COMMUNICATION ON THE FAILURE OF THE EUROPEAN UNION TO COMPLY WITH ARTICLE 6.10 OF THE AARHUS CONVENTION REGARDING THE UPDATE AND REVIEW OF CONDITIONS OF THE INDUSTRIAL EMISSIONS DIRECTIVE PERMITS

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II. Party concerned

Name of the State Party concerned by the communication: European Union

III. Facts of the communication

Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) repealed and replaced a series of Directives including Directive 2008/1/EC on integrated pollution prevention and control (IPPC). This Directive also merged another set of industrial Directives to cover most of the emissions from industrial installations in Europe.

The objective of Directive 2010/75/EU, Industrial Emissions Directive (IED), is to lay down "*rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole*" (Article 1) setting out the so-called "integrated approach" to prevent negative impacts on all environmental media due to a

certain industrial activity through the conditions established in the **permits** granted by public authorities. The new framework strengthened the provisions from the previous IPPC Directive. These provisions are reflected within Chapter II which applies to activities listed in Annex I of the IED. Most of the industrial activities listed in that Annex are coincident with those listed in Annex I of the Aarhus Convention.

The IED not only covers the substantive elements that a permit needs to contain (Articles 5, 11, 12 and 14) and the operator of an existing or new installation needs to comply with but also provides for specific permit procedures such as changes to the installation (Article 20) and the reconsideration and update of permit conditions by the competent authorities (Article 21).

The subject matter of this communication relates to how the provisions of the Aarhus Convention on public participation have been reflected in the permit procedure regulated in the IED and specifically public participation in the reconsideration and update of an IED permit.

Public participation when reconsidering or updating a permit under the IED

Article 24 of the IED entitled *Access to information and public participation in the permit procedure* provides:

"1.Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures:

(a) the granting of a permit for new installations;

(b) the granting of a permit for any substantial change;

(c) the granting or updating of a permit for an installation where the application of Article 15(4) is proposed[1]*;*

[1] Article 15 (4) of the IED provides: *4. By way of derogation from paragraph 3, and without prejudice to Article 18, the competent authority may, in specific cases, set less strict emission limit values. Such a derogation may apply only where an assessment shows that the achievement of emission levels associated with the best available techniques as described in BAT conclusions would lead to disproportionately higher costs compared to the environmental benefits due to:*

(a) the geographical location or the local environmental conditions of the installation concerned; or

(b) the technical characteristics of the installation concerned.

The competent authority shall document in an annex to the permit conditions the reasons for the application of the first subparagraph including the result of the assessment and the justification for the conditions imposed.
The emission limit values set in accordance with the first subparagraph shall, however, not exceed the emission limit values set out in the Annexes to this Directive, where applicable.
The competent authority shall in any case ensure that no significant pollution is caused and that a high level of protection of the environment as a whole is achieved.
On the basis of information provided by Member States in accordance with Article 72(1), in particular concerning the application of this paragraph, the Commission may, where necessary, assess and further clarify, through guidance, the criteria to be taken into account for the application of this paragraph.

(d) ***the updating of a permit or permit conditions for an installation in accordance with Article 21(5)(a).*** (the emphasis is ours)

The procedure set out in Annex IV shall apply to such participation.

2. When a decision on granting, reconsideration or updating of a permit has been taken, the competent authority shall make available to the public, including via the Internet in relation to points (a), (b) and (f), the following information:

(a) the content of the decision, including a copy of the permit and any subsequent updates;

(b) the reasons on which the decision is based;

(c) the results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision;

(d) the title of the BAT reference documents relevant to the installation or activity concerned;

(e) how the permit conditions referred to in Article 14, including the emission limit values, have been determined in relation to the best available techniques and emission levels associated with the best available techniques;

(f) where a derogation is granted in accordance with Article 15(4), the specific reasons for that derogation based on the criteria laid down in that paragraph and the conditions imposed.

3. The competent authority shall also make available to the public, including via the Internet at least in relation to point (a):

(a) relevant information on the measures taken by the operator upon definitive cessation of activities in accordance with Article 22;

(b) the results of emission monitoring as required under the permit conditions and held by the competent authority.

4. Paragraphs 1,2 and 3 of this Article shall apply subject to the restrictions laid down in Article 4(1) and (2) of Directive 2003/4/EC.

Article 21 of the IED entitled *Reconsideration and updating of permit conditions by the competent authority* provides*:*

" 1. Member States shall take the necessary measures to ensure that the competent authority periodically reconsiders in accordance with paragraphs 2 to 5 all permit conditions and, where necessary to ensure compliance with this Directive, updates those conditions.

2. At the request of the competent authority, the operator shall submit all the information necessary for the purpose of reconsidering the permit conditions, including, in particular,

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The competent authority shall re-assess the application of the first subparagraph as part of each reconsideration of the permit conditions pursuant to Article 21.

Article 15(3) of the IED provides the obligation of competent authorities to set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the best available techniques as laid down in the decisions on BAT conclusions published in the Official Journal of the EU.

results of emission monitoring and other data, that enables a comparison of the operation of the installation with the best available techniques described in the applicable BAT conclusions and with the emission levels associated with the best available techniques.

When reconsidering permit conditions, the competent authority shall use any information resulting from monitoring or inspections.

3. Within 4 years of publication of decisions on BAT conclusions in accordance with Article 13(5) relating to the main activity of an installation, the competent authority shall ensure that:

(a) all the permit conditions for the installation concerned are reconsidered and, if necessary, updated to ensure compliance with this Directive, in particular, with Article 15(3) and (4), where applicable;

(b) the installation complies with those permit conditions.

The reconsideration shall take into account all the new or updated BAT conclusions applicable to the installation and adopted in accordance with Article 13(5) since the permit was granted or last reconsidered.

4. Where an installation is not covered by any of the BAT conclusions, the permit conditions shall be reconsidered and, if necessary, updated where developments in the best available techniques allow for the significant reduction of emissions.

5. The permit conditions shall be reconsidered and, where necessary, updated at least in the following cases:

(a) ***the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit;*** **(**the emphasis is ours since this is the cross-referred case in Art. 24 (1) (d))

(b) the operational safety requires other techniques to be used;

(c) where it is necessary to comply with a new or revised environmental quality standard in accordance with Article 18.

Thus, this Article 21 provides for the cases when reconsideration and update of permits conditions is required (so called “permit review triggers”). There is no provision in the Aarhus Convention on this. However, the Aarhus Convention does require public participation when an authority reconsiders or updates the operating conditions of an activity (Article (6)(19) regardless of the reason or case why the permit is being reconsidered or updated (thus, independent of the permit review triggers).

Article 21 in addition to providing the information that the operator must submit to the competent authority when the later reconsider the permit (paragraph 2) also provides for the cases when permits must be reconsidered and, if necessary, updated by the competent authority. These cases are:

1. Within 4 years of publication in the Official Journal of the EU of the decisions on Best Available Techniques (BAT) conclusions relating to the main activity of an installation (paragraph 3).
2. Where an installation is not covered by any of the BAT conclusions, when developments in the best available techniques allow for the significant reduction of emissions (paragraph 4).
3. At least in the following cases (paragraph 5):
    a. **The pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit** (Article 21(5)(a) IED);
    b. the operational safety requires other techniques to be used;
    c. where it is necessary to comply with a new or revised environmental quality standard in accordance with Article 18.

Therefore, according to **Article 24 of the IED** when reconsidering and updating a permit, **public participation will only take place when conditions listed in paragraph 1 (b) or (c) or (d) takes place**. Those conditions are:

1. When the competent authority, by way of derogation, set less strict emission limit values than those emission levels associated with the best available techniques as laid down in the decisions on BAT conclusions (Articles 24 (c) and 15 (4)), and
2. When the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit
3. In case of "substantial change".

It could be inferred that public participation is not compulsory according to EU Law (Article 21 (3) and (4)) when a reconsideration and update is due to the publication of new BAT conclusions in the Official Journal of the EU and to developments in the best available techniques allowing for the significant reduction of emissions if pollution caused by an installation "is not significant".

It is clear that no public participation is required when reconsideration and update of a permit is due to operational safety requirements and to compliance with a new or revised environmental quality standard (Art. 21 (5) (b) and (c)). In addition, Article 24 of the IED only allows public participation when a change introduced to an installation under Article 20 is substantial, what results in the absence of a public participation procedure when the change is not substantial.

This lack of public participation in certain cases when the permit is being reconsidered and updated is provided by EU Law. However, the CJEU has stated that EU law must be aligned to rules on public participation of the Aarhus Convention in its judgment of 15 January 2013 in case C-416/10 known as Križan:

*"77. **Those rules on public participation must be interpreted in the light of, and having regard to, the provisions of the Aarhus Convention, with which,** as follows from recital 5 in the preamble to Directive 2003/35, which amended in part Directive 96/61, **European Union law should be 'properly aligned'** (Case C-115/09* Bund für Umwelt und Naturschutz

Deutschland, Landesverband Nordrhein-Westfalen *[2011] ECR I-3673, paragraph 41). However, Article 6(6) of that convention states that the public concerned must be able to have access to all information relevant to the decision-making relating to the authorisation of activities referred to in Annex I to that convention, including in particular landfill sites receiving more than 10 tonnes of waste per day or with a total capacity exceeding 25 000 tonnes of waste."*

In spite of this, the IED provisions related to certain cases of reconsideration and update of permits are not properly aligned with the provisions on public participation of the Aarhus Convention, specifically with article 6 (10).

IV. Nature of alleged non-compliance

As explained, this communication relates to a wrong reflection of the provisions of the Aarhus Convention related to public participation in the EU Industrial Emissions Directive when it refers to certain cases of reconsideration or update of the operating conditions of an installation subject to that Directive.

V. Provisions of the Convention relevant for the communication

Article 6(1) point (a) of the Aarhus Convention provides that "*Each Party shall apply **the provisions of this article with respect to decisions** on whether to permit proposed activities listed in annex I; "* (the emphasis is ours).

Secondly Article 6 (10) of the Aarhus Convention provides:

*Each Party shall ensure that, when a public authority **reconsiders or updates the operating conditions for an activity*** (the emphasis is ours) *referred to in paragraph 1, the provisions of paragraph 2 to 9 of this article are applied mutatis mutandis, and where appropriate.*

Paragraph 1 refers to activities listed in Annex I of the Aarhus Convention, which are -in almost identical form- covered by the IED in Annex I.

The provisions on public participation of the Aarhus Convention therefore:

a) do not set restrictive cases of permit reviews or updates when public participation has to be ensured for existing installations covered under Annex I (as the IED Article 24.1, in particular point (d) does), the referral in paragraph 1 to apply all the requirements of Article 6 to all "decisions" (explicitly in plural) linked to permitting and
b) does provide that public participation is to be ensured prior to the taking of a decision by the competent authority when all options are still open.

However, the IED only provides for public participation where a permit is reconsidered or updated through the following three permit review triggers:

1. the competent authority, by way of derogation, sets less strict emission limit values than those emission levels associated with the best available techniques as laid down in the decisions on BAT conclusions (Articles 24 (c) and 15 (4)),
2. the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit (Article 21 (5)(a)), and
3. in case of "substantial change".

The **IED does not provide for public participation** where a permit is reconsidered or updated when:

1. a reconsideration and update is due to the publication of new BAT conclusions in the Official Journal of the EU and to developments in the best available techniques allowing for the significant reduction of emissions <u>if pollution caused by an installation "is not significant"</u> (Article 21 (3) and (4) and Article 24 (1) (d)).
2. it is due to operational safety requirements (Art. 21 (5) (b)),
3. it is due to compliance with a new or revised environmental quality standard (Art. 21 (5) (c))
4. when a permit is granted for a non-substantial change (see Art. 24 (1) (b))
5. for other cases (time extension of operation, extension of capacities, other modifications of permit conditions that do not fall within the cases listed in points 1 to 4).

The Aarhus Convention Compliance Committee has already interpreted the provisions of Article 6(10) in two cases: Armenia ACC/C/2009/43, ECE/MP.PP/2011/11/Add.1, April 2011 para.58 and Slovakia ACCC/C/2009/41, ECE/MP.PP/2011/Add.3, 12 May 2011 paras. 53, 55, 56 and 57). It follows a quotation of the most relevant paragraphs to the present communication of the Slovakia case:

" 55.(…) Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, "mutatis mutandis, and where appropriate". In this context, the Committee wishes to stress 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"

56. The Committee considers 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". Thus, the clause does not preclude a review by the Committee on whether the above objective

criteria were met and whether the Party concerned should have therefore provided for public participation in the present case".

However, **the IED provides for a complete discretion denying any possibility for public participation when reconsideration and update of a permit** in the five cases listed above.

The Aarhus Convention Compliance Committee has already stated that although each Party is given some discretion to determine where public participation is appropriate, it does not imply a complete discretion for all cases as the IED provides. In addition, although the clause "where appropriate" is an objective criterion, this has to be seen in the context of the goals of the Convention. However, the lack of public participation in the reconsideration or update of permits under the IED in the five cases listed previously shows that the goals of the Convention are not achieved when they are triggered.

These findings have also been reported in the second edition of the Aarhus Implementation Guide[2], highlighting that Article 6 "*can apply, for example, to spatial planning decisions, […] operating permits, including secondary decisions such as those relating to safety and emissions. Other examples include permits for water or other natural resource use, as well as permits for discharges of pollutants into the water, air or soil.*" *Further the findings highlight that "the requirements of article 6 apply* ***to all decisions to permit activities within the scope of article 6,*** *whether or not a formal licensing or permitting procedure has been established.* (the emphasis is ours)"[3]. The implementing guide also makes clear that the public participation is to be guaranteed in all cases when the public authority reconsiders or updates operating conditions for article 6 activities (i.e. IED Annex 1 activities)[4].

The Aarhus Compliance Committee has made clear that Article 6(10) is to be applied for all administrative procedures relating to the reconsideration of operation conditions for IED activities: "**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]"**

VI. Use of domestic remedies or other international procedures

No domestic procedures have been invoked given that the Treaty on the Functioning of the European Union does not grant a general standing to NGOs to file a case before the CJEU.

VII. Confidentiality

No confidentiality is requested for this communication.

[2] The Aarhus Convention Implementation Guide, second edition 2013
[3] See page 122
[4] See page 124
[5] See page 163 and following of the second edition of the Implementation Guide to the Aarhus Convention

VIII. Supporting documentation (copies, not originals)

- Text of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions.
- CJEU judgement on case C-416/10 , Križan case.
- ACCC/C/2009/41 (Slovakia)

IX. Signature

Ana Barreira

XI. Address

Please send the communication by email AND by registered post to the following address:

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Clearly indicate: “Communication to the Aarhus Convention’s Compliance Committee”