

Public participation under the Aarhus
Convention
in relation to changes to or extensions of existing
activities

Task Force on Public Participation
In Decision-Making
Seventh meeting
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Issues

- Changes and extensions under para 22 of Annex 1 and art.6.10
- Applicable legal framework
 - EIA instruments
 - Espoo Convention
 - EIA Directive
 - IPPC Directive
- Jurisprudence

Changes to or extension of activities (para 22 of Annex 1)

- **Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.**

Art.6.10 of the Aarhus Convention

- 10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

Applicable legal framework - EIA

- Espoo Convention
 - "Proposed activity" means any activity or any **major change** to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;
- EIA Directive
 - Para 24 of Annex I
 - Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.
 - Para 13 (a) of Annex II
 - Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)

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Applicable legal framework – art.25

Industrial Emissions Directive

- 1. Member States shall take the necessary measures to ensure that the competent authority periodically reconsiders in accordance with paragraphs 2 to 5 all permit conditions and, where necessary to ensure compliance with this Directive, updates those conditions.

Applicable legal framework – art.25

Industrial Emissions Directive

- 3. Within 4 years of publication of decisions on BAT conclusions in accordance with Article 13(5) relating to the main activity of an installation, 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 this Directive, in particular, with Article 15(3) and (4), where applicable;
 - (b) the installation complies with those permit conditions.
- The reconsideration shall take into account all the new or updated BAT conclusions applicable to the installation and adopted in accordance with Article 13(5) since the permit was granted or last reconsidered.

Applicable legal framework – art.25

Industrial Emissions Directive

- 4. 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 best available techniques allow for the significant reduction of emissions.
- 5. The permit conditions shall be reconsidered and, where necessary, updated at least in the following cases:
 - (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.

Controversial verdicts of CJEU

- The **definitive decision relating to the carrying on of operations at an existing landfill site**, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Landfill directive) does not constitute a 'consent' within the meaning of Article 1(2) of EIA Directive unless that decision authorises a change to or extension of that installation or site, through **works or interventions involving alterations** to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive (C-121/11, Pro-Braine and Others, paragraph 38)
- The **renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction'** within the meaning of point 7(a) of Annex I to Directive 85/377 (C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraphs 27-30)

Approaches

- Changes interpreted broadly – not only to cover physical change in the project itself (AG Kokot in Case Krizan)
- Extension of lifetime as new activity or major change (Espoo IC in case Rivne)
- ACC in case Slovakia – art.6.10

ACC in Case ACC/41/Slovakia

- the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation
- “the clause ‘where appropriate’ introduces an objective criterion to be seen in the context of the goals of the Convention,
- “when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate.”

Broad interpretation of changes

- to interpret provisions regarding changes to cover not only physical change in the activity itself but also changes in the surrounding environment, including the cumulative effect with other activities, as well as changes in the applicable legislative framework, in particular in relation to safety measures or environmental protection requirements (opinion of Advocate General Kokott in Case C-416/10 *Križan*)
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Espoo – Rivne case (EIA/IC/CI/4)

- The Committee considered that there could be many reasons why Parties to the Convention would decide that the final decision on a proposed activity should be issued only for a limited period of time. Among the reasons, the Committee could identify:
 - The risks associated with such proposed activity;
 - The changes in the state of the environment;
 - The changes in the density of population;
 - The possible effects on human health;
 - The advancement of scientific knowledge as well as relevant developments in the regulatory framework
 - The development of the state of art in relation to mitigation measures.
- Clearly then, when the limited period of time expired, the Party of origin would have to re-evaluate such reasons and make the decision to extend the initial period of time or not.

Espoo – Rivne case (EIA/IC/CI/4)

- On the basis of the above, it was the view of the Committee that the decision to authorize a proposed activity subject to the Convention, according to the national procedure, only for a limited period of time meant that any subsequent decision to extend that limited period of time, whether in the form of a new license or amendment or renewal of the existing one, would, under the Convention, be another decision of a competent authority to authorize or undertake a proposed activity, triggering obligations under the Convention. In that context it becomes less relevant whether it is a new activity or a major change to an activity.

Cases

- Espoo IC
 - Ukraine (Rivne)
 - Czech Republic
 - Borselle (Netherlands)
- Aarhus ACC
 - Borselle (Netherlands)
 - EU - IED