Comments by the European Commission, on behalf of the European Union, on the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to case ACCC/C/2014/121 concerning compliance by the European Union with the Convention's provisions on public participation in decision-making

These comments by the European Union (EU) refer to the draft findings and recommendations by the Aarhus Convention Compliance Committee (ACCC – herewith the Committee) in the above-mentioned compliance case, communicated to the EU on 2 December 2019 (hereinafter the draft findings). They complement the EU's previous submissions in this case, including the EU's *'Comments on preliminary admissibility'* on 26 March 2015, *'Response to the communication'* on 27 November 2015, and *'Final written submissions prior to commencement of deliberations'* on 30 March 2017.

Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission (herewith the Commission) submits these comments on behalf of the EU.

1. Admissibility: lack of exhaustion of domestic remedies

The Commission maintains its objection to admissibility on grounds of lack of exhaustion of domestic remedies, insofar as the Committee did not put forward any valid arguments to rebut it.

In this regard, it should be noted, first, that the reference to the findings in case ACCC/2008/32 (paras 76-77 of the draft findings) cannot be considered as a valid reply to the objection of admissibility for lack of exhaustion of domestic remedies. Indeed, these findings have not been adopted yet by the Meeting of the Parties (MoP). Therefore, we would ask that these two paragraphs be deleted from the findings.

Second, Article 277 TFEU is not relevant here (contrary to what the Committee indicated in para 76, second sentence, of the draft findings), considering that the applicable '*remedy*' here would have been the preliminary ruling procedure under Article 267 TFEU.

2. Interpretation of Article 6(10) of the Aarhus Convention: the provisions on 'mutatis mutandis' cannot be read to require full public participation in all cases irrespective of whether or not the update of the operating conditions for an activity has a significant effect on the environment

As the Committee correctly states in para 93 of the draft findings, the interpretation of the meaning of the terms *'mutatis mutandis'* and *'as appropriate'* indeed *'goes to the heart of this case'*.

The Aarhus Implementation Guide explains the words '*mutatis mutandis*' and '*with the necessary changes*', used in Article 6(10) of the Convention as follows:

'*The reference in paragraph 10 to "mutatis mutandis" means "with the necessary changes", and 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 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****. However, 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.*'[1]

From the above explanatory text, it is clear that the notion of '*doubt*' cannot simply entail a presumption of existence of significant environmental effects on the environment of an update or reconsideration of a permit.

It follows that not all reconsiderations or updates have to pass through public participation, but only those that have significant effects for the environment, as it is clearly confirmed in Article 6 (1)(a) and (b) of the Aarhus Convention.

In particular, letter '*a*' refers to the activities listed in Annex I, for which the effects on the environment are linked to the nature of the activity itself.

As to letter '*b*', it reads that a Party '*shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions*'.[2]

The interpretation followed by the Committee in the draft findings makes the issue of the environmental significance completely redundant.[3] In our view, the assessment of the significance of the environmental effects has to follow a case-by-case approach, considering the categories of installations defined by the national laws of the EU Member States, the specificities of any given installation, and the extent of the reconsideration or of the update of its permit. This is necessary to assess whether an obligation to ensure public participation according to the wording of Article 6(1)(b) of the Aarhus Convention exists.

3. Misconception of the delimitation of competencies between Member States and the EU

The Committee argues that the breach of Article 6(10) of the Aarhus Convention arises out of the text of the EU legislation (the IED).[4] In reality, its arguments appear to put into question the implementation of the IED by the national authorities of the EU Member States, but not the provisions of the IED as such.

[1] Emphasis added.

[2] Emphasis added.

[3] See, e.g. para 102 of the draft findings.

[4] See, e.g. point 114, last sentence of the draft findings.

The EU's position is clear that implementation of the IED at the national level should be guided by the Aarhus Convention.

The requirement of granting public participation in the IED comes indeed from the Aarhus Convention, as recital 27 of the IED recalls. This has the effect of making the Aarhus Convention relevant for interpretation and implementation of the IED.

In accordance with Article 192 TFEU, the IED defines minimum measures that Member States have to apply and determines cases where public participation is mandatory. Member States are obliged to transpose these minimum measures in their national laws, so that public authorities can give the public the opportunity to participate in the procedure when updating the permit. They may also go beyond those instances and decide whether public participation should take place in additional situations.

In this context, the Court of Justice of the European Union (CJEU) stated that an NGO can rely on a provision of EU environmental law, read in conjunction with Article 6(1)(b) of the Aarhus Convention, to claim its right to public participation (C-243/15, *Slovak Bears II*, § 49; see also § 46).

Therefore, on the basis of the combined reading of the provisions of the IED and of Article 6(10) of the Aarhus Convention, an NGO is in a position to successfully claim its right of public participation in the procedure before a national authority to update or reconsider a permit.

4. No consideration is given to the argument that the BAT AELs (Best Available Techniques, Associated Emission Levels) have been set by the Commission following a lengthy procedure of exchange of information with all relevant stakeholders in the framework of the IED including representatives of NGOs

There is no convincing reply of the Committee on this issue.[5] The breach of Article 6(10) of the Convention is based on the assumption of a possible future significant effect on the environment of the updated or reconsidered permit[6], which however does not correspond to the content of Article 6(10) of the Convention as clarified in the Implementation Guide, recalled above.[7]

The Commission has clearly explained this point in its last submission, by recalling that when reviewing BAT conclusions there is a significant public participation taking place.[8] At this stage, it would be appropriate to recall the precise provisions and elements under which this consultation is set up, in order to argue that the IED ensures public participation (and compliance with Article 6(10) of the Aarhus Convention) in this regard.

[5] See para 103 to 106 of the draft findings.

[6] This is particularly clear by reading para 102, last sentence, of the draft findings and para 104.

[7] See Section 2 of this note.

[8] See pages 4 and 5 of the EU's *'Final written submissions prior to commencement of deliberations'* of 30 March 2017.

5. Other means of public participation in case of serious environmental complaints from the public

In addition, it is worth mentioning that, pursuant to Art 23(5) IED, e.g. serious environmental complaints from the public could trigger a '*non-routine environmental inspection to investigate*' such complaints […] '*as soon as possible and, where appropriate, before the granting, reconsideration or update of a permit*'. Therefore, the public can be indirectly associated to the process of reconsideration or update of a permit in those cases beyond the provisions of Art 24(1) IED. The inspection reports shall be made public.