

Recommendations with regard to request for advice ACCC/A/2020/2 by Kazakhstan

Adopted by the Committee on 1 July 2020¹

I. Introduction

1. On 14 May 2020, Kazakhstan submitted a request to the Compliance Committee seeking its advice on whether the holding of public hearings during the COVID-19 pandemic through video-conferencing would meet the requirements of the Convention.
2. By email of 25 May 2020, the secretariat informed the Party concerned that the Chair of the Committee had confirmed the Committee's readiness to provide the requested advice. The Committee expressed its appreciation to the Party concerned for its proactive approach in reaching out to the Committee on this important and timely matter. In its email, the secretariat also explained the Committee's procedure and approximate timeframe for preparing the requested advice.
3. By email of 26 May 2020, the Party concerned confirmed its acceptance of the procedure proposed by the Committee.
4. On 27 May 2020, the Committee wrote to the focal points on compliance for the European EcoForum to ask them to inform the European EcoForum network, including environmental nongovernmental organizations (NGOs) and members of the public in the Party concerned, of the opportunity to provide comments by 3 June 2020.
5. On 2 June 2020, comments were received from, separately, Socio-Ecological Fund and the EcoForum_Kazakhstan.
6. On 3 June 2020, comments were received from, separately, the Center for International Environmental Law (CIEL) and the Environmental Law Office of the Irish Environmental Network.
7. On 4 June 2020, comments were received from, separately, Earthjustice and the European Environmental Bureau. The Environmental Law Office of the Irish Environmental Network also submitted additional information on that date.
8. After taking into account the information received, the Committee prepared its draft advice and agreed it through its electronic decision-making procedure on 19 June 2020. In accordance with paragraph 34 of the annex to decision I/7, the draft advice was then forwarded on that date to the Party concerned and observers for their comments. Both were invited to provide comments by 26 June 2020.
9. Comments on the draft advice were received on 20 June 2020 from observer Resource & Analysis Center "Society and Environment" and on 29 June 2020 from, separately, CIEL and the Environmental Law Office of the Irish Environmental Network.
10. On 30 June 2020, the Party concerned thanked the Committee for its support and confirmed it did not have any comments on the draft advice.
11. The Committee thereafter finalized its advice, taking account of the comments received, and adopted it through its electronic decision-making procedure on 1 July 2020. It requested the secretariat to send the advice to the Party concerned and the observers.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the substance) may take place.

II. Summary of advice and assistance sought by the Party concerned

12. In its request for advice dated 14 May 2020, the Party concerned states that in order to protect the life and health of citizens during the COVID-19 pandemic, a state of emergency has been declared throughout the country since 15 March 2020. Due to the imposition of lockdown, mass gatherings of people, that is, the organization of meetings and gatherings, are presently prohibited. The Party concerned requests the Committee to “share information on how other countries solve the problem of organizing public hearings, as well as to clarify whether the holding [of] public hearings in the form of a video conference is contrary to the provisions of the Convention during a state of emergency”.

III. Consideration and evaluation by the Committee

13. The Committee welcomes the proactive approach taken by the Party concerned with respect to its request for advice on how to ensure it may comply with the Convention’s requirements on public participation in environmental decision-making during the COVID-19 pandemic.

14. The Committee provides the present advice to the Party concerned in accordance with paragraphs 14, 36(a) and 37(a) of the annex to decision I/7.

15. The Committee’s starting point is the objective of the Convention set out in article 1:

“each Party shall **guarantee** the rights of...public participation in decision-making...in environmental matters in accordance with the provisions of this Convention.”²

16. This means that, even in the case of a crisis such as the COVID-19 pandemic, the binding rights set out in the Convention cannot be reduced or curtailed. Rather, if the usual modalities for ensuring effective public participation in decision-making cannot be used, any alternative means must fulfil the requirements of the Convention.

17. The Convention does not preclude public hearings on decision-making under the Convention being held through video-conferencing or other virtual means, provided that in practice all the requirements of the Convention are fully met.

18. To this end, the present advice highlights a number of requirements in the Convention to which particular attention will need to be paid in order to ensure that public hearings under the Convention carried out during the COVID-19 pandemic will indeed fully comply with the Convention. The advice first addresses several over-arching obligations with respect to public participation procedures under the Convention during the COVID-19 pandemic before highlighting a number of more specific obligations.

19. The Committee notes that, while the Party concerned has requested advice on holding hearings by “video conferencing”, the present advice applies equally whether the public hearing is held via video conferencing, through the internet or other virtual means. The terms “virtual hearing” and “virtual means” are accordingly used throughout this advice to cover all such formats.

20. The Committee emphasises that the present advice is provided in the specific context of the current COVID-19 pandemic and should not be read to apply to the situation once the restrictions on free movement and mass gatherings due to the COVID-19 pandemic have been lifted.

21. The Committee reminds the Party concerned that any shortcomings in ensuring effective public participation in decision-making under the Convention during the COVID-19 pandemic may be

² Emphasis added.

subject to challenge by members of the public in accordance with the provisions of article 9 of the Convention.

A. General obligations

Effective public participation – articles 6, 7 and 8

22. As a starting point, the Committee emphasises the general obligation in articles 6-8 of the Convention on each Party to provide for effective public participation in decision-making. Article 6(4) expressly imposes a requirement on Parties to ensure that effective public participation can take place. The same requirement is repeated in article 6(2) and 6(3) and is also thereby incorporated into article 7. Article 8 also refers to effective public participation. Thus, the obligation to ensure opportunities for the public to participate effectively is the fundamental standard against which all the aspects of a public participation procedure under the Convention should be measured. As set out in paragraphs 23 – 69 below, this applies equally to public participation procedures carried out during the COVID-19 pandemic.

Clear, transparent and consistent framework – article 3(1)

23. The opportunities for the public to participate in the decision-making on a particular activity during the COVID-19 pandemic should be “consistent” with, that is in line with, the opportunities for the public to participate in normal times. This means that public authorities may need to make additional efforts to ensure that the public are in practice not disadvantaged.

24. Moreover, because the modalities through which the public may participate during the COVID-19 pandemic may differ in significant respects from the usual public participation procedures which apply in the Party concerned, adequate and timely information will need to be provided to the public concerned throughout the procedure so that the framework in which the public may participate is clear and transparent as required by article 3(1). The provision of adequate and timely information on how the public may participate is discussed further in paragraphs 29 and 33-37 below.

Facilitate the public’s participation in decision-making – article 3(2)

25. Article 3(2) requires that each Party endeavour to ensure that officials and authorities assist and provide guidance to the public in order to facilitate their participation in decision-making under the Convention. In the context of carrying out public participation procedures during the COVID-19 pandemic, the Committee highlights the following matters as deserving of particular attention.

26. As a first step, since it may not be possible to apply the modalities typically deployed in public participation procedures in the Party concerned, a needs assessment should be carried out, at the time of preparing the relevant legal framework or on a case-by-case basis, to identify what modalities will in practice ensure effective opportunities for the public to participate in decision-making under the Convention during the COVID-19 pandemic. The needs assessment should identify any barriers to the participation of the public due to technology, language, literacy or disability as well as any particular obstacles to participation experienced by marginalized groups or by members of the public whose opportunities to participate may be limited due to their duties during the pandemic. This should also include an assessment of the portion of the public facing each such barrier. As a good practice, the needs assessment should be prepared in consultation with the public.

27. As a good practice, the Party concerned should also, on an ongoing basis, evaluate the effectiveness of the modalities applied in public participation procedures under the Convention during the COVID-19 pandemic, including by inviting feedback on this point from the public. Bearing in mind the feedback received, the modalities may need to be adapted going forward in order to ensure that the opportunities for the public to participate are indeed effective in practice.

28. Any alternative modalities for public participation applied during the COVID-19 pandemic should not result in any additional costs on the public who seek to participate. For example, tollfree phone numbers should be provided during the virtual public hearing in order that the public without access to the internet may still participate without charge.

29. Since the modalities for public participation will differ from those typically used in the Party concerned, officials and authorities will need to make additional efforts and allow more time to assist and provide guidance to explain to the public how they can participate in decision-making procedures on environmental matters carried out during the COVID-19 pandemic. This may include the preparation of user-friendly guidance on how the public can participate in such procedures during the COVID-19 pandemic.

30. Each Party will also need to provide training and additional resources to their authorities and officials to ensure that they are properly equipped to facilitate participation by the public in decision-making procedures under the Convention carried out during the COVID-19 pandemic. Among other things, this might include easy-to-use training manuals for officials on how to organize a public participation procedure under the Convention during the pandemic.

No penalization, persecution or harassment – article 3(8)

31. The Committee emphasises that the requirement in article 3(8), that each Party shall ensure that persons exercising their rights under the Convention are not penalized, persecuted or harassed for their involvement, applies with equal force during the COVID-19 pandemic and with respect to persons exercising their rights to participate through virtual means.

No discrimination as to citizenship, nationality or domicile – article 3(9)

32. With respect to decision-making on proposed activities that may have potential transboundary impacts, the Committee reminds the Party concerned that special arrangements may need to be put in place during the COVID-19 pandemic in order to ensure that the foreign public have the possibility to participate in that decision-making without discrimination as to citizenship, nationality or domicile.

B. Specific obligations

Adequate, timely and effective notice - article 6(2)

Means of notification

33. In accordance with article 6(2) of the Convention, during the COVID-19 pandemic the public concerned must still be informed of the proposed decision-making in an adequate, timely and effective manner. Since members of the public may be required to stay in their homes, or may choose to do so for health reasons, it may not be adequate or effective to notify them only through physical notices posted in the vicinity of the proposed activity or on public noticeboards and, accordingly, additional means of notification should be used.

34. Thus, additional means of notification will need to be deployed to ensure that the public concerned is indeed notified in an adequate, timely and effective manner. Depending on the means of notification typically used in the Party concerned, in addition to notification through the most widely-read newspapers in the area potentially affected by the activity, the websites of the relevant public authorities, radio, television and social media, in some cases effective notification may also require that local residents and other persons who have an interest in the decision-making are notified individually, for instance by post and / or mobile text message (sms).

Content of the notice, including the envisaged procedure – article 6(2)(d)

35. Since the procedure may differ in significant respects from the usual public participation procedures which apply in the Party concerned, in addition to the other notice requirements listed in article 6(2), it will be particularly important for the notice to include clear information on the envisaged procedure, including:

- (a) The opportunities for the public to participate (article 6(2)(d)(ii));
- (b) When and how the public may participate in the virtual public hearing (article 6(2)(d)(iii));
- (c) How the public can obtain the relevant information (article 6(2)(d)(iv));
- (d) The relevant public authority to which comments or questions can be submitted, together with the time schedule for doing so (article 6(2)(d)(v)).

36. Accordingly, the procedure for the virtual public hearing should be publicized sufficiently in advance of the hearing to enable the public to prepare and participate effectively. This includes the format, agenda and indicative timing. The public must be informed in advance of any changes in the procedure, and any such changes should not create any additional barriers to the public's participation.³

37. In addition, the notice regarding the virtual public hearing should include all hyperlinks and telephone numbers needed for the public to join the hearing, as well as the contact details of whom the public can contact if they experience technical difficulties when attempting to join the hearing.

Reasonable time-frames – article 6(3)

38. Since the public will not be able to prepare and to participate in the usual way, the standard timeframes for each stage of the public participation procedure may need to be extended to enable the public to prepare and participate effectively. For example, the timeframe for the public to prepare comments may need to be extended since it may take longer than usual for the public to access all information relevant to the decision-making.

Early and effective participation – article 6(4)

39. Any alternative modalities for public participation applied during the COVID-19 pandemic must not preclude early public participation, when all options are open and effective public participation can take place.

Access to all information relevant to the decision-making – article 6(6)

40. If, due to the restrictions in place during the COVID-19 pandemic, the public concerned will not be able to visit the premises of public authorities to examine the information relevant to the decision-making in person, it will be necessary to put in place alternative possibilities for the public to examine the relevant information.

41. In line with paragraph 113 of the Convention's 2005 Recommendations on Electronic Information Tools,⁴ a good practice would be to establish a user-friendly one-stop online portal where the public concerned can easily access all the relevant information.

³ See the 2015 Maastricht Recommendations on Promoting Effective Public Participation in Environmental Matters (Maastricht Recommendations), para. 118(a). Available at <http://www.unece.org/index.php?id=49142>.

⁴ Available at: <https://www.unece.org/index.php?id=21468>.

42. However, if the public concerned cannot visit the public authority's premises to examine the information relevant to the decision-making, it must also be possible for those without access to the internet to easily access that information. This may entail posting information packs containing all the relevant information to such persons. In accordance with article 6(6), these information packs must be provided free of charge. If further relevant information subsequently becomes available, this should then be posted to those members of the public concerned too. The rights of members of the public concerned who do not have access to technology should not be prejudiced; rather, extra effort will need to be taken to ensure their opportunities to participate effectively.

Procedures for submitting comments – article 6(7)

In every case, the opportunity for written comments

43. The public must in every case have the option of submitting comments in writing. In the case of a virtual hearing, this should include the opportunity to submit written comments after the virtual hearing has taken place.

44. In the decision-making, equal account must be taken of comments submitted in writing and comments made during the virtual hearing.⁵

Procedures for a virtual hearing

Open to any member of the public

45. As with hearings held in person, hearings held through video conferencing or other virtual means should be open to anyone who wishes to take part, and not only by invitation.

46. Also, as with hearings held in person, if a large number of members of the public would like to take part in the virtual hearing, in order to enable all members of the public wishing to speak to do so, more than one hearing may need to be held or it may need to take place over more than one day.

47. Care should be taken to ensure that the registration procedure, if any, for the virtual hearing does not present a barrier to participation (including if the registration form could present a barrier due to language or for those without literacy or technical skills) and, insofar as practicable, participants who have not registered to participate should still be allowed to take the floor.⁶

Technical barriers to participation

48. Technical barriers to the public's participation in the virtual hearing may include a lack of access to high quality internet or a lack of technical skills to participate in online activities.

49. In both circumstances, alternatives should be provided so that members of the public lacking access to technology or appropriate technical skills are still able to participate effectively.

50. First, members of the public who do not have access to the internet, or who experience technical difficulties, should still be able to participate in the hearing by calling a tollfree phone number to listen to the proceedings and to ask questions and make statements.

51. Second, as set out in paragraph 43 above, all members of the public should be entitled to submit written comments.

⁵ See the Convention's 2005 Recommendations on Electronic Information Tools, para. 3.

⁶ See also the Maastricht Recommendations, para. 121.

52. If a significant portion of the public do not have access to internet, alternative low-technology means should be used to broadcast the hearing and to enable the public to make statements and to ask questions. For example, the hearing may be broadcast live on television or radio. However, since radio and television do not themselves enable members of the public to speak remotely, it should in every case be possible for members of the public to make statements and ask questions via a tollfree phone number or, for those with access to the internet, through the internet.

53. Depending on the restrictions in place in the Party concerned during the COVID-19 pandemic, it may be possible for several members of the public to come together to participate in the hearing through one person's internet connection. However, since for many members of the public such an option may not exist, the Party concerned should ensure that it provides low-technology means such as a tollfree phone number to enable persons without access to the internet to connect to the virtual hearing.

54. An important element of a public hearing is the opportunity for the public to ask questions and to cross-examine the developer or promoter of the proposed activity and their experts. In addition to the possibility to join the virtual hearing and ask questions by internet or telephone, members of the public should, as a good practice, be given the opportunity to submit written questions in advance of the hearing and for the hearing organizers to put those questions to the appropriate people during the hearing itself. A record should then be kept of the replies provided to any such questions.

Language barriers to participation

55. As for hearings held in person, appropriate interpretation should be provided on request in order to ensure the effective participation of the public. To that end, the notice of the virtual hearing to be published under article 6(2) of the Convention should, as appropriate, indicate the language(s) in which the virtual hearing will be conducted and inform the public of the possibility to request interpretation if it would be required.

56. For those members of the public that do not speak or understand the language in which the virtual hearing will be conducted, a tollfree phone number could be provided for the virtual hearing with interpretation into their language. In this way, they can both listen to, and participate in, the proceedings in their own language.

57. As a good practice, recordings or transcripts of the hearing should be made available in the relevant languages promptly after the hearing, so that members of the public can review these before submitting their written comments.

Participation in the transboundary context

58. For proposed activities that may have potential transboundary impacts, the current status of the COVID-19 pandemic and the measures taken by public authorities in those areas should be borne in mind. Going forward, it may be that the public within the Party concerned are once again able to participate in person, but the foreign public are still under restrictions on their freedom of movement and can only participate in the decision-making procedure remotely. In such a situation, the Party concerned should put in place appropriate arrangements to enable the foreign public to nevertheless participate effectively. This is in line with the requirement in article 3(9) of the Convention to ensure that the foreign public is not discriminated against due to receiving less favourable treatment than the public in the Party concerned.

Technical problems during the hearing

59. The organizers of the public hearing should provide appropriate technical support to ensure the smooth running of the virtual hearing.

60. Contact details of the technical support personnel should be provided in the notification for the virtual hearing, together with instructions on the various ways (e.g. weblink, tollfree phone numbers etc.) through which the public may join the hearing.

61. If members of the public experience technical problems in joining the virtual hearing, they should still be able to participate through the tollfree phone number and to submit written comments.

62. If the virtual hearing has widespread technical problems, it should be postponed and rescheduled, at least for the parts of the hearing which were unable to proceed.

63. The organizers of the virtual hearing should keep a record of any technical problems experienced during the hearing.

Allowing sufficient time for the virtual hearing

64. Due to the risk of technical problems, additional time for the virtual hearing should be allowed for in order to ensure sufficient time for the public to participate effectively as required by article 6(3) of the Convention.

Transparency

65. In accordance with the requirement in article 3(1) for a transparent framework to implement the Convention, the public should be able to know the identity of all those participating in the virtual hearing and who they represent. This includes the identity of the organizers, officials and representatives of the developer or promoter of the proposed activity present at the hearing, as well as the other members of the public participating, and their affiliations (if any).

66. In addition, and even more so than with hearings in person, appropriate controls should be put in place to prevent any entity or persons with an interest in promoting the proposed activity from paying, rewarding or putting pressure on members of the public to express support for the proposed activity during the hearing.⁷

67. The minutes or transcripts of the virtual hearing should be made publicly available so that all those who made oral submissions may verify that their comments have been transcribed accurately. A good practice is to make the minutes or transcripts available online promptly after the virtual hearing through the same one-stop portal where other information related to the decision-making is to be found.⁸

Taking due account of the outcome of the public participation – article 6(8)

68. In every public participation procedure under article 6 and 7 of the Convention, the public must be able to see how their comments have been taken into account in the decision-making in a transparent, traceable way. This obligation applies equally to public participation carried out through virtual means.

Notification of the decision once taken – article 6(9)

69. As a good practice, the methods used to notify the public concerned under article 6(2) should be utilized as a minimum for informing the public under article 6(9) of the decision once taken, recalling that the latter requires the public generally to be informed, and not just the public concerned.⁹

⁷ See also the Maastricht Recommendations, para. 118.

⁸ See also the Maastricht Recommendations, para. 122.

⁹ See ACCC/C/2013/99 (Spain), ECE/MP.PP/C.1/2017/17, para. 103. See also the Maastricht Recommendations, para. 139.

IV. Conclusion

70. With respect to the request for advice by the Party concerned, the Committee concludes that the Convention does not preclude the holding of public hearings on decision-making under the Convention during the COVID-19 pandemic through video-conferencing or other virtual means, provided that in practice all the requirements of the Convention are fully met, including those highlighted in paragraphs 22 – 69 above.

Advance unedited