



JUSTICE AND ENVIRONMENT

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Justice and Environment contribution to SEVESO II review process Compliance of SEVESO II directive 96/82/EC with the Aarhus Convention

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Justice & Environment (J&E) is a European network of environmental law organisations that was created in January 2003 and founded as a non-profit association in September 2004. Since then J&E has, through its expanding membership, been striving to protect the environment, people and nature by improving environmental legislation and enhancing the implementation of these laws. J&E does so at the national and European levels, particularly by focussing on the enforcement of European Union legislation and through the information exchange.

The Aarhus Convention and its implementation to European and national law has been the major objective of work of Justice and Environment since its existence. We have been publishing numerous studies and analyses on this issue in the last years (<http://www.justiceandenvironment.org/issues/>)

Now is the appropriate time to bring the EU's SEVESO II directive into line with the Aarhus Convention. The SEVESO II directive predates the UN ECE's Aarhus Convention and it is therefore understandable that the directive's provisions do not fully reflect the requirements of the Convention. However, now that the European Community and its member states are parties to the Convention, it would not be understandable or defensible for the EU not to use the review of the SEVESO directive to bring it fully into line with the Aarhus Convention's requirements.

The Aarhus Convention of the UN-ECE was signed in 1998 and ratified by the European Community by Council decision 2005/370/EC (OJ L 124/1 of 17.5.2005), whereas SEVESO II directive 96/82/EC on the control of major-accident hazards involving dangerous substances was enacted in 1996. The current SEVESO II review process provides an opportunity to assess compliance of SEVESO II directive with the principles and provisions of the Aarhus Convention

Improvement of communication with stakeholder and reinforcement of public participation and better implementation are major reasons for the directive's review.¹

The Aarhus Convention on Access to Information, Public Participation in decision making and Access to Justice in environmental matters has **three substantive pillars** as indicated in its title. The first pillar on **access to information** distinguishes between individual rights for the public to request environmental information from public authorities (Article 4) and active information obligations by parties (and its public authorities respectively) to the Convention (Article 5).

The second pillar on **public participation** enables the public to participate in environment related decision making both with regard to certain permitting decisions (Article 6) and to any environmental related planning and programming procedures (Article 7).

The third **pillar on access to justice** provides for administrative and/or judicial review procedures in case the first and second pillar of the Convention were breached (Article 9 par 1 and par 2). Furthermore members of the public have the right to legally challenge any act and omission by private persons or public authorities that contravene national or European environmental law.

¹ Presentation of European Virtual Institute for Integrated Risk Management (EU-VRi) EEIG on "F-SEVESO – Study of the effectiveness of the implementation of the SEVESO II directive" at SEVESO II review stakeholder meeting on 10th November 2009 in Brussels

Member organisations:

EELC - Estonian Environmental Law Center, Estonia
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ZA - Zelena Akcija, Croatia
UfU - Independent Institute of Environmental Concerns, Germany

All three pillars are highly relevant for SEVESO II directive. In its current state, the SEVESO II directives does not reflect various provisions and principles of the Aarhus Convention. Access to information provisions of the directive are too limiting, public participation in decision making is covered only in aspects, and access to justice is missing completely.

SEVESO II and Access to information (Article 4 and 5 of the Aarhus Convention)

“Environmental information” is defined as follows (Article 2 par 3 of the Convention):

3. “*Environmental information*” means any information in written, visual, aural, electronic or any other material form on:

(a) *The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(b) *Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;*

(c) *The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;*

Any such information shall be available upon request without an interest having to be stated (Art 4 par 1a). A request may only “*be refused if disclosure would adversely affect” (Art 4 par 4) confidentiality of the proceedings of public authorities, national defence or public security, the course of justice, intellectual property rights and confidentiality of personal data or commercial and industrial information. However, “*the aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”*. With regard to the confidentiality of commercial and industrial information the Convention provides that “*information on emissions which is relevant for the protection of the environment shall be disclosed”* in any case (Art 4 par 4d).*

Furthermore the Convention provides for collection and dissemination of environmental information (Article 5). Environmental information held by public authorities shall not only be available upon request, but distributed actively by public authorities.

With regard to potential accidents the Convention provides as follows (Article 5 par 1c):

(c) *In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.*

With regard to SEVESO II directive this means as follows:

The SEVESO II directive provides the operator to establish different plans, programmes and measures to prevent accidents on the one hand and to enable immediate and appropriate response in case an accident occurs. Public authorities have to ensure that such plans are compiled, comply with the requirements of the directive and that they are implemented in fact. This counts for example for the major-accident prevention policy (Article 7), the safety report (Article 9) or emergency plans (Article 11).

Respective plans, reports and policies under the SEVESO II directive- whatever label they own - are measures and activities relating to environmental factors, the state of human health and safety as well as conditions of human life that affect or may affect the state of the environment’s elements and are thus environmental information in the sense of the Convention.

Any environmental information that derives from SEVESO II directive has to be accessible for the public unless one of the refusal provisions applies. However, the exceptions may only be applied if other interests would be “*adversely affected*” and in addition any such exclusion has to be interpreted in a *restrictive way*, taking into account the *public interest served by disclosure*. Furthermore information relating to emissions can not fall under the exception at all and has to be disclosed in any case. This information has to be available not only upon request, but be made available actively.

This means among others that Article 13 and Annex V of SEVESO II should be revised completely. The existing legislation might be sufficient to summarize most important aspects for the general public, but is not justified to not disclose information that goes beyond that. Any information relating to Article 14 and 15 of the directive shall be available for the public. This does not only derive from the general environmental information provisions of the Convention but also from its Article 5 par 1 c regulating specifically the case of imminent threat to human health or the environment.

Article 20 on confidentiality has to be adapted to the Aarhus Convention by limiting reasons for refusal and underlining the public interest served by disclosure. An article regulating access to information requests in the sense of Directive 2003/4/EC on environmental information and respective Access to Justice should be added.

To conclude, Seveso plans should incorporate all the information that the Aarhus active information provisions require, so that in the event of an imminent threat, the facility/authorities can fully inform the public. Any confidentiality exceptions should go no further than the Convention and the EU access to environmental information provisions, preferably in identical wording.

SEVESO II and Public participation (Article 6 and 7 of the Convention)

The first three sentences of Article 7 of the Aarhus Convention read as follows:

“Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.”

Article 6 par 3, 4 and 8 read as follows:

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

Public participation should be provided in the relevant processes for planning measures under this directive (e.g safety report, emergency plan) taking into account the abovementioned provisions of the Convention. It is important that public participation is carried out in an early and effective manner and that due account is taken of its outcome. Next to the above-mentioned planning procedures, this counts in particular for land-use planning regulated in Article 12 of the directive.

The public shall also have the right to participate in the modification procedure regulated in Article 10 of the directive and in the inspection procedure of Article 18 and Article 17 on the prohibition of use.

SEVESO II and Access to Justice (Article 9)

As indicated above Article 9 provides for access to justice if substantive and procedural rights deriving from the Convention are infringed and in addition if environmental law is breached in general. With regard to refused environmental information request we suggest to use the same access to justice procedure as directive 2003/4/EC provides for.

With regard to other to other breaches of law Article 9 par 3 and 4 applies:

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 9 enables members of the public to legally review procedural and substantive legality of acts and omissions from private persons or public authorities. This includes incorrect application of public participation provisions. The Environmental Liability Directive (ELD) 2004/35/EC on environmental liability with regard to prevention and remedying of environmental damage aims to serve the polluter pays principle and prevention principles of the EC treaty, to some extent similar to SEVESO II directive. ELD implemented aspects of Article 9 par 3 of the Aarhus Convention in its Article 12 and 13. Article 12 gives the right to initiate an administrative procedure and to request the authority to take measures to the public concerned. Article 13 provides for access to justice to review any decision, act or failure to act by the competent authority. It reads as follows:

“1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.”

A similar provision should be added to SEVESO II directive. The same counts for the right to request the authority to take actions in order to fulfil its obligations under the directive such as prohibiting use of installation (Article 17), ensuring establishment and update of emergency plans (Article 11), modification of installations (Article 10) or the establishment of safety reports (Article 9).

Conclusion

The SEVESO II directive is in stark contradiction to the Aarhus Convention. This means both the European Union and its member states are in legal non compliance with the Convention. The review process must thus strive to overcome these shortcomings and make the directive compatible with the Convention by providing rights on public participation, information and justice.

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