

Draft advice by the Aarhus Convention Compliance Committee to the Netherlands concerning the implementation of paragraph 3 (a) of decision VII/8m

Adopted by the Committee on....

I. Introduction

1. On 22 April 2022, the Party concerned requested the Committee to provide it with advice on various questions it had regarding paragraph 3 (a) of decision VII/8m concerning the compliance of the Netherlands.
2. Pursuant to paragraph 36 (a) of the annex to decision I/7, the Committee, in consultation with the Party concerned, may provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention.
3. Accordingly, in reply to the Party concerned's questions of 22 April 2022, the Committee provides the following advice concerning the recommendation set out in paragraph 3 (a) of decision VII/8m.
4. By way of background, the recommendation in paragraph 3 (a) of decision VII/8m concerns the non-compliance found in paragraph 88 of the Committee's [findings](#) on communication ACCC/C/2014/104 (Netherlands), endorsed by the Meeting of the Parties through paragraph 1 of [decision VII/8m](#).
5. While the present advice addresses each of the Party concerned's questions, so that the Committee's explanations can build upon one another, the order in which the questions are addressed differs from that set out in the Party concerned's request of 22 April 2022. Each of the Party concerned's questions are set out in italics below.
6. The Committee completed its draft advice through its electronic decision-making procedure on 18 August 2022. In accordance with paragraph 34 of the annex to decision I/7, the draft advice was then forwarded to the Party concerned and the communicant of communications ACCC/C/2014/104 and ACCC/C/2014/124 on 24 August 2022 for their comments by 12 September 2022.
7. *On XX and XX 2022, respectively the Party concerned and the communicant provided their comments on the Committee's draft advice.*
8. *At its XX meeting (Geneva, XX 2022), the Committee proceeded to finalize and adopt its advice in closed session, taking account of the comments received.*

II. Operating conditions

"What constitutes 'operating conditions' as referred to in article 6 (10)? In the Committee's view, is it possible that, for example, changes in certain administrative obligations, which require a reconsideration or update of the existing permit, are not considered to be 'operating conditions'? Examples of such administrative obligations could be:

- *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.;*
- *Changes in certain reporting or monitoring requirements;*
- *Changes in requirements related to knowledge management; etc"*

9. In accordance with the Committee's findings to date, all permit conditions are to be considered as operating conditions. In its [findings](#) on communication ACCC/C/2014/122 (Spain), the Committee held 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.”¹ Accordingly, for the purposes of article 6 (10), any administrative obligations contained in the permit are to be considered as operating conditions.

10. To the extent that the examples provided in the Netherlands’ question are addressed in the permit, they each therefore constitute “operating conditions” of that permit. Consequently, if any of these matters are to be reconsidered and/or updated in the permit, then in accordance with article 6 (10) the competent authority must determine whether public participation is appropriate and thus required.

11. Importantly, this does not mean that public participation will necessarily have to be carried out each time the administrative obligations (or any other operating conditions) in a permit subject to article 6 (1) are reconsidered or updated. Rather, each time a public authority reconsiders or updates the conditions of a permit subject to article 6 (1) of the Convention, the competent public authority must determine, on a case-by-case basis, whether the reconsideration or update is “capable of significantly changing the basic parameters of the activity” or “will address significant environmental aspects of the activity”. If so, “public participation meeting the requirements of article 6 (2)–(9) is ‘appropriate’ and thus required.” (see the Committee’s [findings](#) on communication ACCC/C/2014/121 (European Union)).²

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.

13. In contrast, the Committee considers that a change in a permit’s reporting or monitoring requirements (the second example) may indeed “address significant environmental aspects of the activity”.

14. As to whether a change of an administrative obligation in the permit could “significantly change the basic parameters of an activity”, the Committee considers that the identity of the operator is one potential example. In the Committee’s view, the identity of the operator, with its particular environmental management practices, environmental performance to date, and level of financial solvency, is a basic parameter of the activity. While the Committee does not consider that a mere change in the name of the operator would change the basic parameters of the activity, in contrast a change in the identity of the operator may indeed be a significant change in the activity’s basic requirements for which public participation is appropriate and thus required.

III. Relationship between article 6 (1) in conjunction with annex I, paragraph 22, and article 6 (10)

“Can it be assumed that for a change or extension of a permitted activity for which no criteria or thresholds are envisaged in the annex only the significance test of article 6, paragraph 10 applies?”

“In the case of an activity with criteria or thresholds, can a proposed measure fall within the scope of both articles and therefore both tests? How do the two tests relate to each other in these cases and how should they be dealt with in practice?”

“Is the fact that the proposed measure does not lead to a physical intervention relevant for which test should be carried out?”

15. Paragraph 22, annex I, refers to a change or extension of an activity listed in annex I. The first sentence of paragraph 22 of annex I establishes that, where a change or extension of an activity listed in annex I meets the criteria/thresholds set out in annex I, that change or extension shall be subject to article 6 (1) (a) of the Convention.

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

² ECE/MP.PP/C.1/2020/8, para. 103.

Commented [JH1]: Concerning the FIRST example: When a change in the description of the organisational structure or the quality assurance systems could lead to a deterioration of the risk overview and control, such changes could have profound influences on the environment. This could include changes in the description of organisational structure or quality assurance that would *de facto* lead to conflicts of interest (staff with overview mandate also made responsible for performance, for instance). We would for that reason argue that also in this case an assessment has to be made.

Concerning the THIRD example: Similarly, when changes in knowledge management would lead to decrease in transparency, for instance making it more difficult to access crucial information, inserting conflicts of interest in archiving and accessibility, etc., this could have severe consequences in emergency situations.

We would for that reason argue that also in this case an assessment has to be made.

IN GENERAL we think that it is wise to make an assessment, but also submit this assessment to a round of public consultation in order not to miss important issues.

Commented [JH2]: This is not clear to me.

Does this mean that changes or extensions to any nuclear power station and other nuclear reactor exceeding 1 kW continuous thermal load meets, according to Annex I (22) the criteria and hence has to be subject to art. 6(1a)? I would argue, yes: If we talk about a large nuclear power station (larger than 1 kW thermal load), any extension or change meets the only criterion set. However, on the other hand, I would want to argue that on the basis of the formulation of art. 6(10), the “appropriateness” test in art. 6(10) should be carried out in all cases...Or would the ACCC argue that the lists in Annex I(1) is a listing without any criteria? I.e., isn’t the only criterion to be met for nuclear power stations the 1 kW continuous thermal capacity?

16. For every other change or extension of an activity listed in annex I, whether it be an activity for which no criteria or threshold is set in annex I or where the change or extension does not meet the criteria in annex I, article 6 (1) (b) of the Convention applies.

17. Article 6 (10) refers to a reconsideration or update of the permit conditions itself. The reconsideration or update may entail a change or extension of the activity, but not necessarily so. The scope of article 6 (10) is thus broader than the scope of annex I, paragraph 22.

18. Whether a particular reconsideration or update will entail a physical intervention is not determinative for which test should be carried out. As explained below, whether article 6 (10) alone, or both paragraph 22 of annex I and article 6 (10), apply will depend on whether a change or extension of the activity is proposed or not.

19. This means that for many reconsiderations and updates, both the tests set in paragraph 22 of annex I and in article 6 (10) will apply. Importantly, if the application of any one of the tests means that public participation is required, then that is determinative.

20. A reconsideration or update of a permit for an activity may occur in at least six different situations:

(a) For an existing activity for which criteria/thresholds are set in annex I of the Convention and where the existing activity meets the criteria/thresholds listed therein, if there is a proposed change or extension that will itself also meet those criteria/thresholds, then, by virtue of the first sentence of paragraph 22 of Annex I to the Convention, article 6 (1) (a) applies and public participation is required. (Since public participation is mandatory under article 6 (1) (a), it is not necessary to go further and also apply the test in article 6 (10)).

(b) For an existing activity listed in annex I of the Convention that meets the criteria/thresholds listed therein, if there is a proposed change or extension that will not in itself meet those criteria/thresholds, then the second sentence of paragraph 22 of annex I applies, and the test in article 6 (1) (b) must be carried out.

If the outcome of the screening determination under article 6 (1) (b) is that the proposed change or extension may have a significant effect on the environment, then public participation is required. (It is then not necessary to also apply the test in article 6 (10)).

In contrast, if the competent public authority, applying the test in article 6 (1)(b), determines that the proposed change or extension will not have a significant effect on the environment, it must then proceed to apply the tests under article 6 (10) to decide whether the proposed change or extension is nevertheless “capable of significantly changing the basic parameters of the activity” or “will address significant environmental aspects of the activity”.³ If the answer to either of these tests is positive, then in accordance with article 6 (10), public participation is “appropriate” and thus required.

(c) For an existing activity for which criteria/thresholds are set in annex I of the Convention and the existing activity does not itself meet the criteria or thresholds set in annex I of the Convention, if a change or extension of the activity is proposed that will mean that the activity as a whole meets the criteria or thresholds set in annex I of the Convention, then article 6 (1) (a) applies and public participation is thus required.

(d) In the case of a proposed change or extension of an activity listed in annex I of the Convention for which no criteria or thresholds are set in annex I, then the tests in both article 6 (1) (b) (by virtue of annex I, para. 22, second sentence) and article 6 (10) likewise apply. The competent public authority should thus apply the tests sequentially as explained in subparagraph (b) above.

(e) In the case of a proposed reconsideration or update of an activity listed in annex I of the Convention for which no criteria or thresholds are set in annex I, if the proposed reconsideration or update will not entail

Commented [JH3]: I would argue to use the language “permitted conditions” rather than “permit conditions”, because in some jurisdictions, the word “permit” is related only to the operating license, which in many cases is only a framework license.

Commented [JH4]: This runs counter the way that the ACCC has approached ACCC/C/2014/104: It first tested whether public participation was necessary under art. 6(10), and because it was considered so, it did not test anymore under art. 6(1), although the communicant had argued public participation was necessary already under art. 6(1).

The test under art. 6(10) is in principle less complicated than the test under 6(1a) (conditions) or 6(1b) (significant effect on the environment), which pleads for the way the ACCC handled ACCC/ C/2014/104. I think that the order of testing is not really of influence on the final conclusion, however.

³ See the Committee’s findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 103.

a change or extension of the activity, then article 6 (10) applies. The competent public authority must accordingly determine whether the proposed change or extension is “capable of significantly changing the basic parameters of the activity” or “will address significant environmental aspects of the activity”.⁴ If the answer to either of these tests is positive, then in accordance with article 6 (10), public participation is “appropriate” and thus required.

(f) For an existing activity that does not itself meet the criteria or thresholds set in annex I of the Convention, if a change or extension of the activity is proposed that will mean that, under the legal framework of the Party concerned, the activity as a whole requires screening as to whether it may have a significant effect on the environment, article 6 (1) (b) applies. If, as a result of the screening, it is determined that the activity as a whole may have a significant effect on the environment, pursuant to article 6 (1) (b) public participation is thus required.

21. The six situations described in paragraph 20 above are illustrated in the diagram in the annex to the present advice. Note: In the case of any disparity between the annex and paragraph 20 above, paragraph 20 is to be considered authoritative.

22. By way of additional clarification, in its request for advice the Netherlands refers to the Committee’s [findings](#) on communication ACCC/C/2009/41 (Slovakia) in which the Committee stated at paragraph 58 that, for those activities listed in annex I for which the Convention does not establish any criteria or thresholds (including nuclear power stations):

“By virtue of the first sentence of paragraph 22 of annex I ... in principle, all changes or extensions to such activities are subject to article 6. However, bearing in mind that a change or extension to already permitted activities requires reconsideration or updating of the existing permit, the provisions of article 6 would apply “mutatis mutandis, and where appropriate”, as stipulated in article 6, paragraph 10.”⁵

23. The Committee notes that it had already determined in paragraph 57 of those findings that the activity at issue in that case was required to undergo public participation under article 6 (10) of the Convention and paragraph 58 was therefore *obiter*. The Committee welcomes the opportunity to clarify the excerpt from paragraph 58 quoted above since the Committee’s understanding of how the Convention applies to changes or extensions of activities for which no threshold in annex I of the Convention is set has evolved in the eleven years since those findings were adopted.

24. In this regard, as explained in paragraph 20 (d) above, in the case of an activity listed in annex I of the Convention for which no criteria or thresholds are set, the competent public authority must, by virtue of annex I, para. 22, second sentence, first apply the test in article 6 (1) (b) to determine whether the proposed change or extension may have a significant effect on the environment. If the proposed change or extension may do so, then public participation under article 6 of the Convention is required. However, if the competent public authority determines that the proposed change or extension will not have such an effect, it must still consider whether the proposed change or extension is nevertheless “capable of significantly changing the basic parameters of the activity” or “will address significant environmental aspects of the activity”. If the answer to either of these tests is positive, then in accordance with article 6 (10), public participation is appropriate and thus required.

IV. “Changing basic parameters” v. “will address significant environmental aspects”

“Will address significant environmental aspects of the activity”

“Could you please provide practical guidance on what constitutes ‘significant environmental aspects’ or examples of cases that ‘will address significant environmental aspects’, in general and especially for nuclear activities? We would expect that the term ‘environmental aspects’ relates to article 2 (3) of the Aarhus Convention

⁴ See the Committee’s findings on communication ACCC/C/2014/121 (European Union), ECE/MP.PP/C.1/2020/8, para. 103.

⁵ ECE/MP.PP/2011/11/Add.3, para. 58.

Commented [JH5]: Where the activity is a “Nuclear power station”, this – in my humble view – contains the entire activity of a nuclear power station. That is including its necessary licensing procedures, oversight procedures, management structures, quality assurance procedures, etc. etc.

In that respect, the case of ACCC/C/2014/104 also would have met the criteria set in Annex I(22) and hence art. 6(1a) should have been applied. But as said above, there is something to say for testing under art. 6(10) first, as the ACCC did.

which mentions the nature of environmental information. Is it possible that what constitutes 'significant environmental aspects' differs from case to case? When is an environmental aspect 'significant'?"

25. As an initial point, the Committee points out that the scope of whether a reconsideration or update of the operating conditions of a permit "will address significant environmental aspects of the activity" and whether a change or extension of an activity "may have a significant effect on the environment" is overlapping but not identical. The scope of the former is much broader. Any proposed change or extension of an activity that may have a significant effect on the environment will necessarily mean that during the related reconsideration and/or update of the permit's operating conditions, significant environmental aspects of the activity will be addressed. In contrast, a reconsideration or update of a permit's operating conditions that will address significant environmental aspects of the activity may not necessarily have a significant effect on the environment.

26. With respect to what constitute the "environmental aspects" of an activity, in its [findings](#) on communication ACCC/C/2012/88 (Kazakhstan), the Committee held:

"The Committee considers, as also stated in the Implementation Guide, that whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of "environment" found in the definition of "environmental information" (article 2, para. 3)."

In line with the above findings, the Committee considers that the implied definition of "environment" found in the definition of "environmental information" in article 2 (3) of the Convention serves as a useful reference for what constitutes the environmental aspects of an activity.

27. To identify which, if any, environmental aspects of a particular activity may be "significant", the Committee considers that the criteria listed in [appendix III of the Espoo Convention](#) and [annex 3 of the EIA Directive](#) are a useful starting point.

28. These two references also demonstrate that activities' environmental aspects, and the significance thereof, will differ from case to case.

"Capable of significantly changing basic parameters"

"Could you please provide practical guidance on what constitutes a 'basic parameter' or examples of cases that are 'capable of significantly changing the basic parameters' in general and especially for nuclear activities?"

"We understand ... that basic parameters may include type, size and location. Could you please confirm that this is what constitutes a 'basic parameter'. Are there other basic parameters?"

29. The basic parameters of an activity are usually set out in the permit itself.

30. A non-exhaustive list of basic parameters includes the nature, size, location and duration of the activity. The basic parameters of an activity, including a nuclear activity, also include any permit conditions required to address significant environmental aspects of that activity, such as for example, water consumption limits, emission limits, required waste management approaches and so forth.

31. In accordance with the Committee's [findings](#) on communication ACCC/C/2014/121 (European Union),⁶ if an activity's basic parameters may be significantly changed as a result of a particular reconsideration or update, then public participation is appropriate, and is thus required to be carried out in the context of that reconsideration or update.

Difference between "capable of changing basic parameters" and "addressing significant environmental aspects"

"What is the difference between 'capable of significantly changing basic parameters' and 'whether it will address significant environmental aspects of the activity'?"

⁶ ECE/MP.PP/C.1/2020/8, para. 103.

Commented [JH6]: And all (organisational and technical) safety measures to reduce the risk of severe accidents leading to substantial emissions of radioactive (or other toxic) substances into the environment.

32. As explained above, the basic parameters of the activity are usually set out in the permit itself. An activity's basic parameters include the measures required to address significant environmental aspects of that activity. In addition, there will also likely be some crossover between an activity's "basic parameters" and its "significant environmental aspects". For example, the emission limits set in the permit for an activity may be both a basic parameter and a significant environmental aspect of the activity.

33. Importantly, whenever a public authority reconsiders or updates the operating conditions for an activity subject to article 6 (1) of the Convention, it must apply both tests and if, on the application of either test, public participation is appropriate, that outcome is determinative and public participation is required.
