

**Comments to the European Commission's observations made on behalf of the European Union to the Communication to the Aarhus Convention Compliance Committee on public participation in the reconsideration or updating of operating conditions under the Industrial Emissions Directive ACCC/C/2014/121**

Following the notification from the Secretary to the Committee of 4 November 2016 whereby the Instituto Internacional de Derecho y Medio Ambiente ("IIDMA") –as party to the communication referred above- was invited to provide further written submissions on the substance of the communication, we hereby submit final comments in relation to the observations filed by the European Commission made on behalf of the European Union concerning communication ACCC/C/2014/121.

**I. OUR COMMUNICATION**

Our communication raised three main points:

- i. The European Union (EU) fails to comply with Article 6 of the Aarhus Convention as its requirements on public participation have been incorrectly reflected in the provisions applicable to the reconsideration and update of permits under Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (IED), (Article 24 read in line with Article 21)
- ii. The IED only provides for public participation when a permit is reconsidered or updated in certain limited (three) and, specific cases, namely those provided in Article 24 (1) paragraphs (b), (c) and (d) in accordance with Article 21(5)(a).
- iii. As a result, decisions by the competent authorities on the reconsideration or update of a permit are not subject to public participation when:
  1. A reconsideration and update is due to the publication of a new BAT conclusion in the Official Journal of the EU and to any other factors and to developments (not stated in that document) allowing for the significant reduction of emissions if pollution caused by an installation

is deemed as “not significant” (Article 21 (3) and (4) and Article 24 (1) (d)).

2. The operational safety requirements require other techniques to be used (Article 21 (5) (b)).
3. This is necessary to compliance with a new or revised environmental quality standard (EQS) (Article 21 (5) (c)).
4. The decision relates to a non-substantial change (Article 24 (1) (b)).
5. Other cases such as time extension of operation, extension of capacities or other modifications of permit conditions that do not fall within the cases listed in the above mentioned points 1 to 4.

## **II. COMMENTS TO THE COMMISSION OBSERVATIONS**

Before providing comments to the observations on admissibility and on substance, it is necessary to cover the point raised by the European Commission (EC) in paragraph 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 request to the ACCC in that regard”

Although it is true that our communication did not contain any specific request to the ACCC in that regard, at the same time, our request can be inferred easily from the whole communication. That is:

That the ACCC finds that the EU failed to comply with the requirements of article 6 of the Aarhus Convention, specifically paragraph 10, when restricting public participation in the reconsideration and updating of IED permits exclusively to cases provided in Article 24 (1) paragraphs (b), (c) and (d) in accordance with Article 21(5)(a) of the IED. Therefore, the Communicant respectfully requests the Committee to adopt the necessary recommendations to “properly align” the EU provisions with the Aarhus Convention.

### **1. On the admissibility of our communication**

As the EC recalls in paragraph 15 of its observations, its arguments on admissibility are the very same as those it presented in its Communication sent to the ACCC on 26 March 2015: the failure by the Communicant to exhaust domestic remedies, referring to legal remedies and judicial review procedures ranging from bringing actions before the Court of Justice of the European Union (CJEU) concerning the legality of EU acts to bringing actions before national courts. We already provided our counterarguments to those arguments through audio-conference during the “hearing” on preliminary admissibility that the Committee held on 25 March 2015.

Based on the arguments and counterarguments, the ACCC determined in its “Preliminary determination of admissibility” of 27 March 2015, that “subject to review following any comments received from the Party concerned, (...) the communication is admissible” (paragraph 9). In addition, when considering paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the

Committee stressed that “the Committee’s view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted” (paragraph 5). Nevertheless, the EC insists on the same arguments although no new ones have been provided. For this reason, we will provide here in writing our counterarguments presented to the Committee during the “hearing” of 25 March 2015 with further details.

The EC states that articles 263 and 277 as well as 267 of the Treaty of Functioning of the European Union (TFEU) would have offered IIDMA a satisfactory domestic remedy. However, as pointed out below, the remedies provided by the TFEU are either not applicable or would be unreasonably prolonged and do not provide an effective and sufficient means of redress (paragraph 21 of the Annex to Decision 1/7). We recall our statement in section VI of our communication “*no domestic procedures have been invoked given that the Treaty of Functioning of the European Union (TFEU) does not grant a general standing to NGOs to file a case before the CJEU*”.

### ***On Article 263 TFEU***

Firstly, the EC refers (paragraph 17) to the possibility by “individuals” to challenge legislative acts, such as the IED, through the action of annulment provided in Article 263 (4) of the TFEU. This Article establishes:

*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. (The emphasis is ours).*

As evidenced in the EC’s observations, the legal remedy set by Article 263 (4) is only effective if the legal act intended to be challenged is of “direct or individual concern” to IIDMA. It is important to recall that the main intention of the communicant by bringing this case before the ACCC is to reveal the non-compliance of certain IED provisions (article 24) with the Aarhus Convention requirements on public participation provided in Article 6 (1)(a) and (10), that is of a legislative act. The EC knows very well that neither the communicant nor any other NGO would meet the *locus standi* criteria to be able to challenge these provisions before the CJEU following what this Court held in Case-538/11P *Inuit* (para 45)<sup>1</sup>. Thus, an applicant must be directly and individually concerned if it wishes to challenge measures adopted through the ordinary or special legislative

---

<sup>1</sup> “45. It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also

(i) against a legislative or regulatory act of general application which is of direct and individual concern to them and

(ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.

(...) it must be held that the meaning of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. **Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them**”

procedure following the so-called “Plaumann test”<sup>2</sup> and the provisions of a Directive (as the IED) fall under this category.

Therefore, it is clear that IIDMA does not fulfill the standing requirements for access to justice under Article 263 (4) of the TFEU, not being entitled to directly institute a proceeding before the CJEU regarding the case concerned. As a consequence, article 263 (4) of the TFEU as pleaded by the EC does not offer any domestic remedy.

### ***On Article 277 TFEU***

Secondly, the EC refers to the possibility to plead illegality under Article 277 of the TFEU as an additional domestic remedy to challenge acts by individuals when these are not entitled to bring a direct action under the requirements of Article 263 (4) of the TFEU. Article 277 of the TFEU, provides:

*“Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, 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, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.”*

The second paragraph of Article 263 of the TFEU, states:

*“It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of 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.”*

Article 277 provides for the plea of illegality. This is a very limited action to indirectly challenge the legality of an EU act in the course of other ongoing legal proceedings and not a cause of action in its own right<sup>3</sup>, hence it only features rarely. It can only be invoked as an ancillary plea, that is, to challenge a measure implementing an EU act (for example, a decision which implements a regulation), not the act itself. The IED, which is the subject matter of this case, is an act in itself. Therefore, the EC cannot pretend that this remedy provides an effective and sufficient mean of redress to substantiate the subject matter of our communication.

### ***On Article 267 TFEU***

Finally, the EC refers in its observations to the possibility of members of the public and civil society to plead, pursuant to Article 267 of the TFEU, the invalidity of EU acts in domestic courts by an exception of illegality. Furthermore, the CJEU could be asked to render a preliminary ruling.

---

<sup>2</sup> Plaumann & Co v Commission, Case 25/62, 15 July 1966.

<sup>3</sup> As it was stated in Case ACCC/C/2008/32, “*Illegality under Article 277 can only be invoked as an ancillary plea and is not a cause of action in its own right*”. Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) para. 13.

Article 267 of the TFEU provides:

*“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

*(...)*

*(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

*Where such a question is raised before any court or tribunal of a Member State, **that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment,** request the Court to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. (...).”*

First of all, the request of a preliminary ruling is not compulsory for a first instance court. In addition although the plaintiff requests the last instance court to submit such a request, it is a prerogative of the national court if they consider there is no need to interpret a matter of EU law<sup>4</sup>. The national court may be reluctant to submit preliminary questions to the EU Court which would mean further delays. It may also err on the question on whether it should or should not submit a case for a preliminary ruling. In addition, the applicant in the national procedure has no possibility to formulate the questions which would be submitted to the EU Court.

Even if a national court would decide to submit such a request to the CJEU, the Communicant should first go through a first instance court, afterwards through a second or final instance court and finally before the CJEU. This procedure could last 8 years as an average. This would, in our view, entail an excessive length of judicial processes at Member State level, not being satisfied the right on access to justice proclaimed in Article 9 (3) of the Aarhus Convention. Thus, in such a case the maxim “justice delayed is justice denied” would apply. This is particularly relevant under current time windows since permit considerations on major IED activities have already took place, are ongoing or will take place within the next two years (2017-2018). The most relevant industrial sectors with significant environmental impacts (listed here are for informative purposes only): Iron and Steel industry (BAT-Conclusions published March 2012 with compliance deadline in March 2016), Manufacture of Glass (BAT-Conclusions published in March 2012 with compliance deadline in March 2016), Production of Cement and Lime (BAT-Conclusions published in April 2013 with compliance deadline in April 2017), Production of Chlor-Alkali (BAT-Conclusions published in December 2013 with compliance deadline in December 2017); Refineries (BAT-Conclusions published in October 2014 with compliance deadline in October 2018); Large Combustion Plants (BAT-Conclusions expected by May 2017, permit reviews expected as from beginning of 2017 also due to derogations taken from binding emission limit values that apply as from January 2016).

It is also necessary to recall that the procedure of Article 267 of the TFEU is limited to individual appeals before Member State Courts to challenge administrative acts. Thus, if such a case would be brought before a national court, the case would only

---

<sup>4</sup> Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ C 338, 6.11.2012

be brought when a Member State reconsiders or updates a permit under one of the cases where public participation is not envisaged by the IED. This means that the case would only analyze one of the assumptions where public participation is prevented but not all. It is highly unlikely that a Court of a Member State would submit a preliminary reference to the CJEU covering all cases relating to update and review of IED permits in which public participation is not provided. Therefore, again the alternative of article 267 is not practicable for the concern raised in our communication.

Consequently IIDMA, after taking into account the different legal remedies provided by the TFEU, considered bringing this case to the Committee as the only and most effective way to bring light on the matter of non-compliance with article 6 (10) of the Aarhus Convention raised in our communication.

## **2. On the substance of our communication**

The arguments on the substance of our communication raised by the EC (paragraphs 33 to 65) are based on the following:

- The review procedure set in Article 25 of the IED provides IIDMA an alternative means to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 IED.
- Article 6(10) of the Aarhus Convention provides a margin of discretion to Parties if, and how they intend to apply public participation requirements set in Article 6 when a permit is being updated or reconsidered.
- The EU has remained within its margin of discretion when limiting public participation to certain substantial and significant events, as stipulated in Article 24 IED in relation to Article 21(5)(a).
- Under EU law, the Aarhus Convention Implementation Guide is not legally binding but can certainly provide valid guidance.

Accordingly, IIDMA would like to provide the following counterarguments:

### ***On the review procedure set in Article 25 of the IED***

The EC refers to the possibility of IIDMA to remedy an unlawful act or omission through the review procedure set out in Article 25 of the IED “in those specific cases where the EU legislator did not consider necessary to provide for an obligation of public participation” (paragraphs 35 and 36 of the EC’s observations). Article 25 of the IED provides:

*“(…) members of the public concerned have access to a 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**”.*

Therefore, this review procedure is exclusively restricted to those decisions, acts or omissions which have already been subject to a public participation procedure (Art. 24(1)) or those which have been subject to the information obligation (Art. 24(2)).

As for Article 24(1), it is important to recall that, the subject matter of this communication is, in fact, that not all decisions by the competent authorities on the reconsideration or update of a permit are subject to public participation (see paragraph I (iii) of these allegations). Therefore, for these cases, the IED does not provide any possibility to trigger the review procedure provided in Article 25, as they are not subject to Article 24.

As for Article 24(2), it provides the obligation, when a decision on granting, reconsideration or updating of the permit has been taken, for certain information to be made available to the public. Therefore, a review procedure could be initiated to challenge those decisions even if they have not been subject to a prior public participation procedure. However, this does not imply that a review procedure can be initiated arguing that the decision which has been reconsidered or updated has not been subject to a public participation procedure if the cause of the reconsideration or update is not included in Article 24(1).

In addition, the public participation procedure is meant to seek public input at the specific points in the decision process where such input has real potential to help shape the decision in the meaning “when all options are open” pursuant to Article 6.4 of the Aarhus Convention, which is void of effect once a decision “has been taken” pursuant to Article 24(2).. Article 25 allows initiating a review procedure once the permit is already granted, reconsidered or updated. Therefore, this does not guarantee that the public concerned is given the same “early and effective” and meaningful opportunities as if there had been a public participation procedure as required by Article 6 (2) to (9) of the Aarhus Convention.

***On the margin of discretion under Article 6(10) of the Aarhus Convention and the limitation of public participation to certain substantial and significant events***

The EC states that article 6(10) of the Aarhus Convention -when using the terms “*are applied mutatis mutandis, and where appropriate*”- provides a margin of discretion 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 (paragraphs 37 and 38 of the EC’s observations). It is right that a certain degree of discretion can be recognized under the Convention provisions. However, this “margin of discretion” must be interpreted in line with the objective of the Convention to guarantee an effective public participation in decision-making with the aim to “*further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment*”.<sup>5</sup> In this line, IIDMA considers crucial to remind what was held by the Committee in the Slovakia Case ACCC/C/2009/41<sup>6</sup> which states that the key expression “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***”.<sup>7</sup>

---

<sup>5</sup> Preamble 10 of the Aarhus Convention.

<sup>6</sup> Findings and recommendations with regard to communication ACCC/C/2009/41 concerning compliance by Slovakia, ECE/MP.PP/2011/Add. 3, 12 May 2011.

<sup>7</sup> The Aarhus Implementation Guide, second edition 2014, p. 159.

This must also be interpreted in light of the observation contained in the Aarhus Implementation Guide, although ignored by the EC, when providing: “(...) *implicit in the concept of “mutatis mutandis”, as applied in the light of the objectives of the Convention, is the presumption that, in case of any doubt, the provisions should be applied (...)*”<sup>8</sup>

Finally the ACCC 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<sup>9</sup>. Therefore, the IED provides for a complete discretion denying the possibility for public participation in the administrative procedures relating to the reconsideration of operating conditions in the five cases listed in paragraph I (iii) of these allegations.

Nonetheless, the EC insists that “(...) *The reference to “and where appropriate” indicates that certain reconsiderations or updating of operating conditions for an activity will 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*” (paragraph 61 of the EC’s observations). In light of the above, it states that it has “*limited the conditions for triggering public participation as stipulated in Article 24 IED to certain substantial and significant events*” (paragraph 38 of the EC’s observations). This does not entail an objective criterion, and necessarily raises the question of “what is to be understood by substantial and significant events”.

The EC suggests, for this purpose, to interpret Article 6 (10) of the Convention in light of point 22 of Annex I, by arguing that only the updating of permits for activities whose thresholds are provided by this Annex (meaning that they are significantly affecting the environment) are subject to the public participation requirements (paragraphs 39-45 of the EC’s observations). This statement is incorrect. It is crucial to highlight that **Article 6 (10) of the Convention is independent of paragraph 22 of Annex I**. This is clearly revealed in the Aarhus Implementation Guide<sup>10</sup> which provides, “*Whereas paragraph 22 of annex I deals with physical changes or extensions to activities, paragraph 10 of article 6 addresses changes to the operating conditions of activities covered by article 6, paragraph 1*”. And, the cases of reconsideration and updating of the permits in which the IED blocks any possibility for public participation imply changes in the operating conditions. The Guide further stresses that in the latter case “*It requires public authorities reconsidering or updating the operating conditions for such activities to apply that article’s public participation requirements, mutatis mutandis, and where appropriate*”.

The EC also referred to the Slovakia case (ACCC/C/2009/41) to emphasize the idea that full-pledge public participation must be limited to significant events (paragraph 43). However, the Committee held in this case that public participation would have been appropriate when reconsidering or updating the operating conditions of an

---

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> The Aarhus Implementation Guide, second edition 2014, p. 132.



activity of such nature and magnitude as a nuclear plant.<sup>11</sup> This does not entail that public participation requirements must exclusively be applied to significant cases. In fact, the same case makes clear that **subsequent reconsiderations and updates of the operating conditions of activities listed in Annex I are subject to the provisions of public participation of Article 6, regardless of whether they involved any significant change or extension of the activity:**

*“51. If the 2008 construction permit implied a reconsideration or an update of the operating conditions of the Mochovce NPP, the Party concerned should have ensured that the provisions on public participation in article 6, paragraphs 2 to 9, of the Convention were applied, “mutatis mutandis, and where appropriate”.*

*“55. (...), it is clear that UJD decision 246/2008 in itself (...) regardless of whether it involved any significant change or extension of the activity, amounted to a reconsideration and update of the operating conditions by a public authority of an activity (a nuclear power plant) referred to in article 6, paragraph 1 (a), of the Convention. 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”.*

The EC also referred to cases ACCC/C/2006/17<sup>12</sup> and ACCC/C/2009/43<sup>13</sup>. In the first case, the Committee allowed for the possibility of not applying the “full-scale public participation procedure” in permitting decisions in minor cases with limited environmental relevance (paragraph 50 of the EC’s observations). This case is not applicable to the subject matter of this Communication as it refers to “multiple permitting decisions” and not reconsideration or updating of a permit’s conditions. The latter, lacks of relevance given that it also refers to the granting of a permit for an activity subject to an environmental impact assessment (EIA) procedure, and not to the reconsideration and update of permit conditions.

In light of the above, it is sufficiently clear that public participation must not be restricted to the substantial and significant events the EC maintains. It is to be guaranteed in **all cases** when the public authority reconsiders or updates operating conditions of activities listed in Annex I of the Aarhus Convention. Nevertheless, it must be highlighted that many of the permit review triggers where public participation is denied by the IED would, in any case amount to substantial and significant events, as follows:

- i. The publication of new BAT conclusions and developments in the BATs (Article 21 (3) and (4) IED).

The environmental significance of the application of BATs is evidenced in its own definition provided in Article 3 (10) of the IED: *“the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole (...)”.*

---

<sup>11</sup> Slovakia case ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, 12 May 2011, para. 57.

<sup>12</sup> Report by the Compliance Committee on Compliance by the European Community with its obligations under the Convention, ECE/MP.PP/2008/5/Add. 10, 2 May 2008.

<sup>13</sup> Findings and recommendations with regard to communication ACCC/C/2009/43 concerning compliance by Armenia, ECE/MP.PP/2011/11/Add.1, 12 May 2011,

Thus, BATs are not only used to establish the emission limit values (ELVs) in environmental permits, but they also set the framework for the operating conditions of installations which have high impact on the environment and on health. Therefore, the reconsideration or updating of permits as set out in Article 21(3) and (4) IED must be considered as a significant event and public participation should be ensured by the IED.

ii. Operational safety requirements (Article 21 (5) (b) IED).

Here, operational safety requirements might relate to avoiding risks in the vicinity of a facility. Nevertheless, the possibility of concerned parties (e.g. neighbours) to be part of a participation procedure is prevented by the IED.

iii. Compliance with a new or revised EQS (Article 21 (5) (c) IED).

EQS are defined in Article 3 (6) of the IED as “*the set of (environmental) requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law*”.

Its relevance is also revealed in Article 18 of the IED<sup>14</sup>. These EQS are contained in EU Directives such as the Habitats Directive<sup>15</sup> or the Water Framework Directive<sup>16</sup>. Given that they relate to environmental conditions, it cannot be understood why concerned parties such as environmental NGOs would be prevented to participate in the reconsideration or update of the operating conditions of a permit to comply with the EQS. Article 6 (6) point c) of the Aarhus Convention requires the competent authority to give the public concerned access to an examination procedure at the time of the public participation procedure on the “*description of the measures envisaged to prevent and/or reduce the effects, including emissions*” which, would relate in particular and *a fortiori* to the mandatory considerations regarding compliance with relevant EQS.

Finally the current restrictive permit review triggers or cases on when decisions or acts would be subject to public participation procedure omits other cases which as such have a significant environmental impact but for which a public participation procedure is not safeguarded. As an illustration the following are mentioned:

- a) the decision on whether to grant any of the optional derogations of the Emission Limit Values set in Annex V part 1 for Large Combustion Plants,

---

<sup>14</sup> Article 18 of the IED provides: “Where an environmental quality standard requires stricter conditions than those achievable by the use of the best available techniques, additional measures shall be included in the permit, without prejudice to other measures which may be taken to comply with environmental quality standards”.

<sup>15</sup> Council Directive 92/43/CEE of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, of 22.07.1992).

<sup>16</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, of 22.12.2000).

by applying Art 31 (desulphurization rate derogation), Art 32 (transitional national plan), Limited Lifetime Derogation (Art 33), or District Heating Plants Derogation (Art 36) amongst others. All of these decisions do have significant and substantial effects in regards to air pollution but would not prompt any required change in the emission limit values referred to under point 5 (a) of Article 21 of the IED because the permit conditions are for the present cases “unchanged”. Yet the IED would trigger a requirement for the competent authority to –objectively- reconsider whether the emission limit values should be strengthened or maintained as such under that derogation period. These decisions clearly relate to an activity listed in Annex I point 1 of the Aarhus Convention and thus should be subject to a public participation procedure. However this is not the case.

- b) The setting up of a system of environmental inspection systems as per Article 23 of the IED is not subject to public participation. Yet the very nature and scope of this plan is to set up a system of environmental inspections of Annex I installations “*addressing the examination of the full range of relevant environmental effects from the installations concerned*”. Thus a cross link to this provision should have been made in Article 24 of the IED.
- c) Time extension of operation or other modifications of permit conditions significantly affecting the environmental impacts do not fall explicitly within the cases where public participation is mandatory in accordance to the IED.

### ***On the non-binding nature of the Aarhus Convention Implementation Guide***

Finally, the EC recalled that the Aarhus Convention Implementation Guide is not legally binding under EU law (paragraphs 54-57 of the EC’s observations). IIDMA has never suggested that said Guide is of a binding nature. Nevertheless, it is a useful text for State Parties to grasp the Convention objectives and obligations in order to achieve a correct and effective implementation of its provisions at the EU and Member State levels. Accordingly, the Communicant considers that the statements of the Implementation Guide which were addressed remain a relevant tool to clarify the scope of Article 6 of the Convention, and therefore, should be taken into consideration.

### **III. CONCLUSION**

The fact that the EU has failed to comply with the requirements of Article 6(10) of the Aarhus Convention when restricting public participation in the reconsideration and updating of IED permits exclusively to cases provided in Article 24 in accordance with Article 21(5)(a) lead to blocking public participation. Therefore, the IED has created a block-restriction for the right of concerned parties to participate in the reconsideration and updating of permit conditions required by Article 6 of the Aarhus Convention because of inappropriate and restrictive wording stated in Article 24 (1) of the IED..

According to the aforementioned and based on our previous legal arguments concerning the non-compliance of the EU with Article 6 (10) of the Aarhus Convention in the reconsideration or updating of operating conditions under the IED, **IIDMA respectfully requests the Committee to:**

1. **Admit our communication in line with the preliminary determination of admissibility and in light of our previous allegations.**
2. Find that the EU has failed to comply with the requirements of Article 6 of the Convention, specifically paragraph 10, when restricting public participation in the reconsideration and update of IED permits to cases provided in Article 24 (1) paragraphs (b), (c) and (d) in accordance with Article 21(5) (a).
3. Adopt the necessary recommendations to “properly align” the EU provisions with the Aarhus Convention in order to preserve the right of concerned parties to participate in the reconsideration and updating of the IED permits conditions.

Madrid, 2 December 2016.