

**Aarhus Convention
Compliance Committee**

Palais des Nations
1211 Geneva
Switzerland

In Prague on 9 November 2022

Comments on the draft advice on decision VII/8m (Netherlands)

Dear Madam / Dear Sir,

we are writing to provide our comments on the Compliance Committee's draft advice on decision VII/8m (Netherlands). First of all, we are very grateful for the initiative of Netherlands as well as for the comprehensive reply of the Compliance Committee. It provided a useful platform for clarifying the way in which Article 6 (10) and Article 6 (1) in conjunction with annex I, paragraph 22 of the Aarhus Convention shall be interpreted and applied in practice, which is highly appreciated. However, upon studying the draft reply in more detail, we came across a few issues which may, in our view, require deeper reflection and a possible reconsideration. We are therefore grateful for the opportunity to send our comments.

I. Situations where public participation is to be allowed according to Article 6 (10)

In case of change or extension of an activity listed in annex 1, public participation is required under Article 6 (1) (a) (i.e. always – if it itself meets the criteria/thresholds set out in the annex) or under Article 6 (1) (b) (i.e. provided that the proposed activity may have a significant effect on the environment – in all other cases). This follows directly from the text of the Convention. In case of a reconsideration or update of operating conditions according to Article 6 (10), the Compliance Committee states that public participation is required if the reconsideration or update “is capable of significantly changing the basic parameters of the activity” or “will address significant aspects of the activity”. Provisions of annex I, paragraph 22 and Article 6 (10) shall be applied separately or simultaneously (sequentially), depending on the situation.

The Committee also states that a reconsideration or update of operating conditions that will address significant environmental aspects of the activity may not necessarily have a significant effect on the environment. It seems to us that the same would apply for the second situation

where the reconsideration or update is “capable of significantly changing the basic parameters of the activity” – changes to the basic parameters of the activity may not always have significant (or even any) effects on the environment (e.g. a change in the identity of the operator may not have any effects on the environment, but the Committee suggests that it could be a case of significant change to the basic parameters of the activity, which would require public participation). It follows that the extent of situations where public participation is required is wider in the case of reconsideration or update of operating conditions than in the case of change or extension of an activity listed in annex 1, which does not itself meet the criteria/thresholds set out in the annex or for which there is no criteria/thresholds set.

We believe that this interpretation does not correspond to the text and objectives of the Aarhus Convention and that it goes beyond its framework. A change or extension of an activity listed in annex 1 usually represents a more serious intervention than a reconsideration or update of operating conditions. This seems to be reflected in the text of the Convention, cf. “where appropriate” in Article 6 (10) and nothing of such kind in annex 1, paragraph 22. We would therefore argue that the phrase “where appropriate” contained in Article 6 (10) should be interpreted with consideration of the extent to which public participation is required in case of changes or extensions of activities listed in annex 1 and that public participation should not be required to a wider extent than in this case. The objective of the Convention, as defined in Article 1, is to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. In our view, it should not be possible to extend the requirements of the Convention to areas that are not even indirectly related to this objective (or at least potentially, but reasonably so). The interpretation provided by the Compliance Committee makes it possible to intervene almost arbitrarily in the legal sphere of the operators of the activities in question, and the only criterion for that are concepts such as “significant change” and “basic parameters”. These concepts are not clearly defined. Many problems may arise in connection with this interpretation, despite the fact that it is not clear why the well-known concept of assessing whether the relevant change may have a significant effect on the environment is not used (as this would also simplify the application of this provision, because it would align it with the cases where EIA is required).

We understand that the interpretation of Article 6 (10) of the Aarhus Convention is based on the previous findings of the Compliance Committee in case ACCC/C/2014/121, paragraph 103.

In paragraph 100 of this case, reference is made to an earlier case ACCC/C/2006/17, which is probably where the criteria of “is capable of significantly changing the basic parameters of the activity” or “will address significant aspects of the activity” came from. However, we do not believe that this interpretation should be applied generally in all cases of reconsiderations or updates of operating conditions as the situation of that case was in fact quite different. If the Committee were to insist that these criteria should be applied generally in all cases of reconsiderations or updates of operating conditions, it should thoroughly justify this view.

In light of the above, we would like to suggest to the Committee to either reconsider its interpretation of Article 6 (10) of the Aarhus Convention or to provide a more detailed explanation, especially with regard to these questions:

- Why is the Committee requiring a wider extend of public participation in the case of reconsideration or update of operating conditions than in the case of change or extension of an activity listed in annex 1, which does not itself meet the criteria/thresholds set out in this annex or for which there is no criteria/thresholds set?
- What are the reasons for the significance test under Article 6 (10) to be “is capable of significantly changing the basic parameters of the activity” or “will address significant aspects of the activity” instead of “may have a significant effect on the environment” such as when applying annex I, paragraph 22, second sentence of the Aarhus Convention or as widely used and known in case of EIA?

II. Changes to activity that does not itself meet the criteria or thresholds set in annex I

In relation to the interpretation provided in paragraph 20 (c) and (f) of the draft advice, we would appreciate a thorough reconsideration of the interpretation provided and/or a more detailed explanation – what provisions of the Convention is this interpretation based on and what related considerations did the Compliance Committee apply? We believe that the interpretation goes beyond the text of the Aarhus Convention. It also seems to be in conflict with the views expressed by the European Court of Justice with regard to similar provisions of the EIA Directive (cf. Case C-411/17, paras 77 and 78). We believe that annex 1, paragraph 22 of the Aarhus Convention should be interpreted as it is written in the Convention, i.e. only the size of the proposed change or extension itself matters, not the size of the activity as a whole.



Ministerstvo životního prostředí

Thank you very much for your time and consideration.

Kind regards

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