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Mr. Jeremy Wates
Secretary
Convention on Access to Information,
Public Participation in Decision-Making
and Access to Justice in Environmental
Matters
Bureau 332 - Palais des Nations
CH - 1211 Geneva 10

Subject: Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Community with the Convention in relation to EC Council Directives 85/337/EEC and 96/61/EC as amended by Council Directive 2003/35/EC (ACCC/C/2006/17)

Re: Your letters of 27 February 2008 and 20 March 2008

Dear Mr. Wates,

The European Community has carefully considered the draft Findings and Recommendations, elaborated by the Compliance Committee in the case ACCC/C/2006/17. It would like to submit the following remarks for consideration.

The European Community welcomes the conclusion by the Compliance Committee that it is in compliance with its obligations under the Convention, taking into account the structural difference between it and other Parties. Indeed, it takes this opportunity to submit a number of remarks which further support that conclusion. However, it has serious reservations concerning the recommendations contained in the draft Findings and Recommendations. The European Community considers that there is no need for modification of the Community legislation, and it does not agree that any such changes are appropriate to facilitate the correct application of the Convention in its legal order.

Against this background, the European Community does not agree that recommendations to the Party are formulated, since it considers that its legislation, practices and procedures are adequate.

On the substance of the draft Findings and Recommendations, the European Community would like to concentrate its attention on two issues:

- Obligations arising from Article 6, paragraph 2 of the Aarhus Convention,
- Obligations arising from Article 9, paragraph 2 of the Aarhus Convention.

The comments on those two issues reflect a more general concern by the European Community that the reference to *'in a sufficiently clear and transparent manner'* contained in point 57, which appears to be a general standard followed by the Compliance Committee, appears to go beyond the provisions of Article 3, paragraph 1 of the Convention.

Obligations arising from Article 6, paragraph 2 of the Aarhus Convention

In its paragraph 27 the draft Communication points out: *'Furthermore, the Party concerned maintains that the fact that both EIA and IPPC Directives do not provide for a clear requirement for the public to be informed in "accurate¹, timely and effective manner'* should not have any direct consequences for the implementation bearing in mind that the directives are to be transposed into the domestic legislation. Moreover, the Convention itself form part of Community law and should be applied directly'. (emphasis added) This paragraph does not accurately reflect the position of the European Community and it is not a conclusion that can be drawn from the European Community's submissions².

It is correct that the wording *'adequate, timely and effective manner'* is not expressly mentioned in Directives EIA and IPPC. In fact, the Community legislator decided to give full effect to this requirement by laying down specific rules implementing it. The Annex to this document supplies more details on the implementation, at Community level, of the Aarhus Convention as far as public participation (notably requirements provided for in Article 6, paragraph 2 of the Convention) is concerned, and presents additional comments.

This consideration has an impact on paragraph 47 of the draft Findings and Recommendations, in the sense that, despite the fact that the wording *'adequate, timely and effective manner'* is not expressly mentioned in the Directives, the applicable rules fully implement this requirement, as the Annex to this document demonstrates.

On the contrary, the European Community may globally accept the conclusions reflected in paragraph 49 of the draft Findings and Recommendations, which point out *'the structural difference between the European Community and other Parties; and the general division of powers between the European Community and its Member States in implementing Community Directives'*. It fully shares the conclusion that *'the fact that the terms "accurate, timely and effective manner" are not used in the directives does not in itself necessarily amount to non-compliance with the Convention'*. However, it has

¹ Article 6, paragraph 2 of the Convention indicates *'The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, ...'*. The draft Findings and Recommendations mention *'accurate'* instead of *'adequate'*.

² The substantive response of 2 May 2007 clearly mentions that *'The reply to the fifth question should be therefore as follows: The obligations under Article 6, paragraph 2 of the Aarhus Convention, and in particular the requirement for informing the public in an "adequate, timely and effective manner", are fully respected in The European Community legislation'*. This specific issue was not dealt with in the second response dated of 21 November 2007.

serious doubts regarding the statement: *'although a similar formulation in the directives as in the Convention would probably help ensuring adequate implementation of the Convention, bearing in mind the specificity of European Community directives'*. On one hand, it considers that Directive 2003/35/EC fully implements this requirement, taking into account the mentioned division of powers between Member States and itself. On the other hand, it considers that, in order to give full effect to a Convention, a Party may use a different wording than that of the Convention, provided that the legal obligation imposed by the wording of the international rule is actually complied with in substance. In addition, any Party has to take into account its legal system and its specificities. This is in particular the case for the European Community. A Directive is not addressed to the general public, but to the Member States which are all of them aware of the obligations they have under the Convention. This situation can not be compared to the situation of a national law giving effect to the Convention, which is addressed to the public.

Furthermore, the European Community would like to express its disagreement with the following conclusions contained in paragraph 58 of the draft Findings and Recommendations: *'Notwithstanding the distinct structure of the European Community, and the nature of the relationship between the Convention and the EC secondary legislation, as outlined in paragraph 34, the Committee notes with concern the following general features of the Community legal framework:*

*(a) lack of clear obligations requiring the public to be informed in an "accurate, timely and effective manner" in the provisions regarding public participation in the EIA and IPPC Directives; ...' In paragraph 59 it is added: *'While the Committee is not convinced that these features amount to a failure to comply with article 3, paragraph 1, and, accordingly has not examined whether an infringement of this provision constitutes per se a violation of the Convention, it considers that they do not serve well the purpose of implementing article 6 of the Convention'*. (emphasis added)*

The Party is of the views that these statements are not fully consistent with the positions on the issue previously developed, in particular in paragraph 49. In addition, after having found no non-compliance with Article 6, paragraph 2 and Article 3, paragraph 1, it does not seem coherent to find in paragraph 59 the sentence already mentioned and underlined.

Obligations arising from Article 9, paragraph 2 of the Aarhus Convention

In paragraph 56, the draft Findings and Recommendations indicates: *'The Committee notes that indeed both the EIA and the IPPC Directive lack provisions clearly requiring the public concerned to be provided with effective remedies including injunctive relief. ... Such remedies are essential for effective access to justice The Committee is nevertheless concerned that lack of such clear provisions may jeopardize implementation by the Member States of procedures guaranteed by article 9, paragraph 2, of the Convention'*.

It is correct that Directives EIA and IPPC, as amended by Directive 2003/35/EC, do not expressly mention injunctive relief. However, it is important to point out that the will of the Community legislator was to give full effect to the pertinent rules of the Convention. In the motivation of Directive 2003/35/EC in two different recitals it is clearly stated that *'(9) Article 9(2) and (4) of the Aarhus Convention provide for access to judicial and other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention'; (11) Council Directive 85/337/EEC of 27 June 1985 ... and Council Directive 96/61/EC of 24 September 1996 ...should be amended to ensure that they are fully compatible with the provisions of the Aarhus Convention, in particular Article 6 and Article 9(2) and (4)*

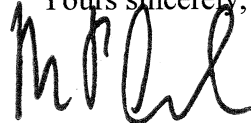
thereof. (emphasis added). Therefore, the intention of the Community legislator was also to cover the requirements in Article 9, paragraph 4 of the Convention, 'including injunctive relief as appropriate'.

In this context, it has to be reminded that, due to its nature and its relationship with its Member States (as mentioned by the Compliance Committee in numerous sections of its draft Findings and Recommendations³), when the European Community envisaged to give full effect to the Convention, it had to consider which was the most appropriate instrument. The retained choice - unavoidable, we could add – was the Directive which 'shall be binding, as to result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'⁴.

The Community intervention could not allow to have precise rules on the national remedies against decisions, acts or omissions concerning the public participation. It was left to the Member States to provide for the necessary procedures, taking into account the specific situation in each country and the mention 'as appropriate' concerning injunctive relief. Thus, special emphasis was put on the fact that access to justice as regards public participation has to be ensured 'in accordance with the relevant national legal system'⁵. In this context, as a general consideration, it has to be taken into account that injunctive relief is an important part of legal remedies in all the Member States of the European Community. Therefore, this has to be also ensured in the framework of access to justice as regards public participation taking into account their judicial system and situation as well as the wording of the Convention. Against this background, the Member States of the European Community are the best placed to ensure the implementation of injunctive relief.

As a general conclusion, the European Community does not agree that in the draft Findings and Recommendations are formulated the recommendations mentioned in paragraphs 62 and 63. In addition, due to the reasons mentioned above, it has reservations concerning certain statements contained in paragraphs 27 (first sentence), 47 (whole paragraph), 49 (first part of the last sentence), 56 (last sentence), 58 (whole paragraph) and 59 (first sentence).

Yours sincerely,



M.P. CARL

Enclosure: 1

³ See paragraphs 43, 45, 49 and 51 of the Draft Findings and Recommendations. As an example, it could be mentioned paragraph 43 '*... the structure of the European Community and its legislation differs from all other Parties to the Convention, in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member State to implement Community directives. ...Because of this distribution of power between the EC and its Member States, the aforementioned significance test cannot be applied, and the assessment must take a slightly different approach.*'

⁴ Article 249, paragraph 3 of the EC Treaty

⁵ Article 10a of EIA Directive (added by Article 3, paragraph 7 of Directive 2003/35/EC) and Article 15a of IPPC Directive (added by Article 4, paragraph 4 of Directive 2003/35/EC).

ANNEX I

I. Directive EIA

Article 6 (emphasis added)

...

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;
- (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;
- (d) the nature of possible decisions or, where there is one, the draft decision;
- (e) an indication of the availability of the information gathered pursuant to Article 5;
- (f) an indication of the times and places where and means by which the relevant information will be made available;
- (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

(Comment: This paragraph gives effect to Article 6, paragraph 2 of the Convention).

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
- (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (1), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

(Comment: This paragraph gives effect to Article 6, paragraph 3 of the Convention).

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

(Comment: This paragraph not only gives effect to Article 6, paragraph 4 of the Convention, but puts also specific emphasis on the requirements of paragraph 2 and complements it).

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

(Comment: This paragraph contains additional obligation for the Member States to ensure adequate and effective information of the public).

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

Additional Comments:

It is important to stress that, like in paragraph 2 of the Article 6 of the Convention, in paragraphs 2 and 4 of the Directive the obligations are stated in passive voice for the reasons and explanations contained in the Implementation Guide to the Aarhus Convention (UN 2000), page 95. Moreover, obligations relate not only the public concerned (as in paragraph 2 of the Convention), but the public and the public concerned.

As shown by the comments to different paragraphs of Article 6 of the Directive, even without taking the precise words, the Community legislator envisaged to give full effect to 'adequate, timely and effective manner'. The Implementation Guide indicates '*This is meant to draw attention to practical problems of notification. Notification needs to be considered flexibly to be effective. ...*' (page 96). This had also been a concern of the Community legislator: to that effect, it added the paragraph 5 which does not exist in the Convention. Because of the nature of the Directive and also for the specific matter, it has been decided that Member States have to properly implement this issue.

II. Directive IPPC

Article 15 ... (emphasis added)

Access to information and public participation in the permit procedure

1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

- issuing a permit for new installations,
- issuing a permit for any substantial change in the operation of an installation,
- updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.

...

4. Paragraphs 1, 2 and 3 shall apply subject to the restrictions laid down in Article 3 (2) and (3) of Directive 90/313/EEC.

5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

- (a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and
- (b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.

ANNEX V

Public participation in decision-making

1. The public shall be informed (by public notices or other appropriate means such as electronic media where available) of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:

- (a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 15(1), including the description of the elements listed in Article 6(1);
- (b) where applicable, the fact that a decision is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 17;
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

- (d) the nature of possible decisions or, where there is one, the draft decision;
- (e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;
- (f) an indication of the times and places where, or means by which, the relevant information will be made available;
- (g) details of the arrangements for public participation and consultation made pursuant to point 5.

2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:

- (a) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;
- (b) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (1), information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.

3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Annex.

Comments:

The previous comments elaborated for Directive EIA could be fully applied for the IPPC Directive.

