Observations by the European Commission, on behalf of the European Union, to the Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Union in connection with public participation in the reconsideration or updating of operating conditions under the Industrial Emissions Directive

(ACCC/C/2014/121)

I. Introduction

1. These observations refer to the note by the Aarhus Convention Compliance Committee (ACCC) dated 28 June 2015, asking the European Union (EU) to submit to the ACCC any written explanations or statements clarifying the matter referred to in the above-mentioned Communication by 28 November 2015.

2. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission replies to this letter on behalf of the EU.

II. Content of the case

3. On 12 December 2014, the Communicant, the organisation *"Instituto Internacional de Derecho y Medio Ambiente" (IIDMA)*, located in Madrid, introduced a Communication to the ACCC. The Communicant is represented by its Director, Ms Ana Barreira López, for the purpose of this Communication.

4. Under the terms of paragraph 18 of the Annex to Decision I/7 by the Meeting of the Parties on Review of Compliance, a Communication is the means for the public to address the *"Party's compliance with the Convention"*.

5. The Communicant alleges that Directive 2010/75/EU (the "Industrial Emissions Directive" or "IED)"[1], which regulates industrial activities as listed in Annex I of the Aarhus Convention[2], does not correctly transpose the Convention's provisions on public participation in cases where an IED permit is being reconsidered or updated. Therefore, in the Communicant's view, the EU would not comply with Article 6(1)(a) and (10) of the Aarhus Convention.

[1] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334 of 17.12.2010, p. 17.

[2] E.g. the energy sector, production and processing of metals, mineral and chemical industry, certain chemical installations, waste management, certain waste-water treatment plants or industrial plants.

6. To recall, Article 6(1)(a) of the Aarhus Convention foresees that each Party *"[s]hall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I"*.

7. Article 6(10) of the Convention stipulates that *"[e]ach 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* [which set requirements for public participation] *are applied mutatis mutandis, and where appropriate."*

8. The Communicant refers to the judgment by the Court of Justice of the European Union (CJEU) of 15 January 2013 in Case C-416/10, *Krizan*,[3] where the CJEU recalled that EU law should be properly aligned with the provisions of the Aarhus Convention. According to the Communicant, Article 24 IED *("Access to information and public participation in the permit procedure")* would not, however, be in line with Article 6 of the Convention.

9. In that context, the Communicant first recalls public participation as stipulated in Article 21 IED in case of reconsideration or updating of a permit, namely that:

- there is a substantial change to the installation (Article 24(1)(b) IED);
- the authority, by way of derogation, intends to set less strict emission limit values (Article 24(1)(c) in combination with Article 15(4) IED; or that
- the pollution caused by the installation is of such significance that the existing limit values of the permit need to be revised or new such values need to be included in the permit (Article 24(1)(d) in combination with Article 21(5)(a) IED).

10. In the Communicant's view, decisions by the competent authorities relating to the reconsideration or update of a permit under Article 24 IED do not comply with Article 6 of the Aarhus Convention, as public participation is not expressly required when the reconsideration or update of a permit is due to operational safety requirements and to ensure compliance with new or revised environmental quality standards (Article 21(5)(b) and (c) IED). In addition, the Communicant claims that Article 24 IED which provides for public participation when a change introduced to an installation under Article 20 is substantial would result in the absence of a public participation procedure when the change is not substantial.

11. In support of this argument, the Communicant refers to previous compliance cases[4] related to Article 6 of the Convention, where the ACCC held that, though some discretion is given to Parties to determine where public participation is appropriate, it has also

[3] Judgment of the Court of 15 January 2013, paragraph 77; ECLI:EU:C:2013:8.

[4] Case ACCC/C/2009/43 concerning Armenia and, in particular, Case ACCC/C/2009/41 concerning Slovakia.

certain limits. Notably, the Communicant quotes Case ACCC/C/2009/41 concerning compliance by Slovakia, where the ACCC stressed that *"although each party is given some discretion in these cases to determine where public participation is appropriate, the clause "mutatis mutandis, and where appropriate" does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation."* (paragraph 55 of the ACCC findings).

12. Finally, the Communicant argues that the Implementation Guide to the Aarhus Convention would equally require full public participation under Article 6 of the Convention for all permit activities. The Communicant quotes in particular two passages which state that *"the requirements of article 6 apply to all decisions to permit activities within the scope of article 6, whether or not a formal licencing or permitting procedure has been established";* and: *"The administrative procedures relating to the reconsideration of operating conditions for a covered activity require the application of full public participation procedures under article 6."*[5]

13. The Communicant thus concludes that the IED *"relates to a wrong reflection of the Aarhus Convention"* when it comes to reconsidering or updating an IED permit. The Communicant does not, however, address any specific requests to the ACCC in that regard.

III. Legal observations

1. Admissibility of the Communication

14. In its "Preliminary determination of admissibility" dated 27 March 2015, the ACCC has declared the present Communication as admissible, *"subject to review following any comments from the Party concerned*" (Title II, paragraph 9).

15. The EU would like to recall that, by note on the preliminary admissibility of this Communication sent to the ACCC on 26 March 2015, the Union already raised objections to the admissibility of the present case for failing exhaustion of domestic remedies as provided by the Annex to Decision I/7 on Review of Compliance. The same arguments as presented in the note on preliminary admissibility are also valid in the context of the present observations and are repeated below, in paragraphs 16 to 18.

16. The Communicant does not elaborate on the issue of admissibility. Section VI of the Communication regarding the *"Use of domestic remedies or other international procedures"* merely refers to a lack of a general *locus standi* for non-governmental organisations (NGOs) before the CJEU. Concerning the alleged lack of *locus standi* of

[5] Pages 126 and 159 of the 2014 Aarhus Convention Implementation Guide (Brochure).

NGOs before EU Courts, the EU would like to note that another case, ACCC/2008/32, is pending on this issue.

17. However, legislative acts such as the IED can be challenged by individuals if they are of direct and individual concern to them (Article 263(4) of the Treaty on the Functioning of the European Union (TFEU); see in this respect Case C-538/11P, *Inuit*, paragraph 75).

18. Where this is not possible through a direct action pursuant to Article 263(4) TFEU, Article 277 TFEU provides that *"any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph* [i.e. lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers], *in order to invoke before the Court of Justice of the European Union the inapplicability of that act"*.

19. As the CJEU indicated in Case *Inuit*, cited above (paragraphs 91 to 95), *"… the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights"* (see, to that effect, Case C-550/09, *E and F*, [2010] ECR I-6213, paragraph 44).

20. To that end, the TFEU has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of EU acts, and has entrusted such review to the Courts of the EU (see Case 294/83, *Les Verts* v *Parliament*, [1986] ECR 1339, paragraph 23; *Unión de Pequeños Agricultores v Council*, paragraph 40; *Reynolds Tobacco and Others* v *Commission*, paragraph 80; and Case C-59/11, *Association Kokopelli*, [2012] ECR, paragraph 34).

21. Accordingly, natural or legal persons who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly EU acts of general application, do have protection against the application to them of those acts. Where responsibility for the implementation of those acts lies with the EU institutions, those persons are entitled to bring a direct action before the EU Courts against the implementing measures, under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead, pursuant to Article 277 TFEU, in support of that action, the illegality of the general act at issue.

22. Where that implementation is a matter for the Member States, such persons may plead the invalidity of the EU act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the CJEU, pursuant to Article 267 TFEU (see, to that effect, *Les Verts* v *Parliament*, paragraph 23).

23. In that context, it must be emphasised that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a EU act of general application, by pleading the invalidity of such an act (see, to that effect, *Unión de Pequeños Agricultores* v *Council*, paragraph 42, and *E and F*, paragraph 45).

24. It follows that requests for preliminary rulings which seek to ascertain the validity of a measure, constitute, like actions for annulment, means for reviewing the legality of EU acts (see Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, [1991] ECR I-415, paragraph 18, and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA and Others*, [2005] ECR I-10423, paragraph 103).

25. Therefore, any alleged invalidity of a provision of the IED with regard to Article 6(1)(a) and (10) of the Aarhus Convention could be questioned before a national court of a Member State of the Union by an exception of illegality, provided that the conditions for raising an exception of illegality under the TFEU are met. Furthermore, where the mechanism of a preliminary reference under Article 267 TFUE is applied, a request for a preliminary ruling could be made to the CJEU, whereby any alleged invalidity of the Directive could also be assessed in that context. The Communicant did not provide any evidence to demonstrate that it had recourse to such remedies provided under Union law.

26. The EU would like to recall[6] that, under paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the ACCC *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress"*.

27. In the Preliminary determination of admissibility of this Communication, the ACCC underlines that the *"Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted"* (Title I, paragraph 5).

28. The EU does not share this interpretation. In the Union's view, the terms of paragraph 21 of the Annex to Decision I/7 on Review of Compliance leave no doubt that domestic remedies are to be taken into account, unless they are unsatisfactory.

29. As outlined above, the alleged invalidity of the IED with regard to Article 6(1)(a) and (10) of the Aarhus Convention could be questioned before a national court of a Member State of the Union by an exception of illegality. Furthermore, the CJEU can be asked to render a preliminary ruling, so that the validity of the Directive can equally be assessed in that context. The Communicant did not, however, provide any evidence that it had recourse to any of the remedies provided already under Union law.

[6] See also the Union's arguments on admissibility in the earlier compliance case against the EU with reference number ACCC/C/2013/96.

30. The EU is therefore of the view that these remedies available at the level of the Union should be *"taken into account"*. This can be done by either suspending a compliance case when the domestic remedy has been taken and is still ongoing or, if the Communicant directly addresses the ACCC without having made use of available domestic remedies as in the case at hand, declare it as inadmissible.

31. The ACCC should not become a means of redress for issues where remedies internal to the EU are available and have not been used, as in the present case. The Communicant should not be given the opportunity to circumvent the available domestic remedies. In the interest of legal clarity and procedural economy, the Communicant should not be able to choose which way to go – either by exhausting domestically available remedies or by bringing his case directly to the ACCC (no *"forum shopping").*

32. The EU would therefore respectfully ask the ACCC to declare the present Communication as inadmissible for failing exhaustion of domestic remedies. The below observations on substance are solely made on a subsidiary basis, to demonstrate that the Communication, beyond being inadmissible, is equally unfounded.

2. Observations on substance

33. As a preliminary remark, the EU would like to stress that it entirely subscribes to the principle, as recalled by the Communicant, that EU law should be properly aligned with the provisions of the Aarhus Convention.

34. However, in the present case, no contradiction can be construed between the right to public participation as provided by the Convention and the provision of Article 24 IED. Indeed, Article 6(10) of the Aarhus Convention expressly states that, when a public authority reconsiders or updates the operating conditions for an activity, the requirements for public participation *"are applied mutatis mutandis, and where appropriate."*

35. It is important to note that, even in those specific cases where the EU legislator did not consider necessary to provide for an obligation of public participation, EU law provides for other means for the public/NGOs/civil society to remedy an unlawful act or omission as set out in the same legal instrument.

36. Article 25 IED indeed introduces the right for a specific review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 IED. This would cover decisions, acts or omission that have been subject to public participation as provided under Article 24(1), but also those that have been subject to the

information obligation under Article 24(2). The latter also covers cases which are not subject to the obligation of prior public participation.

37. The Communicant cannot ignore the fact that, by the terms of Article 6(10) of the Aarhus Convention, a margin of discretion is given to Parties if, and how, they intend to apply the public participation requirements of Article 6 of the Aarhus Convention when a permit is being updated or reconsidered. Were it otherwise, the terms *"are applied mutatis mutandis, and where appropriate"* would be devoid of any meaning.

38. Therefore, the legal issue at hand boils down to the question whether the EU remained within its margin of discretion, as expressly stated in Article 6(10) of the Aarhus Convention, when it limited the conditions for triggering public participation as stipulated in Article 24 IED to certain substantial and significant events (see paragraph 9 above).

39. This provision is to be read in light of point 22 of Annex I to the Aarhus Convention which provides that: *"Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention"*, the latter referring to activities not listed in Annex I and subject to public participation in accordance with the Party's national law.

40. Certainly, analysis of previous compliance cases and the Aarhus Convention Implementation Guide might also give orientation on that matter. However, as to the previous compliance cases, it must be borne in mind that they relate to the specific circumstances of the individual case which they concerned.

41. In Case ACCC/C/2009/43 concerning compliance by Armenia with Article 6 of the Aarhus Convention relating to licences for copper exploitation, the ACCC, while recognising efforts of the Party, held that the national law lacked clarity and appeared to defer broad discretion to the executive and the administration on the setting of thresholds for activities to be subject to an environmental impact assessment (EIA) procedure without giving further guidance, and that therefore *"there is a risk that the setting of thresholds may be arbitrary and decided on a case-by-case basis."* (paragraph 50 of the findings, as adopted by the Meeting of the Parties to the Convention in Chisinau in 2011).

42. The wording of Article 24 IED does not, however, lack clarity or present a risk of arbitrary decisions by the public authority, as the conditions for triggering public participation in case of reconsideration or updating of a permit are clearly and objectively defined and circumscribed. Furthermore, the IED provides for specific means for persons which meet the conditions under Article 25(a) and (b) to contest legality of decisions or omissions as regards the updating or reconsideration of the permits which can be regarded as a specific legal remedy, which applies to all decisions on granting, reconsideration or

updating of a permit, also those that are not subject to the obligation of public participation.

43. Case ACCC/C/2009/41 on compliance by Slovakia with Article 6 of the Convention in relation to the Nuclear Power Plant Mochovce concerned a specific activity *"of such a nature and magnitude"* and with *"increased potential impact on the environment"*, for which the Aarhus Convention does not set criteria or thresholds below which the public participation requirements would not apply and for which public participation would have thus been appropriate (cf. paragraph 57 of the ACCC findings, as adopted by the Meeting of the Parties to the Aarhus Convention in Chisinau in 2011).

44. Article 24 IED specifically foresees full-fledged public participation in case of a substantial change to the installation, or where a derogation from the legally applicable emission limit values is being considered, or where significant pollution triggers the need for stricter or additional emission limit values. In these instances, public participation is mandatory even in the reconsideration or updating of a permit and cannot be waived by the public authority. This complies with the idea as expressed in the above-mentioned Slovak compliance case to give particular attention and safeguards for efficient public participation in significant cases.

45. It also complies with the underlying rationale of Article 6(1)(a) and (b) of the Convention, read in light of Annex I, point 22. Only the updating of permits for activities whose threshold is provided by the Annex (meaning that they are significantly affecting the environment) or where the Parties so provide in their legislation for the updating of permits concerning other activities also significantly affecting the environment, are subject to the public participation requirements provided by the Aarhus Convention.

46. The ACCC further outlined, with regard to Article 6(10) of the Aarhus Convention, that *"the clause "where appropriate" introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that "access to information and public participation in decision–making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns" and aiming to "further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment"."* (paragraph 56 of the ACCC conclusions).

47. As explained above, public participation is mandatory in cases of significant pollution or substantial change or derogation from legally applicable emission limit values, even when the permit is reconsidered or renewed rather than issued for the first time. In these cases, it is certainly important for the public to be made aware of the situation, to be able to express their concerns early and effectively and to contribute to the final decision-making, in order to fulfil the objectives of the Aarhus Convention as also outlined by the ACCC.

48. The EU cannot therefore see that these compliance cases, quoted by the Communicant, would demonstrate or even point to any undue use of the Union's margin of discretion in transposing Article 6(10) of the Aarhus Convention by way of Article 24 IED.

49. The EU would, in this context, also like to refer to another previous compliance case concerning Article 6 of the Aarhus Convention – it was directed against the EU (then European Community) but has not been mentioned by the Communicant – which further supports the Union's view of correct implementation of Article 6 of the Convention through Article 24 IED.

50. In Case ACCC/C/2006/17 on, inter alia, the correct implementation of Article 6 of the Aarhus Convention through provisions of the IPPC Directive[7], the ACCC held, with regard to multiple permitting decisions for landfills, that *"[t]he Committee does not consider that article 6 necessarily requires that the full range of public participation requirements set out in paragraphs 2 to 10 of the article be applied for each and every decision on whether to permit an activity of a type covered by paragraph 1. […] Some such decisions might be of minor or peripheral importance, or be of limited environmental relevance, therefore not meriting a full-scale public participation procedure."* (see paragraph 41 of the ACCC findings, as adopted by the Meeting of the Parties to the Aarhus Convention in Riga in 2008).

51. This case seems much more relevant to the situation at hand than the cases quoted by the Communicant. The ACCC expressly stated that it has *"to be decided on a contextual basis, taking the legal effects of each decision into account"*, whether a full-fledged public participation procedure is required for multiple permitting decisions or not (paragraph 42). According to the ACCC, minor cases with limited environmental relevance do not merit a full-scale public participation procedure, whereas permitting decisions which are capable of *"significantly changing"* the basic parameters of the activity in question or *"which address significant environmental aspects of the activity not already covered by the permitting decision(s)"* need to allow for full-fledged public participation (paragraph 43).

52. This is exactly the approach taken by Article 24 IED, which requires full public participation for events affecting significantly the environment, namely substantial changes to an installation, cases where the pollution caused by an installation is significant, or where the authority intends to set less strict emission limit values.

53. The EU is therefore of the opinion that previous compliance cases relating to the application of Article 6 of the Aarhus Convention rather than pointing to any deficiency in Union legislation, rather confirm the approach taken by Article 24 IED.

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[7] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257 of 10 October 1996, p. 26.

54. When analysing in light of the Aarhus Convention Implementation Guide whether the EU remained within its margin of discretion, as expressly stated in Article 6(10) of the Aarhus Convention, in adopting Article 24 IED to certain substantial and significant events, the Commission has to recall that in Union law, the Aarhus Convention Implementation Guide is not legally binding.

55. As the CJEU already held in several cases (see e.g. judgment in *Solvay and Others*, C-182/10, EU:C:2012:82, paragraphs 27 and 28), the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention. However, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.

56. Nevertheless, the Aarhus Convention Implementation Guide can certainly provide valid guidance in the case at hand before the ACCC.

57. The Communicant argues that the Guide would make it clear that the requirements of Article 6 of the Convention apply to all kinds of permitting decisions.

58. However, the relevant quote from the Guide has to be read in its context, which is to underline that the application of Article 6 does not depend on formal procedures (*"the requirements of article 6 apply to all decisions to permit activities within the scope of article 6, whether or not a formal licencing or permitting procedure has been established")*. In other words, a public authority cannot circumvent full public participation by simply not providing for any formal licencing procedure for a given activity.

59. This is different from limiting full-scale public participation in decisions on the reconsideration or updating of a permit to significant cases. Article 6(10) of the Aarhus Convention precisely allows to apply the public participation requirements in the reconsideration or updating of permits *"as appropriate"* and has to be read in light of point 22 of Annex I of the Convention which confirms the EU's interpretation that the test on the appropriateness of full-fledged public participation is linked to the typology of the modification and its significant consequence for the environment.

60. The Communicant further quotes the statement from the Aarhus Convention Implementation Guide, in its part on Article 6(10) of the Convention, that *"The administrative procedures relating to the reconsideration of operating conditions for a covered activity require the application of full public participation procedures under article 6."*

61. However, the above-mentioned quote has to be read together with the remainder of the text: *"The reference in paragraph 10 to "mutatis mutandis" […] requires that the provisions of paragraphs 2 to 9 of article 6 are to be applied, with the necessary changes, when a public authority reconsiders or updates the operating conditions for an article 6 activity. The reference to "and where appropriate" indicates that certain reconsiderations or updating of operating conditions for an activity not necessarily require the reapplication of all the paragraphs noted. It may be interpreted to allow Parties not to apply article 6 to reconsiderations or updating of operating conditions, if they deem it inappropriate."*

62. These clarifications, rather than pointing to any non-conformity in the application of Article 6(10) of the Aarhus Convention by way of the IED, rather confirm the Directive's approach. Indeed, the IED delimits the full public participation requirements to certain objectively determined cases where the EU legislator had assessed that only permit modification entailing changes which could significantly affect the environment shall undergo a new public participation procedure.

63. The Aarhus Convention Implementation Guide's part on Article 6(10) of the Convention furthermore contains an information box on the *"Reconsideration of permit conditions under the Industrial Emissions Directive"*, listing the conditions of Articles 24 and 21(5) IED. The Guide seems to refer to the IED as a valid example of application of Article 6(10) of the Aarhus Convention in this context.

64. The Aarhus Convention Implementation Guide does not therefore, in the EU's view, support the Communicant's argument that Article 24(b) IED would not comply with the Convention with regard to the updating or reconsideration of a permit.

65. For the reasons set out above, the EU considers the Communicant's arguments as unfounded and concludes that the EU fulfils its obligations under Article 6 of the Aarhus Convention in respect of the IED.

IV. CONCLUSION

66. In view of the above considerations, the EU requests the ACCC to dismiss the Communication as inadmissible, or, on a subsidiary basis, as unfounded.