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## Economic Commission for Europe

### Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

#### Sixty-eighth meeting

Geneva, 23–27 November 2020

Item 9 of the provisional agenda

Communications from members of the public

### **Findings and recommendations with regard to communication ACCC/C/2014/121 concerning compliance by the European Union**

**Adopted by the Compliance Committee on 30 March 2020**

## I. Introduction

1. On 12 December 2014, the non-governmental organization (NGO) International Institute for Law and the Environment (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of the European Union to comply with the Convention's provisions on public participation in decision-making.<sup>1</sup>

2. Specifically, the communicant alleges that the Industrial Emissions Directive<sup>2</sup> does not fulfil the requirements for public participation in decision-making stipulated in article 6 (1) (a) and (10) of the Convention in cases where a permit issued under the Directive is reconsidered or updated.<sup>3</sup>

3. After taking into account the comments received from the Party concerned on 26 March 2015 contesting the preliminary admissibility of the case for failing to exhaust

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<sup>1</sup> The communication and related documentation from the communicant, the Party concerned and the Committee are available at [www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014121-european-union.html](http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014121-european-union.html).

<sup>2</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), *Official Journal of the European Union*, L 334 (2010), pp. 17–119.

<sup>3</sup> Communication, p. 6.



domestic remedies, the Committee determined at its forty-eighth meeting (Geneva, 24–27 March 2015) that the communication was admissible on a preliminary basis.<sup>4</sup>

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 June 2015 for its response.

5. The Party concerned provided its response to the communication on 27 November 2015.

6. On 3 August 2016, the secretariat wrote to the Party concerned and the communicant at the request of the Committee seeking their views on whether a hearing was needed. The Party concerned and the communicant submitted their views on 31 August 2016 and 21 September 2016 respectively, both agreeing that, given the substance of the communication, the Committee might proceed to commence its deliberations without holding a hearing.

7. At its fifty-fourth meeting (Geneva, 27–30 September 2016), the Committee agreed to proceed to commence its deliberations on the substance of the communication. By letter of 4 November 2016, the Party concerned and the communicant were invited to provide any final written submissions on the substance of the communication by 30 November 2016.

8. By email on 25 November 2016, the Committee invited the communicant to comment in its final written submissions on the submissions on the admissibility of the communication made by the Party concerned in its response of 27 November 2015.

9. The communicant submitted its final written submissions on 5 December 2016 and the Party concerned on 15 February 2017 (although, due to a technical error in transmission, these were received only on 30 March 2017).

10. The Committee completed its draft findings through its electronic decision-making on 1 December 2019. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 2 December 2019. Both were invited to provide comments by 20 January 2020.

11. On 17 January 2020, the communicant provided its comments on the Committee's draft findings. Also on 17 January 2020, the Party concerned sought an extension of the deadline for submission of its comments on the draft findings, which was duly granted by the Committee's Chair. The Party concerned submitted its comments on the draft findings by the extended deadline for both parties of 17 February 2020.

12. At its sixty-sixth meeting (Geneva, 9–13 March 2020), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings through its electronic decision-making procedure on 30 March 2020 and agreed that they should be published as a formal pre-session document to its sixty-eighth meeting (Geneva, 23–27 November 2020). It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. Summary of facts, evidence and issues<sup>5</sup>

### A. Legal framework

#### *Reconsiderations and updating of permit conditions*

13. Article 20 (2) of the Industrial Emissions Directive provides that “Member States shall take the necessary measures to ensure that no substantial change planned by the operator is made without a permit granted in accordance with this Directive.”

14. Article 21 of the Directive specifies when the reconsideration and update of permit conditions are required.

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<sup>4</sup> ECE/MPP/C.1/2015/2, para. 53.

<sup>5</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

15. Pursuant to article 21 (3), within 4 years of the publication of decisions on best available techniques (BAT) conclusions adopted under article 13 (5) of the Directive, 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 the Directive;

(b) The installation complies with those permit conditions.<sup>6</sup>

16. Article 21 (4) stipulates that, in cases 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 BATs allow for the significant reduction of emissions.<sup>7</sup>

17. Article 21 (5) stipulates that the permit conditions shall be reconsidered and, where necessary, updated at least when:

(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;

(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 of the Directive.<sup>8</sup>

18. Article 18 of the Directive establishes that:

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>9</sup>

#### *Public participation*

19. Article 24 (1) of the Directive provides for public participation 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;

(d) The updating of a permit or permit conditions for an installation in accordance with article 21 (5) (a).<sup>10</sup>

20. “Substantial change” as referred to in article 24 (1) (b) above is defined in article 3 (9) of the Directive as “a change in the nature or functioning, or an extension, of an installation or combustion plant, waste incineration plant or waste co-incineration plant which may have significant negative effects on human health or the environment.”

21. Article 15 (4), referred to in article 24 (1) (c) above, provides that the competent authority may, in specific cases, set less strict emission limit values.<sup>11</sup>

22. Article 24 (2) establishes that, when a decision on granting, reconsideration or updating of a permit has been taken, the competent authority shall make the content of the decision, the reasons on which the decision is based and other specified information available to the public.<sup>12</sup>

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<sup>6</sup> Communication, p. 4, and annex 1, p. 31.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., annex 1, p. 30.

<sup>10</sup> Ibid., pp. 2 and 3, and annex 1, p. 33.

<sup>11</sup> Ibid., p. 2, footnote 1, and annex 1, pp. 29 and 30.

<sup>12</sup> Ibid., annex 1, p. 33.

*Access to justice*

23. Pursuant to article 25 (1) of the Directive, member States shall ensure that, in accordance with the relevant national legal system, 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.<sup>13</sup>

**B. Facts**

24. On 24 November 2010, the European Parliament and the Council of the European Union adopted the Industrial Emissions Directive, which repealed and replaced seven previous directives,<sup>14</sup> including the Integrated Pollution Prevention and Control Directive.<sup>15</sup>

**C. Domestic remedies and admissibility**

25. The Party concerned disputes the admissibility of the communication on the basis that the communicant has failed to exhaust domestic remedies.<sup>16</sup>

26. Regarding the statement in paragraph 5 of the Committee's preliminary determination of admissibility dated 27 March 2015, that the terms of paragraph 21 of the annex to decision I/7 on review of compliance do not imply any strict requirement that all domestic remedies be exhausted, the Party concerned submits that paragraph 21 leaves no doubt that, unless unsatisfactory, domestic remedies must be taken into account.<sup>17</sup>

27. The Party concerned submits that the Committee has considered the general lack of *locus standi* for NGOs in its deliberations on communication ACCC/C/2008/32.<sup>18</sup> It submits that legislative acts such as the Industrial Emissions Directive can, however, be challenged by individuals under article 263 (4) of the Treaty on the Function of the European Union<sup>19</sup> (TFEU) if they are of direct or individual concern to them.<sup>20</sup>

28. The Party concerned further submits that, where direct action under article 263 (4) is not available and the responsibility for implementation of these acts lies with the European Union institutions, persons are entitled to bring direct action to challenge these implementing measures before the European Union courts under the conditions of TFEU article 263 (4), and can plead, in support of such action, the illegality of the general act at issue under TFEU article 277.<sup>21</sup> Where the member States bear responsibility for implementation, the Party concerned claims that persons may plead the invalidity of the European Union act before the national courts and tribunals and cause the latter to request a preliminary ruling under TFEU article 267.<sup>22</sup>

29. The Party concerned submits that it has thereby established a complete system of legal remedies and procedures to ensure judicial review of the legality of European Union acts and the communicant has not provided any evidence to demonstrate that it has availed itself of such remedies.<sup>23</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Directive 2010/75/EU, recital 1.

<sup>15</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, *Official Journal of the European Union*, L 24 (2008), pp. 8–29.

<sup>16</sup> Party's response to the communication, paras. 15 and 32.

<sup>17</sup> Party's response to the communication, paras. 27 and 28.

<sup>18</sup> Ibid., para. 16. The Committee has, in the meantime, issued its findings on communication ACCC/C/2008/32, part II (European Union) (see ECE/MR.PP/C.1/2017/7).

<sup>19</sup> *Official Journal of the European Union*, C 326 (2012), pp. 47–390.

<sup>20</sup> Party's response to the communication, para. 17.

<sup>21</sup> Ibid., paras. 18 and 21.

<sup>22</sup> Ibid., paras. 22–24.

<sup>23</sup> Ibid., paras. 20 and 25.

30. The communicant acknowledges that no domestic remedies have been invoked. It submits that the TFEU does not grant general standing to NGOs to file a case before the Court of Justice of the European Union (CJEU).<sup>24</sup>

31. Firstly, the communicant submits that an annulment action under TFEU article 263 is not an available domestic remedy because the communicant would be required to demonstrate “direct or individual concern” in accordance with the so-called “Plaumann test”.<sup>25</sup> It submits that, in accordance with the judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council*,<sup>26</sup> neither the communicant nor any other NGO would fulfil this requirement in respect of a claim that the Industrial Emissions Directive fails to comply with the Convention’s requirements.<sup>27</sup>

32. Secondly, the communicant alleges that TFEU article 277 does not provide an effective and sufficient means of redress because it provides only for a very limited action to indirectly challenge the legality of a European Union act in the course of other ongoing legal proceedings and not a cause of action in its own right.<sup>28</sup> The communicant submits that this action can only be invoked as an ancillary plea to challenge a measure implementing a European Union act, such as a decision which implements a regulation, and not an act itself such as the Directive.<sup>29</sup>

33. Thirdly, the communicant submits that the possibility to plead the invalidity of the Industrial Emissions Directive in front of the national courts based on TFEU article 267 and to potentially obtain a preliminary CJEU ruling is not practicable.<sup>30</sup> The communicant submits that: first instance courts are not required to refer a question for a preliminary ruling; a final court may decide not to refer a question because it considers that there is no need to interpret a matter of European Union law; a national court may be reluctant to make a preliminary reference due to fear of further delays; a national court may err in its decision on whether it should make a preliminary reference; and the applicant cannot formulate the questions that are referred by the national court.<sup>31</sup> The communicant further alleges that it would require at least eight years to adjudicate the case at the first, second or final instance court, and the CJEU. It submits that this would amount to a situation of “justice delayed is justice denied”, in particular because the permit considerations of major activities under the Directive are scheduled to be completed by 2018.<sup>32</sup> The communicant further submits that such a case would be limited to challenging the reconsideration or updating of a specific permit and the questions referred for preliminary ruling would likely also focus on the specific case. This would mean that only one of the categories of cases in which no public participation is required under the Directive would be analysed.<sup>33</sup>

## D. Substantive issues

### Applicability of article 6 (1) (a) – permit of proposed activities listed in annex I

34. The communicant submits that most of the industrial activities listed in annex I of the Industrial Emissions Directive are identical to those listed in annex I of the Convention and are thus subject to article 6 (1) (a) of the Convention.<sup>34</sup>

35. The Party concerned has not disputed this point.

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<sup>24</sup> Communication, p. 8, and communicant’s final written submissions, 5 December 2016, p. 3.

<sup>25</sup> Communicant’s final written submissions, 5 December 2016, pp. 3 and 4.

<sup>26</sup> Court of Justice of the European Union, Case C-583/11 P, Judgment of the Court, 3 October 2013, para. 45.

<sup>27</sup> Communicant’s final written submissions, 5 December 2016, pp. 3 and 4.

<sup>28</sup> Ibid., p. 4.

<sup>29</sup> Ibid., p. 4.

<sup>30</sup> Ibid., pp. 4 and 6.

<sup>31</sup> Ibid., p. 5.

<sup>32</sup> Ibid., p. 5.

<sup>33</sup> Ibid., pp. 5 and 6.

<sup>34</sup> Communication, p. 2.

### **Article 6 (10) – reconsideration or update of operating conditions**

36. The communicant alleges that the Party concerned fails to comply with article 6 (10) of the Convention because the Industrial Emissions Directive fails to provide for public participation where a permit is reconsidered or updated if:

- (a) A reconsideration or update is due to the publication of new BAT conclusions in the Official Journal of the European Union and to developments in the BATs allowing for the significant reduction of emissions if pollution caused by an installation is not significant (articles 21 (3) and (4) and 24 (1) (d) of the Directive);
- (b) A reconsideration or update is due to operational safety requirements (article 21 (5) (b));
- (c) A reconsideration or update is due to compliance with a new or revised environmental quality standard (article 21 (5) (c));
- (d) A permit is granted for a non-substantial change (see article 24 (1) (b));
- (e) Other cases such as time extension of operation, extension of capacities or other modifications of permit conditions that do not fall within points (a) to (d).<sup>35</sup>

37. In support of its allegations, the communicant refers to a CJEU decision,<sup>36</sup> which held that European Union law must be aligned with the Convention's rules on public participation.<sup>37</sup>

38. The Party concerned agrees with the communicant that European Union law should be properly aligned with the Convention's provisions.<sup>38</sup> However, the Party concerned disputes that the Directive's provisions fail to comply with article 6 (10) of the Convention.<sup>39</sup>

#### *Margin of discretion*

39. The communicant submits that Parties have a certain margin of discretion in applying article 6 (10) of the Convention but that this does not imply complete discretion in all cases.<sup>40</sup> The communicant submits that although the term "where appropriate" is an objective criterion, this provision must be interpreted in the light of the objective to guarantee effective public participation with the aim of furthering the accountability of and transparency in decision-making and strengthening public support for decisions on the environment in line with paragraph 10 of the Convention's preamble.<sup>41</sup> The communicant refers in this regard to the Committee's findings on communications ACCC/C/2009/41 (Slovakia)<sup>42</sup> and ACCC/C/2009/43 (Armenia).<sup>43</sup> It notes that, in the first of these two findings, the Committee found that the terms "*mutatis mutandis*" and "where appropriate" do "not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation".<sup>44</sup>

40. The communicant submits that *The Aarhus Convention: An Implementation Guide*<sup>45</sup> indicates clearly that the requirements of article 6 of the Convention apply to all decisions to permit activities within the scope of article 6 and that public participation is to be guaranteed in all cases when the public authority reconsiders or updates operating decisions for article 6 activities.<sup>46</sup> It further submits that it is stated in the Implementation Guide that "in case of

<sup>35</sup> Ibid., p. 7, and communicant's final written submissions, pp. 1 and 2.

<sup>36</sup> *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, Case C-416/10, Judgment of the Court, 15 January 2013.

<sup>37</sup> Communication, pp. 5 and 6.

<sup>38</sup> Party's response to the communication, para. 33.

<sup>39</sup> Ibid., paras. 34 and 65.

<sup>40</sup> Communication, p. 8 and communicant's final written submissions, p. 7.

<sup>41</sup> Ibid.

<sup>42</sup> ECE/MP.PP/2011/11/Add.3.

<sup>43</sup> ECE/MP.PP/2011/11/Add.1.

<sup>44</sup> Communication, p. 7, and communicant's final written submissions, p. 7, referring to ECE/MP.PP/2011/Add.3, paras. 55 and 56.

<sup>45</sup> United Nations publication, Sales No. E.13.II.E.3.

<sup>46</sup> Communication, p. 8.

any doubt, the provisions should be applied” and that article 6 (10) should be applied for all administrative procedures relating to the reconsideration of operation conditions for activities under the Directive.<sup>47</sup> The communicant submits in this regard that, while the Implementation Guide is not binding, it constitutes a relevant tool for clarifying the scope of article 6 of the Convention and should be taken into consideration.<sup>48</sup>

41. The communicant submits that, contrary to the foregoing, the Directive provides complete discretion to member States by denying the possibility for public participation in the procedures listed in paragraph 36 above.<sup>49</sup>

42. Regarding the claim by the Party concerned that it has exercised its discretion to limit public participation to certain “substantial and significant events” (see para. 49 below), the communicant submits that this is not an objective criterion and necessarily raises the question of what is to be understood as “substantial and significant events”.<sup>50</sup>

43. The communicant submits that, even though public participation should be guaranteed in all cases when a public authority reconsiders or updates operating conditions of an activity listed in annex I to the Convention, many of the permit review triggers where public participation is denied under the Directive are in any event “substantial and significant events” and public participation should be provided also if that criterion were to be adopted.<sup>51</sup>

44. The communicant submits that article 6 (10) is independent from paragraph 22 of annex I to the Convention. It refers in this regard to the Implementation Guide, which states that paragraph 22 of annex I deals with physical changes or extensions of activities, while article 6 (10) relates to changes to the operating conditions of activities covered by article 6 (1) of the Convention.<sup>52</sup>

45. As to the submissions of the Party concerned (see para. 51 below) regarding the Committee’s findings on ACCC/C/2009/41 (Slovakia), the communicant disagrees that these findings suggest that full-fledged public participation must be limited to significant cases such as the nuclear power plant concerned in that communication. The communicant submits that the findings rather make clear that reconsiderations and updates of operating conditions of activities listed in annex I are subject to the requirements of article 6 regardless of whether they involve any significant change or extension of the activity.<sup>53</sup>

46. As to the submissions of the Party concerned (see paras. 50 and 53 below) regarding the findings on communications ACCC/C/2006/17 (European Community)<sup>54</sup> and ACCC/C/2009/43 (Armenia),<sup>55</sup> the communicant submits that these cases are not relevant as the first concerned multiple permitting decisions and the second concerned the granting of a permit for an activity subject to environmental impact assessment, rather than a reconsideration or updating of permitting conditions.<sup>56</sup>

47. The communicant submits that the foregoing makes clear that public participation may not be restricted to substantial and significant events as submitted by the Party concerned but should rather be guaranteed in all cases where the public authority reconsiders or updates operating conditions of activities listed in annex I to the Convention.<sup>57</sup>

48. The Party concerned contends that the wording of article 6 (10) of the Convention provides a margin of discretion to Parties as to if and how they intend to apply the Convention’s public participation requirements when a permit is updated or reconsidered. It contends that stating otherwise would make the terms “applied *mutatis mutandis*, and where

<sup>47</sup> Communicant’s final written submissions, pp. 7 and 8.

<sup>48</sup> Ibid., p. 11.

<sup>49</sup> Communication, p. 8, and communicant’s final written submissions, p. 8.

<sup>50</sup> Communicant’s final written submissions, p. 8.

<sup>51</sup> Ibid., p. 9.

<sup>52</sup> Ibid., p. 8.

<sup>53</sup> Ibid., p. 9.

<sup>54</sup> ECE/MPP/2008/5/Add. 10.

<sup>55</sup> ECE/MPP/2011/11/Add.1.

<sup>56</sup> Communicant’s final written submissions, p. 9.

<sup>57</sup> Ibid.

appropriate” devoid of any meaning.<sup>58</sup> It submits that the communicant appears to accept that such discretion exists and that, therefore, the communicant’s argument that public participation should be granted in all cases where the public authority reconsiders or updates operating conditions of activities listed in annex I is not legally viable.<sup>59</sup>

49. According to the Party concerned, the central question is, therefore, whether it remained within its margin of discretion when, in article 24 of the Directive, it limited the conditions for triggering public participation to certain substantial and significant events.<sup>60</sup>

50. Regarding the Committee’s findings on communication ACCC/C/2009/43 (Armenia), the Party concerned argues that there was a risk in that case that the setting of thresholds might be arbitrary and decided on a case-by-case basis. The Party concerned submits that, in contrast, the wording of article 24 does not lack clarity or present a risk of arbitrary decisions by the public authority.<sup>61</sup>

51. Regarding the Committee’s findings on communication ACCC/C/2009/41 (Slovakia), the Party concerned draws attention to the fact that the case concerned compliance with the Convention in relation to a nuclear power plant, which constitutes an activity “of such a nature and magnitude … and increased potential impact on the environment”<sup>62</sup> that public participation was mandatory. It submits that, in line with this approach, article 24 specifically foresees full-fledged public participation in very clearly described and objectively defined cases (see para. 19 above).<sup>63</sup>

52. In addition, the Party concerned submits that article 24 complies with the underlying rationale of article 6 (1) (a) and (b) of the Convention, read in the light of paragraph 22 of annex I. Only the updating of those permits for activities whose threshold is provided by annex I (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 Convention’s public participation requirements.<sup>64</sup> The Party concerned concurs with the communicant’s submission that paragraph 22 of annex I is independent from article 6 (10) of the Convention and submits that paragraph 22 of annex I merely provides for a situation in which article 6 (1) (a) of the Convention clearly applies, while article 6 (10) of the Convention leaves discretion to the Parties to determine whether public participation is “appropriate”.<sup>65</sup>

53. The Party concerned submits that the findings of the Committee on communication ACCC/C/2006/17 (European Community) are more relevant to the situation at hand, stating that 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.<sup>66</sup>

54. Regarding the communicant’s submissions concerning the Implementation Guide, the Party concerned points out that the Implementation Guide is not legally binding but agrees that it can provide relevant guidance to the case at hand.<sup>67</sup> It contends that the excerpts cited by the communicant have to be read in their context. The Party concerned submits that, instead of making clear that article 6 of the Convention applies to all kinds of permitting decisions, the Implementation Guide confirms the Directive’s approach to delimiting the Convention’s public participation requirements to certain objectively determined cases in which the permit modifications entail changes that could significantly affect the

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<sup>58</sup> Party’s response, para. 37, and Party’s final written submissions, p. 3.

<sup>59</sup> Party’s final written submissions, p. 3.

<sup>60</sup> Party’s response, para. 48, and Party’s final written submissions, pp. 3 and 4.

<sup>61</sup> Party’s response, paras. 41 and 42.

<sup>62</sup> ECE/MPP/2011/11/Add.3, para. 57.

<sup>63</sup> Party’s response, paras. 43 and 44, and Party’s final written submissions, p. 4.

<sup>64</sup> Party’s response, para. 45.

<sup>65</sup> Party’s final written submissions, p. 4.

<sup>66</sup> Party’s response, paras. 50 and 51, citing Committee’s findings on communication ACCC/C/2006/17 (European Community), ECE/MPP/2008/5/Add.10, para. 43.

<sup>67</sup> Party’s response, paras. 54–56.

environment.<sup>68</sup> The Party concerned further submits that the Implementation Guide appears to cite the Directive as a valid example of application of article 6 (10) of the Convention.<sup>69</sup>

55. The Party concerned submits that, in light of the foregoing, the communicant's arguments are unfounded and that it fulfils its obligations under article 6 of the Convention.<sup>70</sup>

#### *Publication of new BAT conclusions and developments in the BATs*

56. The communicant submits that the environmental significance of the application of BATs is evidenced in the definition included in article 3 (10) of the Directive, which states that they are “designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole.”<sup>71</sup> It submits that, therefore, BATs are not only used to establish emission limit values in environmental permits, but also set the framework for the operating conditions of installations that have a high impact on health and the environment.<sup>72</sup>

57. The Party concerned submits that it would only be necessary to provide for public participation on the publication of all new BAT conclusions if the permitting authority were to consider a possible derogation from the applicable Associated Emission Levels, as this could have a negative impact on the environment. It alleges that, in all other cases, the discretion left to public authorities for setting emission limit values is rather limited as emission limit values must be based on these Associated Emission Levels. It submits that the Associated Emission Levels in the Directive were set following a lengthy procedure of information exchange with all relevant stakeholders, including civil society representatives, and that therefore public participation at the time of updating permits that take these Associated Emission Levels into account would be neither appropriate nor necessary.<sup>73</sup>

#### *Operational safety requirements*

58. The communicant submits that operational safety requirements may relate to avoiding risks in the vicinity of the facility.<sup>74</sup>

59. The Party concerned firstly submits that safety issues are often of a very technical nature and therefore not suitable for wide public consultation. It submits secondly that, where operational safety requirements relate to the presence of dangerous substances, they would be covered by the Seveso III Directive,<sup>75</sup> which requires member States to involve the public in decisions relating 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. The Party concerned alleges that, therefore, the rights of the public concerned are sufficiently protected by the Seveso III Directive where this is important from a safety perspective.<sup>76</sup>

#### *Compliance with new or revised environmental quality standards*

60. The communicant submits that environmental quality standards are defined in article 3 (6) of the Directive as the set of “requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Union law”. It submits that the relevance of environmental quality standards is also revealed in article 18 of the Directive, which provides that additional measures shall be included in a permit if the environmental quality standard requires stricter conditions than those achievable by the use of the BATs. It also states that environmental quality standards are contained in European Union Directives

<sup>68</sup> Ibid., paras. 58 and 62.

<sup>69</sup> Ibid., para. 63.

<sup>70</sup> Ibid., para. 65.

<sup>71</sup> Communicant's final written submissions, p. 9.

<sup>72</sup> Ibid., p. 10.

<sup>73</sup> Party's final written submissions, pp. 4 and 5.

<sup>74</sup> Communicant's final written submissions, p. 10.

<sup>75</sup> 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, *Official Journal of the European Union*, L 197 (2012), pp. 1–37.

<sup>76</sup> Party's final written submissions, p. 5.

such as the Habitats Directive and the Water Framework Directive.<sup>77</sup> The communicant submits that, given that they relate to environmental conditions, the public concerned should be able to participate in the reconsideration or update of the operating conditions of a permit that is required in order to comply with the environmental quality standards.

61. The communicant cites in this regard article 6 (6) (c) of the Convention, stating that this provision requires access to examination at the time of the public participation procedure to a description of the measures envisaged to prevent and/or reduce the effects, including emissions. It submits that this would, in particular and *a fortiori*, concern the mandatory considerations regarding compliance with relevant environmental quality standards.<sup>78</sup>

62. The Party concerned submits that setting stricter or additional emission limit values is not an absolute requirement for a permit under article 18 of the Directive (see para. 18 above), as this is “without prejudice to other measures which may be taken to comply with environmental quality standards.” It alleges that, considering the margin of discretion left to public authorities and the likely positive environmental impact of the updated permit, public participation is not necessary in these cases as such participation primarily aims at avoiding decisions that are detrimental to the environment.<sup>79</sup>

#### *Other cases*

63. The communicant submits that there are also other cases of reconsiderations and updates with a significant environmental impact where the Directive does not provide for public participation, as set out below.

64. Firstly, decisions on whether to grant any optional derogations for large combustion plants under articles 31–33 and 36 (among others) from the emission limit values set in annex V, part 1, of the Directive have significant and substantial effects regarding air pollution but would not be covered by article 21 (5) (a) of the Directive as the permit conditions are considered unchanged. The communicant submits that, nonetheless, the public authority would be required under the Directive to objectively reconsider whether the emission limit values should be strengthened or maintained under that derogation period.<sup>80</sup>

65. Secondly, establishing an environmental inspection system under article 23 (1) of the Directive should be subject to public participation because this system is intended to address “the examination of the full range of relevant environmental effects from the installations concerned”, as stated in that provision.<sup>81</sup>

66. Thirdly, the time extension of operation or other modifications of permit conditions significantly affecting the environmental impacts are not covered by the requirement for public participation under the Directive.<sup>82</sup>

67. The Party concerned submits that derogations under chapter III of the Directive would not normally imply any reconsideration or update of the existing permits.<sup>83</sup>

68. The Party concerned submits that inspection plans would fall under article 7 of the Convention and are, as such, not relevant to the present case.<sup>84</sup>

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<sup>77</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *Official Journal of the European Communities*, L 206, vol. 35 (1992), pp. 7–50; and 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, *Official Journal of the European Communities*, L 327 (2000), pp. 1–72.

<sup>78</sup> Communicant’s final written submissions, p. 10.

<sup>79</sup> Party’s final written submissions, p. 5.

<sup>80</sup> Communicant’s final written submissions, pp. 10 and 11.

<sup>81</sup> *Ibid.*, p. 11

<sup>82</sup> *Ibid.*

<sup>83</sup> Party’s final written submissions, p. 5.

<sup>84</sup> *Ibid.*

69. The Party concerned further submits that any updates implying significant environmental impacts are likely to be considered substantial changes in the meaning of article 20 (2) of the Directive and thus require a permit and prior public participation.<sup>85</sup>

*Review under article 25 of the Industrial Emissions Directive*

70. In reply to the submissions by the Party concerned (see paras. 72 and 73 below), the communicant submits that the review procedure in article 25 of the Directive does not affect its allegations. It submits that article 25 is limited to decisions, acts or omissions that have already been subject to public participation under article 24 (1) of the Directive (see para. 19 above) and those subject to the information obligation under article 24 (2) (see para. 22 above). Regarding decisions under article 24 (1), the communicant reiterates that its communication concerns cases in which the Directive fails to provide for public participation and submits that this remedy is therefore inapplicable. Regarding decisions under article 24 (2), the communicant submits that these decisions could be challenged despite not having been preceded by public participation but that an applicant could not challenge the absence of public participation.<sup>86</sup>

71. The communicant further submits that article 25 only provides for a review procedure once a permit has already been granted, reconsidered or updated and that this does not ensure that the public concerned can participate “when all options are open” as required by article 6 (4) of the Convention and is given “early and effective” and meaningful opportunities to participate in the sense of article 6 (2)–(9) of the Convention.<sup>87</sup>

72. The Party concerned submits that, even in cases in which the European Union legislator did not consider it necessary to provide for public participation, there are other means by which the public may challenge the substantive or procedural legality of decisions, acts or omissions subject to article 24 of the Directive. It submits that, by covering decisions under article 24 (2) of the Directive, access to justice under article 25 applies to all decisions on granting, reconsideration or updating of a permit, including those that have not been preceded by public participation.<sup>88</sup>

73. The Party concerned agrees with the communicant that, in cases where there is no right to public participation, the review procedure could not be used to challenge the lack of public participation but submits that the decision to update or reconsider the permit conditions could be challenged on all points of substance, for instance the operating conditions, emission limit values and monitoring provisions. It further submits that, while it is indeed less early and effective than prior public participation, this review procedure is both necessary and sufficient to protect the rights of the public concerned in cases of updates and reconsiderations of lesser significance or for those that leave a large margin of discretion to the competent authority.<sup>89</sup>

### **III. Consideration and evaluation by the Committee**

74. The European Union signed the Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005.<sup>90</sup> The European Union has been a Party to the Convention since 17 May 2005.

#### **Admissibility**

75. The Party concerned disputes the admissibility of the communication. It submits that it has established a complete system of remedies, specifically referring to TFEU articles 263

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<sup>85</sup> Ibid.

<sup>86</sup> Communicant’s final written submissions, pp. 6 and 7.

<sup>87</sup> Ibid., p. 7.

<sup>88</sup> Party’s response, paras. 35, 36 and 42, and Party’s final written submissions, p. 6.

<sup>89</sup> Party’s final written submissions, p. 6.

<sup>90</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, *Official Journal of the European Union*, L 124 (2005), pp. 1–3.

(4), 267 and 277, which the communicant did not rely on (see paras. 27–29 above). It also submits that paragraph 21 of the annex to decision I/7 leaves no doubt that domestic remedies are to be taken into account unless they are unsatisfactory.<sup>91</sup>

76. In this context, the Committee recalls its findings on communication ACCC/C/2008/32 (European Union), part II, in which the Committee, after examining TFEU articles 263 (4) and 267, found that the Party concerned fails to comply with article 9 (3) and (4) of the Convention regarding access to justice by members of the public.<sup>92</sup> Regarding the reference by the Party concerned to TFEU article 277,<sup>93</sup> the Committee also recalls that article 277 does not provide a separate basis for legal standing and can only be used as an ancillary plea once an applicant has sufficiently accessed the European Union courts.<sup>94</sup>

77. Regarding the specific allegations made in this case, the Committee considers that the communicant cannot be required to exhaust procedures that do not meet the requirements of the Convention. The Committee recalls its findings on communication ACCC/C/2008/32 (European Union), part I, in which it held that “the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts”<sup>95</sup>. In this respect, the situation in the legal system of the Party concerned remains the same and, in consistency with its previous findings, the Committee accordingly finds the communication to be admissible.<sup>96</sup>

### **Scope of consideration**

78. The communicant and the Party concerned have exchanged arguments regarding article 25 of the Industrial Emissions Directive, which concerns access to justice. However, since the communicant has not alleged that article 25 of the Directive fails to comply with article 9 of the Convention, the Committee will not examine the compliance of article 25 in the context of this case.

79. The Committee notes with interest the submission of the Party concerned (see paras. 72 and 73 above) that the requirements regarding access to justice in article 25 of the Directive (which are clearly based on article 9 (2) of the Convention) apply to all procedures of granting, reconsideration or updating of a permit, and not only to those listed in article 24 (1) of the Directive. The Committee, without entering into the merits of the issue, emphasizes however that, contrary to what the Party concerned appears to suggest, providing the public with access to justice cannot compensate for failing to comply with the requirements of articles 6, 7 or 8 of the Convention.

80. The allegations regarding procedures for optional derogations in chapter III and environmental inspection plans under article 23 of the Directive were raised by the communicant in its final written submissions. Accordingly, the Party concerned has not had a proper opportunity to respond to them and the Committee thus will not examine them in this case.

81. The Committee notes that the communicant has not challenged the procedural requirements regarding public participation envisaged in the Directive and in particular its annex IV and thus the Committee will not examine them in this case.

### **Extent of obligations on the Party concerned in relation to article 6**

82. On its approval of the Convention, the Party concerned made a declaration that met the requirements of article 19 (5).<sup>97</sup>

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<sup>91</sup> Party’s response to the communication, para. 28.

<sup>92</sup> ECE/MPP/C.1/2017/7, para. 122.

<sup>93</sup> Party’s response to the communication, paras. 18, 21 and 24.

<sup>94</sup> Ibid., para. 14.

<sup>95</sup> ECE/MPP/C.1/2011/4/Add.1, paras. 89 and 90; and ECE/MPP/2011/2/Add.1, decision IV/9, para. 6.

<sup>96</sup> See Party’s comments on Committee’s draft findings, 17 February 2020, p. 1.

<sup>97</sup> ECE/MPP/C.1/2017/18, paras. 48 and 49, and ECE/MPP/C.1/2017/21, paras. 83–86.

83. The Committee has considered the effect of the declaration in previous cases concerning the Party concerned.<sup>98</sup> In those findings, the Committee held that the effect of the declaration by the Party concerned is that it assumes obligations under the Convention to the extent that it has European Union law in force; member States remain responsible for the implementation of obligations that are not covered by European Union law in force.<sup>99</sup> As set out in the Committee's findings on communication ACCC/C/2010/54 (European Union), regarding those matters in which the Party concerned has assumed obligations, the Party concerned should have in place a regulatory framework that reflects all the relevant provisions of the Convention and ensures its effective implementation.<sup>100</sup>

84. Regarding the present communication, the Committee considers that, in the case of publication of new BAT conclusions and developments in the BATs, operational safety requirements and compliance with new or revised environmental quality standards, the obligation to conduct an update and, where necessary, reconsideration of the permitting conditions of certain facilities derives directly from article 21 (3), (4) and (5) (b) and (c) of the Directive.

85. The Committee considers that a different situation arises when a permit is granted for a non-substantial change or in the case of time extension of operation, extension of capacities or other modifications of permit conditions.<sup>101</sup>

86. In accordance with article 20 (1) of the Directive, "Member States shall take the necessary measures to ensure that the operator informs the competent authority of any planned change in the nature or functioning, or an extension of the installation which may have consequences for the environment. Where appropriate, the competent authority shall update the permit." Following this, in accordance with article 20 (2) of the Directive, "Member States shall take the necessary measures to ensure that no substantial change planned by the operator is made without a permit granted in accordance with this Directive."

87. The Committee considers the above-mentioned legal scheme as somewhat similar to the determination under article 6 (1) (b) of the Convention that requires Parties to determine whether an activity which is outside the scope of annex I, and which may have a significant effect on the environment, should nevertheless be subject to the provisions of article 6. In these cases when it is determined for each case individually, the competent authority is required to make a determination which will have the effect of either creating an obligation to carry out a public participation procedure in accordance with article 6, or exempting the activity in question from such an obligation.

88. The Committee notes the communicant's submission in paragraph 36 (e) above that the Party concerned fails to comply with the Convention since it does not require public participation when a permit is updated to extend time of operation, capacities or for other modifications of permit conditions that do not fall within paragraph 36 (a) to (d) above. However, the Committee considers that these will either be cases where the Directive requires public participation or where the Party concerned did not assume obligations. Specifically, article 24 (1) (b) of the Directive will require public participation wherever these changes are considered to be "substantial changes" under article 3 (9) of the Directive. Where these changes are not considered to be substantial in the meaning of the Directive, there will not be any obligations under the Directive and the Party concerned will accordingly not have assumed any obligations under the Convention.

89. The foregoing does not mean that a reconsideration and update of a permit for changes by operators that are considered "non-substantial" under the Directive, for example, regarding time extension of operation, may not entail a requirement for a Party to the Convention to conduct public participation under article 6 (10) of the Convention. However, this question falls outside the scope of these findings, which only address the compliance with the Convention of the Party concerned as a regional economic integration organization

<sup>98</sup> ECE/MP.PP/C.1/2011/4/Add.1, para. 58, ECE/MP.PP/C.1/2017/18, paras. 49–51, and ECE/MP.PP/C.1/2017/21, paras. 86–89.

<sup>99</sup> ECE/MP.PP/C.1/2017/18, para. 51, and ECE/MP.PP/C.1/2017/21, para. 89.

<sup>100</sup> See, for example, ECE/MP.PP/C.1/2012/12, paras. 77 and 80.

<sup>101</sup> Communication, p. 7, and communicant's final written submissions, pp. 1 and 2.

within the meaning of article 17 of the Convention and not of individual European Union member States.

90. In light of the foregoing, the Committee concludes that the Party concerned has not assumed obligations under the Convention regarding non-substantial changes of installations besides those discussed in paragraphs 86 and 87 above, nor regarding any time extensions of operation, extensions of capacities or other modifications of permit conditions that do not meet the requirements of article 24 (1) (b) of the Directive. The Committee will accordingly limit its considerations to the publication of new BAT conclusions and developments in the BATs, operational safety requirements and compliance with new or revised environmental quality standards. These are examined in paragraphs 105–118 below.

### **Applicability of article 6 (10)**

#### *Activities referred to in article 6 (1)*

91. Article 6 (10) of the Convention only applies to activities that fall under article 6 (1). As the communicant submits, the activities listed in annex I of the Directive are, to a large extent, the same or almost the same as those listed in annex I to the Convention. The Committee considers that the communicant's allegations relate to provisions of the Directive that regulate the decision-making to permit these activities. This does not appear to be disputed by the Party concerned. The Committee accordingly examines the compliance of the Party concerned regarding activities under the scope of article 6 (1) of the Convention.

#### *Reconsideration or update of operating conditions*

92. The Committee next considers whether the submissions of the communicant relate to “reconsiderations or updates of the operating conditions” of such activities in the sense of article 6 (10) of the Convention.

93. The Committee notes that the relevant provisions of the Directive in the case of the publication of new BAT conclusions and developments in the BATs, operational safety requirements and compliance with new or revised environmental quality standards (article 21 (3), (4) and (5) (b) and (c)) expressly refer to the reconsideration and, where necessary, updating of the permit conditions. In addition to the wording of these provisions, the Committee considers that, substantively, the reconsideration of permit conditions related to these three cases are clear examples of a reconsideration or update of operating conditions in the sense of the Convention. This does not seem to be disputed by the Party concerned.

94. The Committee accordingly considers that, by requiring the competent public authorities to reconsider and, if necessary, update the “permit conditions” of existing industrial facilities for changes in BATs, operational safety requirements or environmental quality standards, article 21 (3) and (4), (5) (b) and (c) are to be characterized as reconsiderations and updates of operating conditions in the meaning of article 6 (10) of the Convention.

#### *Mutatis mutandis and where appropriate*

95. The parties disagree as to the meaning of the terms “*mutatis mutandis*” and “as appropriate” in article 6 (10) of the Convention, in particular regarding the margin of discretion awarded to the Parties in implementing this provision. This disagreement goes to the heart of this case.

##### *(i) Mutatis mutandis*

96. As the Committee has previously made clear, the reference in paragraph 10 to “*mutatis mutandis*” simply means “with the necessary changes”, i.e. when applying the provisions of paragraphs 2 to 9 of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority applies those paragraphs with the necessary

changes.<sup>102</sup> Rather than conveying some discretion for the Parties whether or not to apply these provisions, it refers to the changes necessary due to the nature of the given decision-making procedure.

(ii) *Where appropriate*

97. The Committee has previously found that the phrase “where appropriate” does not imply complete discretion for a Party to determine whether or not it was appropriate to provide for public participation.<sup>103</sup> Rather, the term “where appropriate” introduces an objective criterion to be applied in line with 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”,<sup>104</sup> and “aiming thereby to further the accountability of and transparency in decision-making and strengthen public support for decisions on the environment”.<sup>105</sup> Most importantly, the term “where appropriate” does not preclude a review by the Committee on whether the Party concerned should have provided for public participation in the particular case.<sup>106</sup>

98. This does not mean that the Committee shares the communicant’s view (see para. 47 above) that public participation should be guaranteed in all cases where the public authority reconsiders or updates the operating conditions for activities listed in annex I to the Convention. As correctly stated by the Party concerned (see para. 49 above), the question is rather whether the Party concerned was within its margin of discretion as to what was “appropriate” when it decided not to provide for public participation regarding the reconsideration and possible update of the permits’ conditions.

99. The Party concerned submits that the Committee’s findings on communication ACCC/C/2006/17 (European Community) are instructive to the present case. While communication ACCC/C/2006/17 (European Community) concerned the issue of multiple permits, the Committee agrees that those findings provide useful guidance. As in the case of multiple permits, the Committee considers that, when determining whether it will be “appropriate”, and thus required, to provide for public participation meeting the requirements of article 6 (2)–(9) when a public authority reconsiders or updates the operating conditions of an activity subject to article 6, some kind of significance test, to be applied at the national level to each such decision-making procedure in question, is the most appropriate way to understand the requirements of the Convention.<sup>107</sup>

100. The Committee recalls that in its findings on communication ACCC/C/2006/17 (European Community), it found that:

If ... there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the [activity’s] basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.<sup>108</sup>

101. The Committee considers the above finding pertinent to the case of a reconsideration or update of an activity’s operating conditions also. Specifically, if the reconsideration or update of an activity’s operating conditions is capable of significantly changing the basic parameters of the activity, or will address significant environmental aspects of the activity not already covered by the permitting decision, and no public participation process meeting

<sup>102</sup> ECE/MP.PP/C.1/2019/3, para. 70, see also *The Aarhus Convention: An Implementation Guide* (United Nations publication, Sales No. E.13.II.E.3), p. 159.

<sup>103</sup> ECE/MP.PP/2011/11/Add.3, para. 55, and ECE/MP.PP/C.1/2019/3, para. 71.

<sup>104</sup> Convention, ninth preambular paragraph.

<sup>105</sup> Ibid., tenth preambular paragraph, and ECE/MP.PP/2011/11/Add.3, para. 56.

<sup>106</sup> ECE/MP.PP/2011/11/Add.3, para. 56.

<sup>107</sup> ECE/MP.PP/2008/5/Add.10, para. 43.

<sup>108</sup> Ibid.

the requirements of the Convention is foreseen, this would not meet the requirements of the Convention.

102. The Committee's findings on communication ACCC/C/2014/104 (Netherlands) provide further guidance as to how the words "as appropriate" in article 6 (10) should be applied in practice. In those findings, which concerned a reconsideration and update of the duration of a nuclear power plant, the Committee found that "except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of duration to be subject to the provisions of article 6."<sup>109</sup> The Committee considers that a similar test should be applied whenever a public authority reconsiders or updates an activity's operating conditions.

103. Accordingly, when a public authority reconsiders or updates the operating conditions for an activity subject to article 6 of the Convention, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate" and thus required. It would be for a Party to demonstrate to the Committee that any possible change in the activity's parameters would not be capable of significantly changing the basic parameters of the activity and would not address significant environmental aspects of the activity.

104. The Committee emphasises that it is not the actual outcome of the reconsideration or the update that is determinative of whether public participation should be carried out. Rather, in line with the Committee's findings on communication ACCC/C/2006/17 (European Community), the key criterion is whether the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity. In this regard, the scope of what is to be considered "appropriate" must be even more limited if the update of the operating conditions may itself have a significant effect on the environment.<sup>110</sup> However, it is not decisive whether the operating conditions of the activity will indeed ultimately be updated or will in fact have significant environmental effects. Likewise, it is immaterial that, if the operating conditions are updated, the updated conditions could in some respects have a beneficial effect on the environment, human health and safety. The crucial point is whether the reconsideration or update is "capable of" changing the activity's basic parameters or will "address" significant environmental aspects of the activity.

### **Compliance with article 6 (10)**

#### *(i) Publication of new BAT conclusions and developments in the BATs*

105. Article 21 (3) and (4) of the Directive require that the permit conditions of the installations concerned shall be reconsidered and, if necessary, updated if new BAT conclusions are published or if developments in BATs allow for "significant reduction of emissions". "Best available techniques", as defined in article 3 (10) of the Directive, provide "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".

106. The Committee notes the submission by the Party concerned that the BAT conclusions are established through a lengthy process including exchanges with relevant stakeholders.<sup>111</sup> Without examining these processes, the Committee makes clear that providing for public participation during the preparation of generally applicable standards like the BAT conclusions in no way relieves the Party concerned from ensuring opportunities for the public to participate in decisions on specific activities, such as the subsequent permitting procedures that will decide how those standards are to be applied to a particular installation.

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<sup>109</sup> ECE/MPP/C.1/2019/3, para. 71.

<sup>110</sup> ECE/MPP/C.1/2017/17, para. 85, and ECE/MPP/C.1/2019/3, para. 71.

<sup>111</sup> Party's final written submissions, pp. 4 and 5, and Party's comments on Committee's draft findings, 17 February 2020, p. 3.

107. The Committee also takes note of the submission by the Party concerned that the discretion of public authorities would be limited in this kind of reconsideration, as they would be required to base applicable emission limit values on the Associated Emission Levels and that only in case of a derogation from these levels is a negative impact on the environment to be expected (see para. 57 above). The Committee considers, however, that in order to ascertain whether a specific facility meets the requirements of the Associated Emission Levels and the BATs more generally, the public authorities must evaluate the facility's compliance with its permit conditions. This requires an examination of the operating conditions of the permit and will ultimately determine whether further measures will be taken to reduce the environmental impact of the facility or whether no measures will be taken at all.

108. Given the above, the Committee considers that, where a public authority reconsiders and, if necessary, updates the operating conditions of an activity subject to article 6 of the Convention due to the publication of new BAT conclusions or developments in BATs, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is “appropriate”, and thus required.

109. While there may be situations in which a Party may not be required to apply article 6 (2)–(9) of the Convention to permit reconsiderations based on the publication of new BAT conclusions or to ensure compliance with developments in the BATs, in many situations such reconsiderations could, and in reality often would, modify the future environmental impact of a given facility. Accordingly, a legal framework that does not address the possibility of such situations cannot be compatible with the requirement to apply the provisions of article 6 of the Convention “where appropriate”. In the light of the above, the Committee finds that, by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under article 21 (3) and (4) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention.

#### *(ii) Operational safety requirements*

110. Article 21 (5) (b) of the Directive requires that permit conditions shall be reconsidered and, where necessary, updated if operational safety requires other techniques to be used. The Directive does not define “operational safety” requirements. Generally, operational safety requirements are understood as intended to ensure the safe operation of an installation and serve to prevent impacts on humans and the surrounding environment. Accordingly, at least some of a facility’s operational safety requirements will concern the facility’s potential for having impacts on the environment, human health and safety.

111. Based on the above, the Committee considers that where a public authority reconsiders and, where necessary, updates the operating conditions of an activity subject to article 6 of the Convention in order to meet operational safety requirements, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is “appropriate”, and thus required.

112. It is clear to the Committee that the argument of the Party concerned that, due to their “very technical nature” (see para. 59 above), operational safety requirements would not be suitable for “wide public participation”, is incorrect. The public includes persons with different expertise, knowledge, opinions or experience.<sup>112</sup> To exclude the possibility for public participation on the basis that issues are too technical would thus be unfounded and, moreover, contrary to the Convention’s objectives.

113. The Committee also notes the submission of the Party concerned that operational safety requirements concerning the presence of dangerous substances would be covered by the Seveso III Directive (see para. 59 above). Without entering into a detailed assessment of

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<sup>112</sup> ECE/MR.PP/C.1/2015/10, para. 82.

the requirements of that Directive, the Committee considers that it is sufficient to state that not all changes to operational safety requirements to prevent or reduce environmental impacts will concern the presence of dangerous substances. Accordingly, the requirements of the Seveso III Directive do not compensate for the failure to provide for public participation for reconsiderations and updates of operational safety requirements that do not relate to the presence of dangerous substances.

114. The Committee does not exclude that there may be situations in which a Party may not be required to apply article 6 (2)–(9) of the Convention to permit reconsiderations based on operational safety requirements. However, the Committee finds that, by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under article 21 (5) (b) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention.

*(iii) Compliance with new or revised environmental quality standards*

115. Article 21 (5) (c) of the Directive requires that permit conditions shall be reconsidered and, where necessary, updated where it is necessary to comply with a new or revised environmental quality standard in accordance with article 18 of the Directive. Article 3 (6) of the Directive defines environmental quality standard as “the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof”. It is obvious to the Committee that measures taken to comply with environmental quality standards will regulate the environmental impact of a facility.

116. Taking into account the above, the Committee considers that where a public authority reconsiders and, where necessary, updates the operating conditions of an activity subject to article 6 of the Convention in order to comply with a new or revised environmental quality standard, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is “appropriate”, and thus required.

117. The Committee takes note of the submission of the Party concerned that article 18 of the Directive may not necessarily lead to additional measures being included in the permit but that article 18 may also be addressed by the adoption of “other measures” (see para. 62 above). On this point, the Committee reiterates (see para. 104 above) that, when assessing whether public participation is “appropriate” in the context of a reconsideration of a permit, it is not decisive whether the permit is indeed finally updated, for instance by including additional measures in the permit. Likewise, it is immaterial that, should measures indeed be adopted, they may in some respects have a beneficial effect on the environment. Rather, the public concerned should be given an opportunity to participate at a stage where the public authorities consider whether the permit should be updated or not.

118. The Committee does not exclude that there may be situations in which a Party may not be required to apply article 6 (2)–(9) of the Convention in permit reconsiderations based on new or revised environmental quality standards. However, the Committee finds that, by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under article 21 (5) (c) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention.

## **IV. Conclusions and recommendations**

119. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings regarding non-compliance**

120. The Committee finds that, by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under

article 21 (3), (4) and (5) (b) and (c) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention.

## B. Recommendations

121. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, recommends that the Party concerned put in a place a legally binding framework to ensure that, when a public authority in a Member State of the Party concerned reconsiders or updates permit conditions pursuant to national laws implementing article 21 (3), (4) and (5) (b) and (c) of the Industrial Emissions Directive, or the corresponding provisions of any legislation that supersedes that Directive, the provisions of article 6 (2)–(9) will be applied, *mutatis mutandis* and where appropriate, bearing in mind the objectives of the Convention.

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