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REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

ON THE APPLICATION AND EFFECTIVENESS OF 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

1. INTRODUCTION

This report has been compiled by the Commission pursuant to Article 5 of Directive 2003/35/EC (hereinafter 'the Directive'). The aim of this Directive was to contribute to the implementation of the obligations arising under the Aarhus Convention of 25 June 1998[1], particularly Articles 6, 7, 9(2) and 9(4) thereof.

Article 5 reads: *'By 25 June 2009, the Commission shall send a report on the application and effectiveness of this Directive to the European Parliament and to the Council. With a view to further integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other plans and programmes relating to the environment.'*

It should be noted that Article 3 of the Directive amended the Directive on environmental impact assessment (EIA). A thorough analysis of the EIA Directive was carried out, including those aspects covered by Directive 2003/35/EC, the outcome of which led to the compilation of the Report of 23 July 2009[2]. In addition, Article 4 of the Directive amending Directive 96/61/EC[3] concerning integrated pollution prevention and control (IPPC) was formally repealed when the latter Directive was consolidated. The repeal was purely formal, inasmuch as the provisions of Article 4 and Annex II were incorporated without amendment into the codified Directive. By its Decision of 2 March 2006[4], the Commission established a questionnaire on IPPC concerning the experience gained over the 1 January 2006-31 December 2008 period, including aspects covered by the Directive. The report on this matter will be transmitted to the other institutions pursuant to Article 17(3) of Directive 2008/1/EC.

In these conditions, the Commission considered that this Report should be limited to an examination of the application and effectiveness of Article 2, since those points concerning EIA were reviewed in the Report of 23 July 2009[5] and those relating to IPPC are due to be assessed in a future report. This Report will also examine the issues of the necessity or appropriateness of submitting proposals for amendments and the possibility of extending the scope of the Directive to plans and programmes other than the ones provided for in Annex I.

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1 Convention on access to information, public participation in decision-making and access to justice in environmental matters. Following Council Decision 2005/370/EC of 17 February 2005, OJ L 124, 17.5.2005, the EU has been a party to the Convention since 17 May 2005.

2 Report from the Commission on the application and effectiveness of the EIA Directive, COM(2009) 378 of 23 July 2009.

3 Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (codified version), OJ L 24, 29.1.2008.

4 Commission Decision of 2 March 2006 establishing a questionnaire relating to Council Directive 96/61/EC (2006/194/EC), OJ L 70, 9.3.2006, p. 65.

5 The following items of the Report of 23 July 2009 concern public participation in EIA (namely Article 3 of Directive 2003/35/EC): Sections 2.2 and 3.3 and Annex 2.

2. SCOPE OF THE DIRECTIVE AS COVERED BY THIS REPORT, NAMELY ARTICLE 2 CONCERNING CERTAIN PLANS AND PROGRAMMES RELATING TO THE ENVIRONMENT

Article 2 of the Directive aims to give full effect to Article 7 of the Aarhus Convention. Thus, it stipulates *inter alia* that '*Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I*'. By virtue of paragraphs 4 and 5 of Article 2, the rules established by it do not apply to plans and programmes designed for the sole purpose of national defence or taken in case of civil emergencies (paragraph 4) or to plans and programmes set out in Annex I for which a public participation procedure is carried out under Directive 2001/42/EC or Directive 2000/60/EC (paragraph 5).

Subject to the above exemptions, Article 2, according to Annex I to the Directive as worded in 2003, concerned the plans and programmes referred to in:

- Article 7(1) of Directive 75/442/EEC on waste;

- Article 6 of Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances;

- Article 5(1) of Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources;

- Article 6(1) of Directive 91/689/EEC on hazardous waste;

- Article 14 of Directive 94/62/EC on packaging and packaging waste;

- Article 8(1) of Directive 96/62/EC on ambient air quality assessment and management.

Nonetheless, on the one hand, certain acts have been consolidated for the sake of clarity and rationality and, on the other, certain directives have been amended in order to enhance environmental protection.

As a result of the legislative changes that have taken place, the plans and programmes which are or will be affected by Article 2 of the Directive are the following:

- from 12 December 2010, the waste-management plans referred to in Article 28 of Directive 2008/98/EC[6]; indeed, pursuant to Article 41, Directives 2006/12/EC (itself codifying Directive 75/442/EEC) and 91/689/EEC will only be repealed with effect from that date; until then, the plans referred to under Article 7 of Directive 2006/12/EC and Article 6 of Directive 91/689/EEC are subject to these provisions;

- the action programmes provided for by Article 5(1) of Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources;

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[6] Directive 2008/98/EC of 19 November 2008 on waste and repealing certain directives, OJ L 312, 22.11.2008, p. 3. Recital 40 expressly refers to the public participation required by Directive 2003/35/EC.

- from 11 June 2010, the air-quality plans referred to in Article 23 of Directive 2008/50/EC[7]; indeed, pursuant to Article 31 of that Directive, Directive 96/62/EC will only be repealed with effect from that date; until then, the plans referred to in Article 8(3) of Directive 96/62/EC are governed by this Directive.

As for the management plans referred to in Article 14 of Directive 94/62/EC[8], in view of the fact that '*a specific chapter on the management of packaging and packaging waste, including measures taken pursuant to Articles 4 and 5*' must be included in the waste-management plans drawn up pursuant to Article 7 of Directive 75/442/EEC (now 2006/12/EC) and which will be replaced from 12 December 2010 by the plans referred to in Article 28 of Directive 2008/98/CE, public participation in this area takes place within the context of plans.

Unlike Article 6 of Directive 91/157/EEC, which expressly provided for plans drawn up by Member States, Directive 2006/66/EC[9] repealing that Directive with effect from 26 September 2008 took a different approach to achieve the goals set out, namely that of voluntary agreements between the competent authorities and economic operators concerned (Article 27). It is only in the event of non-compliance with the agreements that Member States are obliged to take the necessary action through legislative, regulatory or administrative measures. The programmes initially provided for in Directive 91/157/EEC have therefore ceased to exist.

3. INFORMATION DERIVING FROM EXPERIENCE ACQUIRED

Information concerning the application of Article 2 derives both from the experience of the Commission itself and from the reports requested from Member States[10], despite the fact that such reports were not anticipated in the Directive.

- *Transposition of the Directive, in particular Article 2*

At the time of this Report's adoption, all Member States which responded had transposed into domestic law — and sometimes at the regional level as well (Belgium and Austria) — the Directive, and in particular its Article 2. Some Member States, notably France, the Czech Republic and Belgium, transposed, at least in part, Article 2 with the adoption of the acts transposing Directive 2001/42/EC[11], more commonly known as the Strategic Environmental Assessment (SEA) Directive. Moreover, among the seven States which did not respond, only

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7 Directive 2008/50/EC of 21 May 2008 on ambient air quality, OJ L 152, 11.6.2008, p. 1.

8 Directive 94/62/EC on packaging and packaging waste, as amended by Regulation (EC) No 1882/2003, Directives 2004/12/EC and 2005/50/EC and recently by Regulation (EC) No 219/2009.

9 Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, OJ L 266, 26.9.2006. Pursuant to Article 28, Directive 91/157/EEC was repealed with effect from 26 September 2008.

10 Unlike Directive 2003/4/EC aimed at adapting Community legislation to the Aarhus Convention in terms of public access to environmental information, the Directive does not expressly provide for the submission of reports by Member States to the Commission on their experience in applying the Directive. However, the Commission held it necessary to be able to draw on their information and views. Thus by letter dated 29 July 2008, it asked States to submit their comments on the basis of a guidance note. Twenty States responded, some of them significantly after the deadline of 14 November 2008. The seven States which failed to submit a contribution were: Finland, Ireland, Italy, Luxembourg, Portugal, Slovenia and Slovakia.

11 Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 30).

Ireland had yet to transpose the Directive in full into its domestic law[12]. That is not the case, however, for Article 2.

The conclusion can thus be drawn that all Member States have taken the measures necessary to transpose Article 2 into their national legal systems.

- *Experience acquired by the Commission in the application of Article 2*

Following the legislative changes made after the adoption of the Directive[13], the plans and programmes have concerned and will concern from end-2010 in particular waste-management and air-quality plans. In view of their nature and scope the SEA Directive might appear to be a more suitable instrument in reality than Article 2 for dealing with these matters, including the public participation aspect. Moreover, in its Article 6, the SEA Directive provides for public participation on a scale comparable to that of Article 2 of the Directive. A similar consideration emerges from the experience acquired in some States. At this stage, this is no more than a trend. The future will tell whether this trend is built upon and becomes a general practice.

The relationship between action programmes concerning the protection of waters against nitrate pollution and the SEA Directive, particularly its Article 3, was raised by Belgium's Council of State[14] in two identical requests for a preliminary ruling. At the time of this Report's adoption, these cases, concerning the nitrogen-management programme approved by the Walloon Region in its decree of 15 February 2007 were still before the Court of Justice.

The information available to the Commission was supplemented by the reports requested from all States. The contributions from the 20 States which responded were based on a guidance note appended to the letter from the Commission dated 29 July 2008. The standard of information and amount of detail in these contributions differed considerably. In analysing them, the Commission followed to the layout of its own guidance note. In addition, it took into account contacts with both national experts and NGOs for the seven States which did not respond. The comments made by the States which did answer its letter did not differ markedly from the information which the Commission obtained for the seven States which did not reply.

Two aspects of the experience at the national level warrant emphasis: the positive and negative effects of application of the Directive and its effective use.

- *Positive and negative effects of application of the Directive*

Numerous States pointed out that, thanks to rules regarding public participation, the standard of information acquired by the public on environmental issues, including those linked to plans and programmes, had been raised significantly. The greater sensitivity of officials responsible for drafting plans or programmes and of the political authorities responsible for adopting them

[12] Judgment of the Court of 16 July 2009, case C-427/07.
[13] Those changes were addressed in Section 2.
[14] Joined Cases C-105/09 and C-110/09, pending.

with respect to the need to seek the public's opinion before approving them was also perceptible. Greater effort might, however, prove necessary on the part of local authorities.

With greater awareness of the issues and the stakes, consulting the public had facilitated the application of the measures adopted and instilled more confidence in the institutions concerned. In some instances, public comments had led to alterations to the project initially planned and the removal or mitigation of elements which caused concern to the populations affected. On occasions, thanks to consultation, the public authorities were made aware of areas where action was deemed to be a priority by civil society and took account of it when redefining priorities.

Certain comments indicate that the participation of individuals who are not linked to associations is more limited, even on strategic projects[15]. This could, according to one contribution, be tied to the fact that '*the majority of the general public*' still does not know that it can take part in the consultations. In several States, efforts have been made to inform the public of its rights and to publicise as widely as possible — including in the local media, if appropriate — the consultations due to take place in the following weeks.

Certain contributions attest to the fact that organising consultations involves providing adequate financial and human resources, with, for instance, a view to analysing the public's comments.

In a few Member States, either legislation for or an established practice of public consultations existed long before the Directive, hence the Directive has not given rise to any major effects or changes, at least for plans and programmes. In any event, the Directive has ensured that the public's right to take part in the decision-making process on environmental matters has been firmly and clearly established and, in some cases, more securely entrenched.

At a different level, the contributions received also emphasised what were felt to be less positive aspects. Thus, it was noted that:

- in certain cases, the public asked the authorities for information, data or documents which were not relevant to the consultations under way;

- in several instances, it was difficult to assess properly the opinions expressed due to the lack of appropriate documentation supporting them;

- for large-scale plans (in this case, nationwide waste-management plans in two States), public participation led, in one instance, to a considerable workload and difficulties in finding a solution acceptable to everyone, or most persons concerned, thereby significantly delaying approval of the plan; in the other case, additional delays due to public participation meant that certain data were out of date. Nonetheless, these two cases do not appear to reflect ordinary circumstances.

- *Effective use of Article 2*

[15] One contribution states in this respect: *'The persons who respond are those who already possess the greatest awareness of environmental issues. To resolve this, the (Brussels Capital) Region has, in addition to public inquiries, ventured as far as possible to carry out specific opinion polls using a representative sample of the population'.*

Generally, the evidence suggests very limited use of Article 2. This might be attributable to the relatively short period between the final date of transposition (25 June 2005) and the date selected for reporting on the experience acquired by States (31 May 2008). Another explanation put forward by certain States lies in the fact that the consultations referred to in Article 2 are carried out in the broader framework of Directive 2001/42/EC.

The contributions did not mention any particular difficulties (of interpretation or otherwise) of a significant nature.

As for other considerations regarding its application, the following points were raised:

- in order to obtain as broad and as active participation as possible, in addition to publication in official journals and the press, a more proactive approach (through meetings, letters, seminars) should be followed, aimed at the public and private associations likely to be interested;

- the public should be informed of the approval or rejection of the opinions expressed and the reasons justifying their acceptance or refusal, before the final decision is adopted; to this end, amendments to Article 2(2)(c) and (d) were suggested in the contribution from one State;

- participation in consultations might be affected by the fact that the public does not know how its answers will be taken into account in the final decision or that it has the feeling that they will not really be taken into account.

4. THE COMMISSION'S ASSESSMENT

- *Effectiveness of Article 2*

Generally, the Commission is of the opinion that, thanks to Article 2:

- the decision-making process has become more transparent, by giving rise to a more constructive climate of relations and greater confidence between the authorities responsible and civil society;

- the decisions adopted take more account of the needs and concerns of a greater proportion of the population and their acceptance and implementation is thus facilitated;

- society's increased awareness of and interest in environmental issues in the specific themes addressed (particularly waste management and water quality) have come to the fore, especially at the regional and local levels; the case of the preliminary ruling before the Court of Justice concerning the action programme for the protection of waters from pollution by nitrates drawn up by the Walloon Region constitutes a significant example.

Admittedly, public participation implies major changes for the authorities concerned, given that the decision-making process must take account of the need to consult the public effectively at a sufficiently early stage. Adequate financial and human resources must thus be provided.

It is for Member States to assess both the best moment for consultations to begin, in order for them to take place '*when all options are open*' (as required by Article 6(4) of the Aarhus Convention, to which Article 7 of the same Convention refers), and how to ensure that they

are effective. In this respect, the Commission notes that the States ensure that the launch of consultations is really made known to the public, particularly the section of the population concerned. Indeed, the apparent trend is not merely that of publication in official journals, but of supporting that by information in the media (both printed and broadcast), posters in the municipalities concerned and notices on the websites of the authorities responsible. It is for States to decide whether, as one contribution suggested, an even more proactive publicity approach, using individual letters, meetings and seminars, aimed at the public or private associations likely to be interested, proves necessary or appropriate. The Commission notes that such an approach may turn out to be useful in involving a greater number of citizens and NGOs in the consultations.

It was said that a large part of civil society still does not take part in consultations, even if they then express reservations when the final decision is adopted. This phenomenon may, in part, depend on the fact that the public does not know how its representations will be taken into account in the final decision. In this respect, the Commission encourages States to explain as clearly as possible the reasons which prompted them to reject in part or in full certain suggestions. Appropriate feedback seems to be one of the keys to effective public participation and fostering greater confidence. At this stage, it is not considered necessary to amend 2(2)(c) and (d), as was suggested by one contribution.

The Commission is aware of the fact that the consultation process can prolong, sometimes significantly, the timescales anticipated for the final adoption of plans or programmes. This increase in duration does not appear to depend on the time allotted for consultations as such, but on the nature of the project anticipated, especially when it gives rise to protests by or concerns within civil society. Appropriate public consultations, as early as the planning stage, make plans more socially acceptable and remove or limit later obstacles, such as court action, thus facilitating implementation. The positive aspects arising from public participation thus appear to outweigh the negative ones. The question of longer timescales occurred more or less explicitly in numerous contributions and appears to be a matter to which more attention must be given in the future. Greater experience acquired in applying the Directive could make it possible to arrive at concrete solutions which ensure a better balance between public participation and a legitimate concern for efficacy.

States must continue their efforts to inform the public of the rights and guarantees upheld by the Directive at whichever level is regarded as most appropriate, bearing in mind the structure and traditions of each country. The will to do so is apparent in several contributions. But this task is not one for the States alone. The NGOs themselves can make an effective contribution by circulating the information.

- *Proposed amendments*

In view of the limited experience acquired with Article 2, it does not seem appropriate, at this stage, to propose amendments.

In the comments above, the Commission has expressed some considerations which might help to enhance the effectiveness of the Directive. Given that the precise conditions of public participation are for each State to determine, while taking account of its structure and traditions, it will be for Member States to judge whether such considerations are relevant to the reality of each country, whether their implementation proves practicable and, if so, how.

The actual application of Article 2 by States and the practical solutions found to limit certain factors viewed as less positive could, in the future, point to the need or advantage of making amendments.

- *Extending the scope of Article 2 to plans or programmes other than those indicated in Annex I*

No Member State regarded such an extension as either necessary or appropriate. Certain States, however, indicated that a clear vision of the scope of the list of plans and programmes falling within Directive 2001/42/EC was needed, before entertaining the idea of adding other plans and programmes to the scope of Article 2. In other words, certain contributions called for a thorough examination of the relationship between Article 2 and Directive 2001/42/EC. One contribution added that, when Directive 2003/35/EC was adopted, the list of plans and programmes provided in Annex I was, in the opinion of the authors, drafted as an exhaustive list, since public participation in new plans and programmes was to be addressed in new specific instruments, in order to comply with the Aarhus Convention. This argument seems to be based on the tenth recital of the Directive.

The Commission acknowledges that, in a number of instances, a single situation could be subject to both Directives, a possibility which appears to be more frequent with respect to waste, particularly the future plans referred to in Article 28 of Directive 2008/98/EC. The Community legislature itself noticed the possible overlaps to the extent that, by paragraph 5, it ruled out the application of Article 2 if public participation was already carried out under Directive 2001/42/EC. Further, the future ruling of the Court of Justice on the relationship existing between the action programmes for the protection of waters from pollution by nitrates and the SEA Directive will constitute a major key to analyse this issue.

In addition, in the Implementation Guide for the Aarhus Convention[16] it is indicated: '*Thus, proper public participation procedures in the context of strategic environmental assessment (SEA) is one method of implementing article 7… SEA provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programmes and policies. It is, therefore, one possible implementation method that would apply to both parts of article 7 — the provisions covering public participation in plans and programmes, and the provision covering public participation in policies*'.

The Commission presented a Report concerning the application and effectiveness of Directive 2001/42/EC, the SEA Directive[17]. It undertakes to engage in such analysis, either through possible follow-up resulting from the assessment of the Report by the other institutions or by way of specific action. Its conclusions will be duly made known to the other institutions, accompanied, if necessary, by appropriate proposals.

It follows from this that any proposal to enlarge the scope of Article 2 would, at this stage, be premature.

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[16] The Aarhus Convention — An Implementation Guide, UN, New York and Geneva, 2000. It is not an official interpretation of the Convention.

[17] Report from the Commission on the application and effectiveness of the EIA Directive, COM(2009) 469 of 14.9.2009.

5. CONCLUSION

Despite distinctly limited application at the national level in the three years which followed the deadline for transposition by Member States (25 June 2005), Article 2 of the Directive has had the effect of firmly establishing the right of the public to participate in the decision-making process on plans and programmes uniformly in the legislation of Member States. This has kindled the public's interest in environmental issues, which has increasingly taken account — at least among those people and bodies with the greatest awareness — of the sustainable development dimension. The efforts made must be sustained in order to enhance the public's knowledge of its rights and to achieve real participation by a larger number of people in consultations. It will be for each State, in view of its specificities and traditions, to attain these objectives by the most suitable means. They will also have to ensure that they provide the human and financial resources which the effective implementation of this article implies.

In view of this situation, the Commission does not deem it appropriate to propose amendments or extensions to the scope of Article 2 to other plans and programmes than those currently subject to it. However, given the interrelation which may exist between this article and Directive 2001/42/EC, it will conduct the examination suggested by some States with respect to these two instruments and the results will, in due time, be presented to the other institutions.