

Comments Draft Advice it has prepared for the Netherlands concerning the implementation of paragraph 3 (a) of the decision VII/8m,

From: Environmental Law Officer of the Irish Environmental Network

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As Environmental Law Officer of the Irish Environmental Network, IEN, the coalition of national eNGOs in Ireland – I offer the following comments on the matter of the above draft advice for consideration by the Committee, and very much welcome the opportunity to do so.

1. In the first instance I wish to commend the Netherlands for its [request](#)¹ in seeking advice from the Committee on this matter, in order to ensure the compliance in its approach in responding to decision VII/8m in respect of the findings in communication ACCC/C/2014/104.
2. Secondly, the Committee has prepared a very helpful and useful piece of advice drawing on the Committee's previous findings in a very thorough and comprehensive way, and it has served to distinguish the implications of Annex I paragraph 22 and Article 6(10) and the intersection with Article 6(1) (a) and (b) in a way which I have found to be very helpful on reflection, as this matter is more complex than it might seem on first glance.
3. Some further comments and recommendations are detailed below for the consideration of the Committee in respect of the advice

Focusing on the objective of the Convention:

4. As an overarching sanity check – it is recommended that the advice includes near the start perhaps after paragraph 8, a new paragraphs highlighting the importance of the Party concerned ensuring in its approach, a purposive approach to what the Convention is seeking to do address very distinctly in para 22 of Annex I and Article 6(10), and in triggering public participation requirements. The fundamental guide is to protect the interests of the public in respect of the Article 1 objective of the convention.

Regarding paragraphs 11 and 12.

5. The emphasis on the need for case by case analysis across the guidance and in particularly paragraph 11, and in the scenarios set out in paragraph 9 of the draft advice is very welcome and helpful.
6. I submit that in the scenarios of changes which fall to be examined and which are set out in paragraph 20, it is those under Article 6(1)(b) where there is potentially the most vulnerability that the consequences of the change and the imperative for public participation obligations to be triggered may be overlooked by an overly formulaic approach, and hence the need for case by case examination is key.
7. The Party concerned provided in its question 2 examples of changes to administrative obligations which it felt would not be an update to operating conditions. I would respectfully consider that each of the three categories in the examples provided in their question – might indeed result in significant environmental effects and result in a positive screening under Article 6(1)(b), depending on the circumstances.
8. I note and welcome that the Committee effectively agrees with this in paragraph 12. It indicates that at least one of the three sets of examples (“changes in certain reporting of monitoring requirements”), might be capable of “changing the basic parameters of the activity or would address significant environmental aspects of the activity”.

¹ https://unece.org/sites/default/files/2022-04/frPartyVII.8m_22.04.2022_questions.pdf

9. I acknowledge that the Committee in paragraph 12 caveats its comments in respect of the other two examples in the absence of the relevant details. However, I submit in discussing this with colleagues – we found the Committee’s view surprising that it *“could not readily see how either the first or third example would be capable of either changing the basic parameters of the activity or would address significant environmental aspects of the activity.”* We considered particularly in the context of this advice arising in the context of a nuclear facility, but even in the context of other activities – that concerns would arise if there was no public participation on changes to the matters detailed in examples 1 and 2 by the Party concerned, given the potential for impacts to arise, or changes in the nature of impacts to arise, and I expand on this below.
10. Specifically in respect of the Party concerned’s wording on example 1, it refers to: *“adaption of the description of the management system, such as the description of the organizational structure, the organizational units or the required functions, or of the description of quality assurance systems, etc.;”*
- The word **“adaption”** used in example 1 is in itself significant, with “to adapt” meaning as it is variously defined as *“to make (something) suitable for a new use or purpose; modify”*, and is defined in the Cambridge dictionary as *“to change, or to change something, to suit different conditions or uses”* and elsewhere as *“make fit for, or change to suit a new purpose;”* So the word adapt clearly connotes the concept of something having changed which then needs to be modified or altered – and is **not** just textual in nature.
 - Furthermore, example 1 also refers to:
 - Changes to an *“organisational structure”* or *“organisational units”*. I submit changes to this could have profound implications in respect of the liability if the legal nature of the organisation is altered. It could also impact on the extent of security which might be or not be available in the event of damage or remediation requirements. This is something which the Environmental Protection Agency, EPA, here in Ireland has considered closely and quite well, and indeed had to. I acknowledge the Committee might expect this to be encompassed within the particulars of the permit – and thus captured. But there is potential for ambiguity and confusion to arise, and given the wording used later in respect of basic parameters of the permit which I address later below.
 - The Party concerned’s list offered also refers to *“adaption”* in respect of *“units”* and *“functions”* – which could have material bearing on the adequacy and quality of resources and expertise available for the activity or specific requirements or the stretching of resources to address something.
 - The list offered also refers to *“adaption”* in respect of *“quality assurance functions”* – which again depending on the nature of the change – could actually create the possibility for effects – or different effects to those previously consulted on. For example the calibre track-record or reputation and experience and sufficiency in of resources involved on quality assurance carries with it a lot of implications for risk of impacts.
 - Furthermore, in example 3 *“changes in requirements related to knowledge management”* are referred to. Again, in the context of this having arisen in respect of a nuclear power plant this is surprising – given that keeping abreast of developments and issues and how that knowledge is *“managed”* which includes

potentially how it is made available could well be a parameter of significance or indirectly or directly influence environmental aspects.

- The issues highlighted above are not just of concern in respect of nuclear – they are of concern in respect of a whole host of activities particularly those where there are emissions to the environment, but not limited to those either. It is worth considering the requirements of the Mining Waste Directive on such matters.

11. Therefore in light of the above, albeit while we note the Committee’s caveats about the need to have the details and not just consider the abstract – the following recommendation is made:

Delete paragraph 12 which says:

“12. While it is difficult for the Committee to provide a view in the abstract on the three examples cited by the Netherlands (and reiterating that the determination must always be made on a case-by-case basis in the light of the specific circumstances), the Committee cannot readily see how either the first or third example would be capable of significantly changing the basic parameters of the activity or would address significant environmental aspects of the activity.”

or modify it significantly to say – something more along these lines:

12. The three examples cited by the Party concerned might actually be capable of significantly changing the basic parameters of the activity or would address significant environmental aspects of the activity. There is risk in an overly formulaic approach which risks not looking into the underlying significance and impacts of what has been altered and which needs to be reflected as a change. Therefore, the Committee reiterates that the determination must always be made on a case-by-case basis in the light of the specific circumstances and details.

Regarding changes to the party to whom the permit is granted, and/or to changes to organisations involved in the delivery of any aspect of the activity which is the subject of a condition of the permit

13. I welcome the fact the Committee have highlighted in para. 9 of this draft advice their previous findings in ACCC/C/2014/122 that:

“...for the purposes of article 6 (10), an activity’s “operating conditions” include all the conditions in the permit and not just the technical or functioning conditions affecting the production process.”² Accordingly, for the purposes of article 6 (10), any administrative obligations contained in the permit are to be considered as operating conditions.”

14. In respect of the above, the matter of who a permit is granted to is fundamental to virtually all developments. The Irish EPA undertakes a “fit and proper person” assessment in respect of a host of activities – including those under the EU Industrial Emissions Directive, Waste Directives. Additionally under new Maritime Legislation here in Ireland – the experience and other factors relating to the operators are key considerations in the grant of certain authorisations or consents.

² ECE/MP.PP/C.1/2021/7, para. 73 (emphasis added).

15. However, the name of the assignee may not be expressed as a condition or an administrative obligation – it may be a detail on the face of the permit – but we submit it is a fundamental parameter of the permit and one capable of environmental consequences.
16. Given its fundamental importance I recommend that it would be worth explicitly including in the advice – in the context of the advice sought in respect of “capable of significantly changing basic parameters” and after paragraph 29 and/or in the non-exhaustive list in paragraph 30, that:

All changes in respect of the organisations or units to whom the permit has been granted, and also organisations and units involved in the delivery of any aspect of the activity which is the subject of a condition of the permit – should be considered as changes to basic parameters of the permit.

17. This would serve to capture changes to those to whom the permit was granted and changes to those involved in an activity which is of sufficient significance that it warranted the imposing of a condition on the permit. The need for this is perhaps also highlighted given the examples offered by the Party concerned for question 2 and the various different interpretations on the potential significance of them.
18. It would be also helpful in this regard to:

Amend para 14 which refers in the first line only to administrative “obligation” to refer to instead to “administrative obligation or the responsibility thereto”

Paragraph 20

19. I very much welcome that in the advice on screening determinations under the scenarios considered in paragraphs 20 (c) and (f), that the need to consider “the whole project” is emphasised by the Committee.

Paragraph 27 and screening.

20. It might be also worth adding to the suggestions in para 27, the considerations of Article 4 – in the 2014 amended version of the EIA Directive – as it’s Annex III is not the sole focus for screening determinations anymore, and it may be helpful to consider this in line with Article 4 and the amended Article 4(4) of the amended EIA Directive, in particular including the parts relating to “...*the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive*” and “*description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.*”

Complementary requirements

21. There is no mention of the information needed to support the determinations to be made in respect of the public participation obligations, and it is submitted that advice on this is naturally complementary to the advice sought and would additionally add to the quality of the determinations made. Framing the information to be provided in very clear terms of what is the purpose of the change, the drivers for the change etc – can help clarify and support the analysis of the changes to basic parameters or environmental aspects.
It is recommended that the Committee consider expanding this in the advice.

Considerations under Paragraph 30 and 31

22. A number of recommendations are made below in respect of paragraphs 30 and 31 for consideration – with the one on cumulative effects and incremental changes being particularly important.
23. The issue of size mentioned in paragraph 30 might also benefit from further expansion in respect of hours of operation and matters such as dimensions and specifications– which can result in differing effects. I am conscious of the potential for example of a wind turbine to be of a particular overall height – which might be specified as a basic parameter without being broken down further. However different environmental effects consequent on the potential variabilities which might arise consequent on the different configurations of hub and rotar blades ratios – as has arisen here in Ireland. Differing impacts arise consequently in respect of factors such as noise and flicker, differing manufactures involved in such variabilities also may feed into safety track-record considerations which the public also should be consulted upon – so they have an opportunity to input into the decision and conditions associated with such changes if permitted. While the Committee very clearly addresses the potential cross over between basic parameters and environmental aspects of the activity in paragraph 32 – but it may be helpful to reflect that thinking further in paragraph 30 also – lest 30 be read in isolation.
24. I am conscious that paragraph 30-31 and the associated question reflects on the wording from pervious findings of the Committee regarding “*significantly*” changing the basic parameters of the activity. While I appreciate the issues being addressed in these paragraphs – the ultimate consideration perhaps might be additionally highlighted here also – which is the potential to significantly effect the environment.
25. Additionally, and very importantly the cumulative effect of small changes at any one point and over multiple small changes within the project, in addition to changes external to it and in a different temporal context and therefore a different environment could be emphasised. I appreciate that properly read and applied leveraging the Annex III screening criteria of the EIA Directive and the Espoo Convention which the Committee mentions in para 27 should assist here. But the advice might be more explicit on these considerations and cumulative considerations not just external to the project, but also internal to it – as numerous small internal changes over time can serve to erode and change safeguards and/or alter impacts.
26. To support the above – it is also important that even where participation is not triggered a clear decision is recorded and a clear and accessible log of the changes maintained, and the Committee might consider including that as practical advice necessary to support the overall considerations raised by the Party Concerned here and in its efforts to move toward compliance.

Finally, I wish to thank the Committee for its consideration of these remarks and apologise for the rather hurried nature of them given a multiplicity of demands.