

Interface between EU Law and National Law

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The aim of this chapter is to give additional emphasis to the issue of participation discussed in the Obradovic's chapter. With a view to fostering the debate, I would like to put forward a number of comments, with respect to decision-making issues as well as the scientific debate underpinning environmental decisions.

1 Introductory remarks¹

At the outset, one should bear in mind that both the conception and the implementation of environment law has never been the sole prerogative of the public authorities; since its beginnings, environment policy has been driven forward by pressure groups acting at the international, national and local levels. In addition to imposing obligations upon State organs, the right to environmental policy has given rise to calls from pressure groups as well as the public at large for procedural rights, among them the right to information, participation and legal action.²

As public authorities increasingly find themselves called upon to arbitrate among conflicting interests, they are keen to invite interested parties to set out their points of view directly. In addition, participation constitutes a useful source of information for those charged with taking decisions. Ebbesson stresses that 'public participation is likely to improve the quality of environmental decisions by bringing knowledge, insights, and subjective perceptions into the procedure, which would otherwise risk being ignored'.³ Furthermore, the effectiveness of environmental rules would be enhanced if various actors are accurately informed about the choices being considered as well as the reasons underpinning them and are allowed to participate in drawing up environmental regulations.

Therefore, whether it be preventive or anticipatory in nature, environment policy must have as a corollary a dynamic process of participation for interested parties.

2 From international to EC law

The conditions for public participation were already present in Principle 19 of the 1972 Stockholm Declaration on the Human Environment.⁴ Recommendation 97 of the Plan of Action adopted at that Conference invited

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² See Ebbesson, J., 'The Notion of Public Participation in International Environmental Law' *YbIEL* 1997, 8, p. 70.

³ Ebbesson, J., *op. cit.*, at pp. 78 and 95.

⁴ Declaration of the United Nations Conference on the Human Environment, Stockholm 1972, <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

States to facilitate 'the participation of the public in the management and supervision of the environment' by specifying that, towards that end, 'it is necessary to envisage ways to encourage the active participation of citizens.' Later on, principle 23 of the 1982 UNGA World Charter for Nature, provided that:

'All persons shall have the right to participate ... in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.'⁵

The principle of participation gathered momentum during the Rio de Janeiro's conference on Environment and Development, on the account that Principle 10 of the 1992 Rio Declaration⁶ states that: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have ... the opportunity to participate in decision-making processes.' As a result, an important number of multilateral conventions enacted in the 1990s contain references to or guarantees of public participation.⁷

Participation moved to centre stage with the 1998 Aarhus Convention on Access to Information, Public Participation in the Decision-making Process and Access to Justice in Environmental Matters⁸ which is indeed the most far-reaching expression to date of Principle 10. This international agreement makes a very powerful statement on the importance of participation in a wide range of decisions: in order to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'. Its Article 1 binds States to 'guarantee the right of access to information, public participation in decision-making and access to justice in environmental matters...'

Put it simply, this convention deals with three decision-making processes in three separate provisions:

- public participation in decision-making related to listed activities (Annex I), as well as activities which may have a significant effect on the environment (Article 6(1));
- public participation concerning plans, programmes and policies relating to the environment (Article 7);
- public participation concerning the preparation of executive regulations and generally applicable legally binding normative instruments (Article 8).

⁵ United Nations General Assembly Resolution 37/7 of 28 October 1982 on a World Charter for Nature, <http://www.un.org/documents/ga/res/37/a37r007.htm>.

⁶ Rio De Janeiro Declaration, Earth Summit, 1992 (UNCED), <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

⁷ See the list given by Shelton, D., 'Environmental Rights' in Alston, Ph. (ed.), *People Rights* (Oxford University Press, Oxford 2001), pp. 204-205.

⁸ Convention on Access to Information, Public Participation in the Decision-making Process and Access to Justice in Environmental Matters (1998), <http://www.unece.org/env/pp/treatytext.htm>.

Given that the EC became a party to the Aarhus Convention, the EC lawmaker had to rethink several EC regulatory EC procedures with the aim of complying with the Convention. The EC lawmaker pursuant to a two-pronged approach has been enacting the following regimes:

- 1) a cluster of directives requiring Member States to enact participatory procedures for different environmental sectors (listed installations (Directive 96/61/EC as modified by Directive 2003/35/EC⁹), environmental impact assessment (Directive 85/337/EEC¹⁰), water management (Directive 2000/60/EC¹¹), nature conservation (Directive 92/43/EEC¹²), CO₂ emissions trading (Directive 2003/87/EC¹³),);
- 2) EC provisions calling upon EC institutions to provide for public participation concerning plans and programmes relating to the environment pursuant to Regulation 1367/2006 on the application of the Aarhus Convention on Access to Information, Public Participation in the Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Articles 1(c) and 9).¹⁴

3 From EC to national law: much leeway to the Member States

In EC environmental law, a procedural shift occurred in the beginning of the 1990s: instead of laying down precise standards, a new generation of EC directives required the Member States to provide for the involvement of the public mostly in licensing plants or in setting up programmes. According to the principle of subsidiarity, these directives offer much room for manoeuvre

⁹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L 257/26; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.

¹⁰ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

¹¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

¹² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

¹³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.

¹⁴ Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 246/13.

to the Member States' authorities to define the means of participation at local, regional and national levels. As a result, one is facing a wide array of approaches as regards participation, ranging from a mere consultation at the low end of the scale to genuine negotiations between the various stakeholders. In some Member States, the authorities bring together the parties involved and invite them to negotiate usually within existing legal frameworks.¹⁵ Therefore, the regulatory approaches differ significantly. In France, for instance, participation is enshrined as a constitutional principle (Article 7 of the *Loi constitutionnelle relative à la Charte de l'environnement*) whereas in other Member States, participation is merely encapsulated in administrative guidelines. It follows that participatory rights could vary tremendously from one member state to another.

One must not forget, however, that participation has limits. These generally relate to the late stage at which it occurs,¹⁶ the manipulation it may produce and the significant human and technical resources needed for its implementation. It is also frequently that authorities at the outset listen to the claimants, but go ahead as planned. In other words, a show of discussion hides the fact that a decision has already been taken in the corridors of political power, with citizen participation merely serving to confirm what has been decided.

4 A double-edged sword for developers and public authorities

To some extent, public authorities have been keen to foster public participation in order to reduce the risk of litigation. Indeed, the rationale behind participation is that a decision receives greater acceptance where all stakeholders were able to participate in the decision-making process. As a result, proper participation fosters the confidence in policy decisions and belittles the risk of litigation that could hinder economic development. That said, although they are aware of the benefits of participation, public authorities are basically reluctant to embark on lengthy negotiations on the account that participation opens the doors to endless discussions between stakeholders and as a result,

¹⁵ Verschuuren, J., 'Public Participation regarding the Elaboration and Approval of Projects in the EU after the Århus Convention' *YbEEL* 2004, 4, p. 44.

¹⁶ The Aarhus Convention insists on this point. Under its Article 6(4): 'each Party [must] take steps to ensure that public participation begins at the start of the procedure – that is, when all options and solution are still possible – and that the public may exercise a real influence.' In addition, under its Article 8, 'each Party shall make efforts to promote effective public participation at an appropriate stage – and while options are still open – during the phase when public authorities are drawing up regulatory provisions and other binding legal rules of general application which could have a significant effect on the environment.' See also Article 9(1) of the Regulation 1367/2006 [2006] OJ L 264/13 on the application of the Århus Convention to Community institutions and bodies, which provides for public participation 'at the preparatory stage' of the preparation, modification or review of plans and programmes relating to the environment 'when all options are still open' (Article 9(1)).

may delay projects. In other words, one could denounce the Janus-faced attitude of the public authorities: on one hand, they are eager to promote participation whereas, on the other, they won't like to be drowned in endless controversies.

5 A shift from representative democracy to a new technocracy?

Representative democracy is deemed to confer legitimacy and accountability on all decisions through regular elections. To some extent, participation belittles representative democracy in favour of participative democracy. Nonetheless, it is particularly difficult to determine the public that should participate in the decision-making process. Given the technicality of many environmental issues, environmental non-governmental organisations (NGOs) are becoming the harbingers of public participation.¹⁷ Indeed, NGOs have a great deal to offer in terms of streamlining public participation. First, they offer public authorities an expertise in the environmental field. Second, in negotiating directly with NGOs, public authorities don't have to negotiate with a large number of stakeholders. That said, the employment of NGOs as a form of proxy for the general public leads to a controversy as regards the legitimacy of these organisations. According to some critics,

'the proxy role accorded to NGOs ... does give significant cause for concern as, by employing this subtly bastardized version of public participation, its whole character is in fact altered from a notional mechanism of participative democracy to a practical alternative form of representative democracy'.¹⁸

In addition, to restrict participation to a limited number of NGOs could jeopardize other forms of participation.

¹⁷ International law has similarly shown itself more open to civil society, by providing for the participation of certain NGOs in the work of committees established by treaty. Thus, Article 13(3) of the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (<http://conventions.coe.int/Treaty/en/Treaties/Html/104.htm>) provides for the participation at the meetings of its Standing Committee of bodies that are technically qualified in the conservation of wild flora and fauna, unless one-third of the Contracting Parties object. In addition, NGOs have played an important and varied role with respect to the CITES Convention (Convention on International Trade in Endangered Species of Wild Fauna and Flora, <http://www.cites.org/eng/disc/text.shtml>), monitoring compliance and participating directly in the development of law through involvement in conferences of the Parties. Further, Article 4(1)(i) UNFCCC (The United Nations Framework Convention on Climate Change, http://unfccc.int/essential_background/convention/background/items/2853.php) requires States to encourage the participation of non-governmental organisations in the process of education, training and public awareness related to climate change.

¹⁸ Morrow, K., 'Public Participation in the Assessment of the Effects of Certain Plans and Programmes on the Environment' *YbEEL* 2004, 4, p. 55.

6 A threat to scientific expertise?

For many decades, public authorities believed that complex technical environmental issues could only be decided by technical experts. Under pressure from demands by interest groups, the classical decision-making procedure has had to cede ground to a wider cooperation, which is no longer limited to experts. However, tensions arose between the need for expert decision-making and the recognition that expertise alone, whatever its merits, cannot legitimately make controversial decisions. Expert analyses are therefore being discussed and scrutinized by the public and NGOs. It follows that participation enhances general views of the laymen to the detriment of the knowledge of the experts. We do not share this point of view. As a matter of fact, complex environmental risks cannot be adequately addressed through a purely expert-driven 'sound science' approach. Risk assessors should therefore become more aware of the 'social dimensions' of their expertise by creating greater room for deliberation. Last, given that decision-making sits astride facts and values, public participation is essential. Although risk preventive decisions must be based on a proper scientific approach, the decision-maker must decide how safe is safe in the light of various socio-economic considerations. As a result, expertise must go hand in hand with participation.

7 Participation in the face of uncertainty

The uncertainty inherent to most environmental issues makes it difficult to adopt decisions that do not cause heated controversies. As long as the scientific premises justifying decisions have not been fully proved, controversy concerning their justification will continue to rage. Specifically intended to apply in situations of scientific uncertainty, the precautionary principle distances decision-making from the notion that risk assessment should almost automatically determine what decision would be adopted. Under conditions of uncertainty, decisions concerning risk management will increasingly be the result of arbitration and value judgements; they are thus vulnerable to challenge, making public justification and debate especially important.

Reflecting this, the 2000 Communication from the EC Commission on the Precautionary Principle states that:

'All interested parties should be involved to the fullest extent possible in the study of various risk management options that may be envisaged once the results of the scientific evaluation and/or risk assessment are available and the procedure be as transparent as possible.'¹⁹

¹⁹ Paragraph 6.2. of the Commission of the European Communities 'Communication from the Commission on the Precautionary Principle' COM(2000) 1.

Precaution thus provides greater transparency in determining risk management and closer involvement of the public in making technological choices. In the perspective of the precautionary principle, risk management results in a new social contract between those giving rise to and managing risks and those likely to be exposed to them – a contract that implies a new type of decision-making.

8 Participation in the field of product policy

Most of the participatory procedures discussed so far address the decision-making process with respect to plans and programmes as well as individual decisions to authorise a plant or a hazardous activity to be operated. However, pollution is not only caused by infrastructures and activities but also by products. In this respect, with the exception of genetically modified organisms (GMOs) regulation (see Directive 2001/18²⁰), little participatory procedures are provided for under directives related to the placing on the market of products. However, many of these procedures rely extensively upon scientific risk assessment with a view to determining whether the product is safe for human health or the environment. Unlike environmental impact assessment, which is intended to increase the accountability of decision-making to interest groups, risk assessment frequently functions as a more arcane expert procedure, couched in technical terms such as 'risk probability' or 'dose-response curve' that have little meaning to most laymen. At present, values are hidden behind quantitative models that leave very little room for deliberation. Because scientists adhere to the view that risk assessment is in essence a scientific undertaking, interest groups are afforded few possibilities to make recommendations. Thus, risk assessment is technocratic rather than democratic. However, risk regulation is beset by divergent perceptions, interests and value judgements. As a result, risk assessment must not be considered as a purely scientific enterprise to which only experts have access; it should become more pluralistic in character. Public consultation is thus a necessary part of any 'sound scientific' approach to the regulatory appraisal of ecological risks. For this reason, public authorities should ensure that the viewpoints of various stakeholders (*e.g.*, workers, consumers, environmentalists, industrialists) are openly discussed in the risk assessment process.²¹ These stakeholders should also be allowed to contribute to determining the relevant factors that scientists should take into consideration when carrying out assessments and the form in which those findings should be expressed.

²⁰ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 206/1.

²¹ According to the Communication from the European Commission on the Precautionary Principle, it is essential that the decision-making process gathers the views of all interested parties at a very early stage: 'the decision-making procedure should be transparent and should involve as early as possible and to the extent reasonably possible all interested parties' (paragraph 5).