

**Additional observations by the European Union in relation to
Case ACCC/C/2014/121 concerning public participation in the
reconsideration or updating of operating conditions under the
Industrial Emissions Directive**

The European Union (EU) reserved, in earlier correspondence with the Aarhus Convention Compliance Committee (ACCC), the possibility to reply to any further comments on this Case. These additional observations refer to certain comments ("additional comments") by the Communicant of 2 December 2017 to the EU's observations of 27 November 2015. They are meant to further inform the ACCC for its 56th meeting from 28 February to 3 March 2017, where the ACCC is scheduled to continue its deliberations on this case. It is not intended to repeat the legal exchange we already had at earlier stages of the procedure, but to focus on certain **technical aspects** of the applicable EU legislation which have not yet been raised in that detail.

To recall, the Communicant, the organisation "*Instituto Internacional de Derecho y Medio Ambiente*" (IIDMA), alleged 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, 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.

As the Communicant also summarised in its additional comments, the EU notably made the following arguments on substance²:

- Article 6(10) of the Aarhus Convention leaves a **margin of discretion** to Parties if, and how, they intend to apply public participation requirements when a permit is being updated or reconsidered. This follows from the wording of Article 6(10) according to which, for permit updates or reconsiderations, the public participation requirements are applied "*where appropriate*";
- 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;
- The review procedure in Article 25 IED on "Access to justice" provides the Communicant an alternative means to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 IED;

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 The arguments on admissibility are already outlined in the earlier observations of 27 November 2015, to which reference is made (see paragraphs 14 to 32).

In its additional comments, the Communicant argued the following:

Though Article 6(10) of the Aarhus Convention provides that the provisions on public participation apply “*mutatis mutandis, and where appropriate*” to situations in which the public authority reconsiders or updates the operating conditions, this does not imply “**complete discretion**”, and in case of doubt, the provisions on public participation should be applied. In the view of the Communicant, the IED would provide for a complete discretion denying the possibility of public participation in all cases of updating or reconsideration of permit conditions which are not covered by Article 24(1).

Limiting public participation to “*certain substantial and significant events*” would not entail an **objective criterion** for deciding on public participation requirements for permit updates or reconsiderations. The IED would be wrongly inspired in this regard by paragraph 22 of Annex I to the Aarhus Convention, i.e. to apply public participation to any change or extension of activities where such a change or extension in itself meets the criteria/thresholds set out in the annex, whereas other extensions shall only be subject to public participation in accordance with national law and where there is a significant effect on the environment. The Communicant argues that Article 6(10) of the Convention is independent of paragraph 22 of Annex I, the former applying to reconsideration or updates of operating conditions of activities covered by the Convention (IED), whereas paragraph 22 of Annex I merely addresses physical changes or extensions to activities.

Furthermore, many cases which are not subject to public participation under the IED **would amount to substantial and significant events**, in particular publication of BAT (“best available techniques”) conclusions, updates as a result of operational safety requirements and updates to take into account environmental quality standards. **Other cases** which should be subject to public participation would be reconsiderations of permit conditions when assessing derogations requests (limited life time, transitional national plan and others), the setting-up of a system of environmental inspections, time extensions of operations or other modification of permit conditions significantly affecting the environment. Thereby, the Communicant implies that the IED is not inclusive enough on situations which require mandatory public participation for permit updates or reconsiderations.

The Communicant concludes that public participation should not be restricted to the substantial and significant events the EU maintains, but **should be guaranteed in all cases** when the public authority reconsiders or updates operating conditions of activities covered by the Convention (page 9, last paragraph of the additional comment).

As to the review procedure in Article 25 IED, the Communicant argues that it is exclusively restricted to those decisions, acts or omissions which have already been subject to a public participation procedure (Article 24(1) IED) which is not the case for permit updates or reconsiderations or those which have been subject to the information obligation (Article 24(2) IED). The review procedure could thus not be used to challenge the absence of public participation in cases not covered by Article 24(1) IED. Further, a

review procedure can only take place after a permitting decision has been granted, reconsidered or updated, and therefore it cannot be considered to provide for the same early and effective opportunities as in a proper public participation procedure prior to the taking of the decision.

In the EU's view, none of these arguments allow to conclude that Article 24 IED would not be properly aligned with the provisions of the Aarhus Convention.

First of all, the EU would like to stress again that, contrary to Article 6(1)(a) of the Aarhus Convention which includes a clear, unequivocal obligation to ensure public participation in relation to first permitting decisions, Article 6(10) leaves **a clear margin of discretion to the Parties as regards reconsiderations or updates** of the operating conditions in existing permits.

Were it otherwise, the terms "where appropriate" in Article 6(10) of the Convention for indicating situations where public participation requirements kick in, in case of permit updates or reconsiderations, would be devoid of any meaning.

In its additional observations, the Communicant itself clearly recognises that "*[i]t is right that a certain degree of discretion can be recognized under the Convention provisions*" (page 7, last paragraph).

The EU is therefore puzzled how the Communicant can request that public participation is granted in **all** cases where the public authority reconsiders or updates operating conditions of activities listed in Annex I of the Aarhus Convention (see notably page 9, last paragraph), as this would nullify the discretionary element of Article 6(10) of the Convention.

Either there is discretion or not – there is no middle way –, and the joint conclusion of all Parties, even the Communicant, seems to be in favour of recognising discretion.

Given the clear wording of Article 6(10) of the Aarhus Convention on this point, **no other solution would be legally viable**.

All the previous compliance cases and the Aarhus Implementation Guide quoted by the Communicant on the issue of the discretionary element in public participation when permits are reconsidered or updated **confirm that Article 6(10) of the Convention** ("where appropriate") **allows for discretion, but does not give "carte blanche" for complete discretion, and that the criterion is to be applied objectively** (see page 159 of the Aarhus Implementation Guide, Second Edition 2014). The EU entirely subscribes to this solution.

Therefore, as the EU has already outlined in its earlier observations of 27 November 2015 (paragraph 38), the legal issue at hand exclusively 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, where public participation is considered appropriate and useful.**

This covers cases:

- (1) that concern a substantial change (requiring in fact a new permit under the IED);
- (2) that involve a derogation from compliance with associated emission levels set in BAT conclusions and
- (3) that are done in order to set stricter or additional emission limit values in case of significant pollution caused by an installation.

The cases of reconsideration and updates requiring public participation (or not) are therefore **very clearly described and objectively defined** (see for further details and references paragraph 9 of the earlier Commission observations).

In addition, it follows from Article 20(3) IED that any change in the nature or functioning or an extension of an installation shall be **deemed to be substantial if the change or extension in itself reaches the capacity thresholds set out in Annex I**. This provision further clarifies in which cases, amongst others, public participation is required because the updating or reconsideration implies a substantial change. Article 20(3) IED is **similar to paragraph 22 of Annex I to the Aarhus Convention**, which also provides that such significant changes shall be subject to public participation.

This does not, however, exclude that there are other cases of significant changes which may trigger the granting of a new permit subject to prior public participation.

The EU therefore agrees that Article 6(10) of the Aarhus Convention is independent from paragraph 22 of Annex I to the Aarhus Convention. Paragraph 22 of Annex I merely provides for a situation in which Article 6(1)(a) of the Convention clearly applies and public participation is mandatory, there being no need to consider, in that specific case, whether this is "*appropriate*" in line with Article 6(10) of the Convention. In other cases of permit reconsideration or updates, Article 6(10) of the Convention leaves a margin of discretion to the Parties.

As to the additional arguments by the Communicant on how the EU exercised its margin of discretion under Article 6(10) of the Aarhus Convention:

The EU cannot agree with the allegation that updates or reconsiderations in view of the **publication of new BAT conclusions** should in all cases be subject to public participation. This would only be necessary where the permitting authority would consider a possible derogation from the applicable Associated Emission Levels (AELs), as this could have a negative impact on the environment. In all other cases, the discretion left to the public authority for setting emission limit values is rather limited as emission limit values must be based on the BAT AELs. Those BAT AELs 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 civil society. Therefore, public participation at the time of updating permits to take those AELs into account would not be appropriate, or necessary.

The EU cannot further agree with the allegation that **updates to take into account operational safety requirements** should imply prior public participation under the IED. First, safety issues are often of a very technical nature and may therefore not be suitable for wide public consultations. Second, where the operational safety requirements relate to the presence of dangerous substances, they would be covered by the Seveso III Directive³ 2012/18/EU on the control of major-accident hazards involving dangerous substances (about half of all Seveso establishments are also IED installations). The Seveso III Directive obliges Member States to involve the public in decisions related to the siting of new establishments where dangerous substances are present, as well as decisions related to substantial changes to existing establishments and for new developments in the neighbourhood of Seveso establishments. For these cases, the Seveso III Directive therefore sufficiently protects the rights of the public concerned in cases where this is important from a safety perspective.

The EU cannot agree with the allegation that **updates to take into account the need to comply with environmental quality standards** should be subject to prior public participation, either. Setting stricter or additional emission limit values is no absolute requirement for a permit under Article 18 of the IED, as it is "*without prejudice to other measures which may be taken to comply with environmental quality standards*". Considering this margin of discretion left to the competent authorities and the likely positive environmental impact of the updated permit, the EU is of the opinion that public participation, which is primarily aimed at avoiding decisions that may be detrimental to the environment, is therefore not necessary or appropriate in those specific cases.

Concerning the application of **derogation mechanisms under Chapter III of the IED**, referred to by the Communicant, those would not normally imply any reconsideration or updates of the existing permits.

As regards **inspection plans**, those would rather fall under Article 7 of the Aarhus Convention and as such are not relevant for the present case.

Finally, it is to be noted that **any updates implying significant environmental impacts are likely to be considered substantial changes** in the sense of Article 20(2) of the IED, requiring a permit and prior public participation.

³ Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ L 197 of 24.7.2012, p. 1-37.

In cases of updates and reconsideration **without prior public participation**, it will still be possible for the public to **challenge the decision ex post, on the basis of Article 25 IED**, in line with Article 9 of the Aarhus Convention.

Obviously, where there is no right to public participation, such review procedure could not challenge the lack of public participation in a concrete case. Nevertheless, the decision to update or reconsider the permit conditions can be challenged on all points of substance, e.g. the operating conditions, emission limit values, monitoring provisions etc.

Though agreeably less "early and effective" than prior public participation, the EU considers that such review procedure is both necessary and sufficient to protect the rights of the public concerned in cases of updates and reconsiderations which are deemed of lesser significance or which do not leave a large margin of discretion to the competent authority.

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