which is to add definitions to those appearing in Article 1(2) of Directive 85/337, and in particular to indicate, for the purposes of the latter directive, what is to be meant by 'the public concerned' and, whereas, at the same time, Directive 2003/35 accords new rights to that public, it cannot be concluded from Ireland's failure to reproduce those definitions in its legislation expressly that Ireland has not fulfilled its obligation to transpose the provisions in question.

57. The scope of the new definition of 'the public concerned' thus introduced by Directive 2003/35 can be assessed (...) only with regard to all of the rights which that directive accords to 'the public concerned', since those two aspects are indissociable".





“Information dissemination” (6.2 EIA Directive)

The public shall be informed about:

- The existence of a project (the request for development consent), whether it is subject to an EIA (and transboundary) and the nature of possible decisions or, where there is one, the draft decision;
- Practical matters: details on who is competent to take the decision, to deliver information and to receive comments / questions; an indication of the availability of the information gathered on the project; an indication of the times and places where and means by which the relevant information will be made available; details of the arrangements for public participation.



“Information dissemination” (6.3 EIA Directive)

The public concerned shall be informed about:

- any information gathered pursuant to Article 5, i.e. description of the project and of its consequences, an outline of the alternatives, a non technical summary;
- the main reports and advice issued to the competent authorities
- information other than that referred in 6.2 which is relevant for the decision and which only becomes available later.

“Information dissemination” (6.1 SEA Directive)

The public shall be informed about the draft plan or programme and the environmental report prepared in accordance with Article 5



Public participation is an essential part of the EIA and SEA procedures

-The public concerned shall be given **effective opportunities to participate** in the environmental decision-making procedures.

C-435/97, WWF and others

In the case of a project requiring assessment under Directive 85/337, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2) of the Directive. **However, an alternative procedure of that kind must satisfy the requirements of Article 3 and Articles 5 to 10 of the Directive, including public participation as provided for in Article 6.**

This would otherwise undermine the Directive’s objective.



Timing of the procedures

-timing is left to the MS to decide, as long as it is “early in the procedure” and as it ensures early and effective public participation

C-332/04, Commission v. Spain, §54

While Article 6(1) and (2) of the EIA Directive require Member States to hold a consultation procedure, in which the authorities likely to be concerned by the project and the public are invited, respectively, to give their opinion, the fact remains that **such a procedure is carried out, necessarily, before consent is granted.** Such opinions – and further opinions which Member States may stipulate – **form part of the consent process** and are aimed at assisting the competent body’s decision on granting or refusing development consent.



Setting conditions to public participation

C-216/05, *Commission v. Ireland*, §37-38, 42-45

The levying of an **administrative fee** is not in itself incompatible with the purpose of the EIA Directive. (...) **Article 6(3)** allows Member States to place certain conditions on participation by members of the public concerned by the project. Thus, under that provision, the Member States may determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted.



■ follow-up C-216/05, *Commission v. Ireland*, §37-38, 42-45
■ A fee cannot, however, be fixed at a level which would be such as to prevent the directive from being fully effective, in accordance with the objective pursued by it. This would be the case if, due to its amount, a fee were liable to constitute an **obstacle to the exercise of the rights of participation conferred by Article 6** of the EIA Directive. The amount of the fees at issue here, namely 20€ in procedures before local authorities and 45€ at the Board level, cannot be regarded as constituting such an obstacle.



What kind of participation? Some examples (1)

- **public meetings** (these are “open” with no restriction as to who may attend);
- **advisory panels** (a group of individuals, chosen to represent stakeholder groups, which meets periodically to assess work done/results obtained and to advise on future work);
- **open houses** (a manned facility in an accessible local location which contains an information display on the project and the study. Members of the public can go in to obtain information and make their concerns/views known);



What kind of participation? Some examples (2)

- **interviews** (a structured series of open-ended interviews with selected community representatives to obtain information/concerns/views);
- **questionnaires** (a written, structured series of questions issued to a sample of local people to identify concerns/views/opinions. No interviewing may be involved);
- **participatory appraisal techniques** (a systematic approach to appraisal based on group inquiry and analysis and, therefore, multiple and varied inputs. It may be assisted, but not controlled or directed, by external specialists).



The results of consultations and the information gathered must be taken into consideration in the development consent procedure.

An example: public debate in France

-About 1/3 of the projects subject to a public debate have been amended, sometimes slightly, sometimes heavily



- Alternative projects presented by associations have been chosen in some cases and projects have been stopped (highway A 32, Nice harbour's extension)
- Some fiascos too: the Bordeaux bypass – resignation of the commission after the government announced, during the debate, that the project would be carried out anyway



Opinions' status

C-332/04, *Commission v. Spain*, §54

Opinions are (...) preparatory in nature and not, generally, subject to appeal.

-Most of the time, it is possible to challenge the authorization on the ground that participation has not been properly done.

Public debate, articles L. 121-13 and 121-14 environmental code

"When a public debate has been organised on a project, the developer (...) decides (...) on the principle and the conditions of the continuation of the project. Where necessary, he or she specifies the principal modifications made to the project submitted for public debate."

"No irregularity with regard to the provisions of the present Chapter may be invoked when the notice mentioned in Article L. 121-13 has become final."

Conseil d'Etat, 31 juillet 2009, *Aéroport Notre-Dame-des-Landes*, 314955



■ CE, 23 avril 2009, *CRILAN*, 306242

■ Article 6.2 SEA ineffective



■ Objective of 6.4 EIA:

- public debate, from October 2005 to February 2006
- public enquiry, from 15 June to 31 July 2006



■ law of 13 July 2005: French research policy must develop EPR ; ordinance of 7 July 2006: objective as non renewable energy

■ 4 August 2006: planning permission

■ According to the *Conseil d'Etat*, these legal acts did not replace the authorisation for the EPR as a nuclear installation; therefore, participation was conform to article 6.4 of Directive 85/337 as amended.



Article 9 EIA

When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public about its content, the main reasons on which it is based and a description of the main measures to avoid adverse effects.

Case

Spanish decree required that an environmental impact statement be issued by a competent administrative authority in environmental matters before the final authorization is granted. Such a procedure is not required under Directive 85/337. Does it comply with article 9 requirements?



Case C-332/04, *Commission v. Spain*, §56-60

Under Article 9 of the EIA Directive the public is to be informed once the decision to grant or refuse development consent has been taken. **The purpose of issuing this information is not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines.**

It follows from the foregoing that the publication by a Member State of an environmental impact statement issued by a competent administrative authority in environmental matters, an action not required under Community law, is no substitute for the obligation, under Article 9 of Directive 85/337/EEC as amended, to inform the public of the granting or refusal of consent to proceed with a project under Article 1(2) of the Directive. (...)



■ follow-up...Case C-332/04, *Commission v. Spain*, §56-60

■ By imposing, in Article 9, the obligation on Member States to inform the public when a decision granting or refusing development consent is adopted, the amended Directive 85/337/EEC is intended to involve the public concerned in supervising the implementation of these principles. **Informing the public only of the content of the opinion which is to be taken into account by the competent authority before adopting its decision is a less effective way of involving the public in supervision than informing the public of the final decision which concludes the consent procedure.**