

## Seveso III – The Public Participation Challenge

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The Seveso III Directive will be seen by many as essentially an update to allow harmonisation with UN's system of classifying dangerous substances. This would be a flawed approach, as the updated Seveso legislation now also interacts with the United Nations Economic Commission for Europe's (UNECE) Convention on access to information, public participation on decision-making and access to justice in environmental matters, plus four other key EU Directives. While in theory such provisions applied to the implementation of Seveso legislation since ratification by the EU of the Convention in 2005, in reality they were largely ignored. As such therefore, there is a steep learning curve ahead; not least as such provisions and the experience with them are evolving. The paper therefore takes the reader through both the provisions in the Convention and as to how they are transposed in the Seveso III Directive, the experiences to date and some recommendations, such as to how an operator should approach the issue of confidentiality. The legal provisions of the Convention and associated key Directives already have an established 'case law' at both UNECE, EU and Member State level with regard to decisions on planning and pollution control. A 'business as usual' approach to Seveso implementation without properly taking into account the new and detailed requirements to interact with the public, could lead to both operators and regulators finding themselves on the wrong side of resulting legal challenges.

### Seveso III – What's really new?

As engineers we can often be guilty of thinking in silos, such as Seveso legislation on control of major accident hazards which requires a safety report, ATEX legislation on explosive atmospheres which requires an Explosion Protection Document, pollution control legislation which requires an integrated permit, etc. As such therefore, we can often miss the bigger and inherently interconnected picture. As described in a paper for Hazards XXI on "Implementing EU Industrial Safety Legislation in Central and Eastern Europe" (Swords, 2009), my own work experience included more than a decade of involvement on EU technical assistance programmes in the accession countries for EU membership. The importance of the 'acquis communautaire' and in particular the 'environmental acquis' is well understood in those countries by both regulators and industry alike, while in Western Europe this awareness is lacking. To explain, the 'acquis communautaire' is a French term referring to the cumulative body of European Community laws, comprising the European Community's objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union. The 'environmental acquis' relate to the body of law regulating environmental issues.

It is estimated that the 'environmental acquis' comprises more than three hundred Directives alone. This body of law has enormous influence on planning, energy, agriculture, water, waste, air quality, pollution control, industrial risk, etc. The important aspect, which too often the 'silo' mentality fails to identify, is that the individual legislative elements both interact and have a unified objective of achieving a high level of protection for both man and the environment. As such therefore one has two choices: (a) Consider the new Seveso III Directive 2012/18/EU as specifying the template for a list of deliverables, such as a safety report, or; (b) identify it as a body of legislation, which actually contains the requirements of two International Treaties with the United Nations (UN) and interacts closely with four other key Directives within the 'environmental acquis'. By adopting the latter approach, one's understanding of the 'drivers' and hence requirements behind this new legislation concerning control of major accident hazards is greatly enhanced.

Another 'silo' we are guilty of is being EU / Brussels centric. Increasingly legislative principles, technical standards, etc. are developed on a larger and global scale, for which the EU is only one economic bloc, albeit a large one, contributing to the decision making process. Special reference here has to be given to UNECE based in Geneva, and despite its 'Europe' name, it also comprises of countries in North America and Central Asia. For instance, an example of increasing globalisation in the field of major accidents is the UNECE's Convention on the Transboundary Effects of Industrial Accidents, which entered into force in 2000 following ratification by 26 Parties. Its purpose is to help its Parties to prevent industrial accidents which can have transboundary effects, to prepare for them and to respond to them. The Convention also encourages its Parties to help each other in the event of such an accident, to cooperate on research and development and to share information and technology. In some respects it is a 'Seveso light' and the EU has both ratified it and given effect to it through its Seveso legislation.

In the 1992 Rio UN Conference on Environment & Development, Agenda 21 was the name given to a comprehensive 40 Chapter plan, which sought to provide a comprehensive blueprint of action on sustainable development to be taken globally, nationally and locally by organisations of the UN, National Governments and major groups. Chapter 19 on "Environmentally Sound Management of Toxic Chemicals" led to the development of the UN Globally Harmonized System of Classification and Labelling of Chemicals (GHS), to which EU legislation, including the new Seveso Directive, is now harmonised to.

It is not the intent of this paper to delve into the implications of GHS, this is an extremely well thought out and documented system. It is naturally enough a 'step change' from the previous system of classification used by the EU, such as in the previous Seveso legislation. However, once that step change is made, and there is no indication that this will be problematic, then the situation will essentially be the same as the principles we have been used to for many years now. However, if we consider the other UN Treaty and the four other key Directives in Seveso III, then these require us to enter an area of

responsibilities and deliverables, which is currently only evolving and for which a quite considerable period of time will be required for both the regulators and operators to develop the necessary understanding and competencies. It is this area, which can be grouped under the heading of general heading of 'public participation', which is the subject matter of this paper.

## Public Participation, where did it come from?

The Rio Declaration from the same UN Conference in 1992 was a statement of 27 principles upon which Nations agreed to base their actions in dealing with environmental and development issues. Principle 10 stated that:

- *“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.*

This principle led to the development of the UNECE's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus in 1998, which has to date been ratified by 47 Parties (countries). As the EU ratified in February 2005, it has since then been a key 'horizontal' component of the Environmental Acquis, the body of Community legal order related to the environment. In particular, as it defines the procedural rights of the citizen related to the implementation of that legislation. As always it helps to understand the context from which this International Treaty evolved in the 1990s. The 'iron curtain' was no more, but Eastern Europe was scarred with derelict industrial sites and an unacceptable pollution burden, as a consequence of a centrally and ideologically planned economic structure, which neither put value on environmental impacts nor was accountable to its citizens; the Convention evolved from this legacy.

Whereas most multilateral environmental agreements cover obligations that Parties have to each other, the Aarhus Convention covers obligations that Parties have to the public. It goes further than any other environmental convention in imposing clear obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned. This is reinforced by the compliance review system under the Convention, which allows members of the public to bring issues of compliance before an international body. It is also quite scientific, possibly reflecting the strong input from Eastern Europe in its development, a point which can be seen clearly in some of its definitions, such as on what constitutes environmental information.

*“I not only use all the brains that I have, but all that I can borrow” - Woodrow Wilson, US President, 1913-1921. Gathering opinions and information from interested parties is an essential part of the policy-development process, enhancing its transparency and ensuring that proposed policy is practically workable and legitimate from the point of view of stakeholders. Furthermore, civil society is not without considerably talented people. It is not by any means uncommon that members of the public may be more competent and knowledgeable in the subject matter than designated public officials, in particular where it concerns matters in their locality. A modern democracy is about being inclusive and bringing out the talents of the public, not suppressing them in the manner which George Orwell so aptly described in Animal Farm: “No one believes more firmly than Comrade Napoleon that all animals are equal. He would be only too happy to let you make your decisions for yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?”*

Some may judge the Convention to be 'radical', but yet history teaches us that populist trends and fashions come and go; as a result that is why a defined legal structure and associated rights have been put in place. This legal structure and associated rights are there for a reason, as part of the necessary checks and balances. The environment does not belong to the State apparatus, but to the people who live in that environment and they have to be given robust procedural rights.

## Pillar I – Access to Information

It is useful to consider the Convention in terms of its three 'pillars' of access to information, public participation in decision-making and access to justice in environmental matters. As the 'Aarhus Convention: An Implementation Guide second edition' (UNECE, 2014) points out in relation to the first pillar on access to information:

- *Under the Convention, access to environmental information ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.*

Obligations are placed on public authorities not only in relation to providing access to environmental information on request, but also to possessing and updating environmental information which is relevant to their function, ensuring that it is transparent and effectively accessible. The latter relates to the general obligation of the Convention of:

- *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.*

These measures were adopted through Directive 2003/4/EC on public access to environmental information and implemented in each Member States, such as in the UK by the Environmental Information Regulations and in Germany by the

Umweltinformationsgesetz. The new Seveso III Directive makes several references to Directive 2003/4/EC, but it is important to realise that this Directive was required to be implemented by the Member States by February 2005, when the EU ratified the Aarhus Convention with the UN. So essentially its provisions applied since 2005, including to all Seveso related environmental information, from that period on. In reality, it wasn't complied with, Member States justifying their position, not entirely correctly, on issues related to public security, in order to restrict citizens' access to information on Seveso sites. It was this somewhat glaring non-compliance with International, Community and National law, which led to the update of the Seveso II Directive and the inclusion of the Aarhus Convention and Directive 2003/4/EC in Seveso III. As to what environmental information will ultimately have to be provided to the public on request, only time will tell, as some citizens will seek to exert their rights and some public authorities will seek to restrict them.

## Pillar I – Experience to date and expected trends with Access to Information

The ratification of the Convention by the EU in 2005 occurred in a period when the 9/11 terrorist attacks and war in Iraq were a heightened consideration. The circumstances which then prevailed in the United Kingdom (UK), and as to what is now proposed to be implemented as part of Seveso III, are best described in the "Consultation on draft Control of Major Accident Hazard (COMAH) Regulations 2015 to implement the Seveso III Directive 2012/18/EU" (HSE, 2014). In this the Health and Safety Executive (HSE) clarified the interaction with the Environmental Information Regulations of 2004, which implemented in the UK Directive 2003/4/EC on access to information on the environment.

- *The COMAH Regulations 1999 require the Competent Authority to make safety reports available to the public via a public register and provides that operators can apply for information which is commercially confidential to be excluded. Since the USA terrorist attack of 11 September 2001 this requirement has been protected by a Secretary of State (SoS) Direction which has prohibited the disclosure of safety reports. However, members of the public can request a copy of a safety report under the Environmental Information Regulations 2004. The SoS Direction will fall on 1 June 2015. From that date under the COMAH Regulations 2015 each request will be dealt with on a case-by-case basis but unless there are commercial confidentiality or national security issues the Competent Authority will be required to provide the full safety report.*
- *To facilitate the release of safety reports to the public under the COMAH Regulations 2015, operators could be required to identify issues relating to national security or commercial confidentiality when they submit their information to the Competent Authority. This means that following the fall of the SoS Direction the system to release safety reports in the COMAH Regulations 2015 would be the same as currently under the COMAH Regulations 1999, although operators have not had to identify these issues for the past 12 years.*

The same document clarifies; "Over the last eight years, two (safety) reports have been redacted". One can presume from this that in two circumstances members of the public exercised their rights under the access to information on the environment legislation to obtain redacted safety reports.

It is also instructive to consider the legal obligations with regard to the Convention itself. As mentioned previously, the Convention has a compliance mechanism. Members of the public can submit 'communications' to the Compliance Committee in Geneva with regard to failures of a Party to comply with its Treaty obligation. The Compliance Committee will investigate issues, which it considers of merit and produces a detailed report with findings and recommendations. Every three years the Aarhus Convention has a Meeting of the Parties, in which matters of compliance are reviewed. If the Compliance Committee's findings and recommendations are endorsed, then this engages the Vienna Convention on the Law of Treaties (UN, 1969), in which that agreement by the Parties becomes part of the interpretation of the Convention. As the Convention is a binding part of Community law, and hence National law, there is direct effect. The consequence is that a body of 'case law' is being built at UNECE level, through the endorsed findings and recommendations of the Compliance Committee.

On the issue of confidentiality, the Compliance Committee has already confirmed to the European Union in the findings and recommendations related to Communication ACCC/C/2007/21, as agreed with the Meeting of the Parties:

- *30 (c): In paragraph 23 of its submission of 5 August 2008, the position of the Party concerned implies that the condition for environmental information to be released is that no harm to the interests concerned is identified. The Party concerned apparently bases this statement on article 4, paragraph 4 (d), of the Convention, which states that a request for information may be refused if the disclosure would adversely affect "the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest". The Committee wishes to point out that this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified. Such a broad interpretation of the exemption would not be in compliance with article 4, paragraph 4, of the Convention which requires interpreting exemptions in a restrictive way, taking into account the public interest served by disclosure. Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.*

This is where one needs to start taking the 'wider view'. If one reads the Seveso III Directive with respect to disclosure of information submitted to the competent authority, one sees in Article 22 on access to information and confidentiality:

- 3. *Disclosure of the complete information referred to in points (b) and (c) of Article 14(2) held by the competent authority may be refused by that competent authority, without prejudice to paragraph 2 of this Article, if the operator has requested not to disclose certain parts of the safety report or the inventory of dangerous substances for the reasons provided for in Article 4 of Directive 2003/4/EC.*

Many operators will conclude they just have to request confidentiality with their documents submitted and it is ‘business as usual’. However, Article 4 of Directive 2003/4/EC and its context within the above have to be carefully read and understood. In particular, that the grounds for refusal of a request for information by a member of the public, has to be interpreted by the public authority in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure has to be weighed against the interest served by the refusal, while public authorities cannot provide for a request to be refused, where the request relates to information on emissions into the environment. A further obligation is that environmental information has to be made available in part, where it is possible to separate out any information, which can be legitimately withheld, from the rest of the information requested.

If we go back to the UNECE ‘case law’, in its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee referred to their adoption of a Government regulation “On Rent of Forestry Fund for Hunting and Recreational Activities”, which set out a broad rule with regard to the confidentiality of information received from rent-holders. This constituted a failure by the Party concerned to comply with the necessary provisions in which the public authority must take the public interest in disclosing the information into account, must consider whether the information relates to emissions and must generally interpret the grounds for refusal in a restrictive way. Similarly, in Case C-266/09 the Netherlands referred a case related to disclosure of ‘confidential’ information on trials with a plant fungicide to the European Court of Justice, which held that:

- *“Article 4 of Directive 2003/4/EC should be interpreted, to require that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose, must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved”.*

To reiterate a blanket rule cannot be applied and as the HSE quite rightly point out in their consultation; *“each request will be dealt with on a case-by-case basis but unless there are commercial confidentiality or national security issues the Competent Authority will be required to provide the full safety report”.*

So how has this limitation on claiming commercial confidentiality been dealt with elsewhere to date? In many respects the Irish Environmental Protection Agency (EPA) has been the role model when it comes to access to information in relation to licensing details, such as for pollution control. The enforcement section of their website contains the environmental information; application details, EPA assessments, correspondence, etc. Think of such licensing like a kitchen. The EPA has to know how the kitchen interacts with the outside environment, such as utilities, waste water, air emissions, noise, etc. They need to have some knowledge of the characteristics of the raw materials and products, plus an outline of the processing modules. They do not need to know the recipes; that is the operator’s intellectual property. So with a bit of care and attention, Irish industry has moved away from a position where the ‘kitchen sink’ level of detail was thrown at the regulator in the application, to a happy medium where the level of documentation can go on the public file and also adequately inform the regulator. Sometimes a limited amount of information has to be sent in as a ‘special package’ on a confidential basis. In many cases the EPA review it, understand it, record what they need from it and send it back.

In this regard Article 22 of the Seveso III Directive clarifies that:

- *The competent authority may also decide for the same reasons that certain parts of the report or inventory shall not be disclosed. In such cases, and on approval of that authority, the operator shall supply to the competent authority an amended report or inventory excluding those parts.*

The lesson to be learnt is that if operators of Seveso installations do not adjust their position to the point where they are writing documentation for both the regulator and the public, is it then fair to be critical, if at a later date the regulator is unable to restrict dissemination of that documentation to a member of the public, who has a legal entitlement? Remember, it is not the operator who decides on what is confidential based on his business considerations, but legal framework decides as interpreted by the regulator. Furthermore, the regulator can be legally challenged in relation to his or her interpretation, while there is an overriding legal requirement not to withhold information related to emissions into the environment.

## **Pillar I – Restricting Access to Information because of ‘Public Security’**

To reiterate the extent of public participation will evolve, not least as issues are challenged under the access to justice provisions. Naturally there is a keen interest from a Seveso perspective in what defines ‘public security’ for the purpose of restricting access to information on the environment. The first edition of the ‘Aarhus Convention: An Implementation Guide’ (UNECE, 2000) was dated to 2000 and published prior to the development of the ‘case law’ through the communications. In European Court of Justice in Solvay and Others, Case C-182/10, it was decided with regard to this edition of the Implementation Guide, in that while it was a very useful reference tool, it did not purport to be legally binding. The only relevant clarification we have from this document, as carried through to the 2014 second edition, is the limited statement that: *“The Convention does not define the terms “international relations”, “national defence” or “public security”, but suggests that the definition of such terms will be determined by the Parties consistent with international law”.* So until such

time, as a communication is made to UNECE challenging an interpretation by a Party for refusal to disclose on the basis of 'public security', and this leads to endorsed findings and recommendations, we will be none the wiser in clarification from UNECE. Neither are we any the wiser on this issue from EU legislation, as Directive 2003/4/EC left this interpretation to be resolved by the Member States.

However, an interesting legal case, dealing with a refusal to provide Seveso related documentation on the basis of 'public security', was dealt with in a very competent fashion in the German courts. Germany is a federal state and in February 2008 the Higher Administrative Court (Oberverwaltungsgericht) of Rheinland-Pfalz in case (1 A 10886/07) ordered the release of information on Seveso sites in that province, such as names, addresses and obligations under the Seveso legislation. This was based on an appeal to the Court from BUND, the German association for environmental and nature protection. Their request for this information under the Umweltinformationsgesetz, the German implementation of Directive 2003/4/EC, had been refused by the authorities on the basis that it related to a highly sensitive security related area corresponding to heightened tensions post 9/11, etc. This refusal was first referred to the Verwaltungsgericht, Mainz, a Lower Administrative Court, which upheld this refusal on the basis that the release of the information presented a serious, firm (*konkrete*) risk to public security, which could contribute to a terrorist attack on such a facility.

However, the judgement of the Higher Administrative Court, to which the matter was then appealed, reinforced the objectives of the legislation on access to information on the environment and that refusals would only be justified on cases, which were clearly determined and precisely clarified. With regard to public security, the Higher Administrative Court quoted Community law, in particular the judgement of the European Court in C-54/99, in which "public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society". According to established German case law also quoted, a firm risk occurred, when in a firm case sufficient probability arose, that within a foreseeable time frame, damage to the legally protected interest would occur. Vague suggestions or mere speculations without tangible causes connected to the particular case did not suffice. As the Higher Administrative Court concluded, the justifications articulated for refusal to release such environmental information did not fall into the categorisation of a firm risk.

In a related case (AZ 8 A 2190/11) of February 2014 in the Higher Administrative Court of the province of Nordrhein-Westfalen, the Court ordered the release of the names and address of Seveso sites in that province. The German environmental lobby group BBU had requested release of that information, to which they had been granted access, but this grant of access had been referred to the Lower Administrative Courts by one of the operating companies, claiming that release should be refused on grounds of 'public security'. This Court upheld the release, but the operating company then appealed to the Higher Administrative Court, which referring to the previous judgement in Rheinland-Pfalz in dismissing their appeal.

## Pillar II – Public Participation in Decision-Making – Permit Approval of Proposed Activities

As regards the principles of public participation the 'Aarhus Convention: An Implementation Guide' further clarifies:

- *Public participation in decision-making is the second "pillar" of the Convention. Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.*
- *In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation. The level of involvement of the public in a particular process depends on a number of factors, including the expected outcome, its scope, who and how many will be affected, whether the result settles matters on a national, region or local level, and so on. In addition, different persons may have different status in connection with participation on a particular matter. Those who are most affected by the outcome of the decision-making or policymaking should have a greater chance to influence the outcome. This is behind the distinction between "public" and "public concerned".*

The Convention differentiates between the public participation requirements for permit approvals, such as on planning or pollution control legislation, which is Article 6 of the Convention and public participation requirements for plans, programme or policies related to the environment, which is Article 7 of the Convention. The Annex I of the Convention defines the 'activities' to which Article 6 applies, which will be recognisable by those familiar with projects requiring an Environmental Impact Assessment or installations falling under the licensing requirements of Integrated Pollution Prevention and Control. Indeed, many, but not all, Sevesos installations would fall into the Annex I List of Activities, but does Seveso legislation engage a permitting arrangement? The legal framework for Seveso has always required that: "Member States shall ensure that the operator is obliged to take all necessary measures to prevent major accidents and to limit their consequences for human health and the environment". The Bulgarian implementation of their Seveso legislation resulted in the authorities actually issuing a 'Seveso' permit, a permit requirement which was never actually explicitly specified in the EU legislation. This was an exception, as many Member States were naturally deeply wary of such a permitting procedure, as it inherently involves some joint acceptance of the installation's risk profile. However, if one looks closely at Seveso III and Article 19 in particular:

- *“Member States may prohibit the use or bringing into use of any establishment, installation or storage facility, or any part thereof if the operator has not submitted the notification, reports or other information required by this Directive within the specified period”.*

In other words, there is clearly an ‘application process’ and a defined set of documentation, while the permission to operate can be withdrawn at any period if it is not complied with. Article 6 of the Convention applies to *“decisions on whether to permit proposed activities listed in Annex I”*. Is the above not such a decision? To be clear Article 6 requires considerable public involvement in decision making, such as is currently completed for planning permits for projects requiring an Environmental Impact Assessment or permits for an industrial facility falling under the scope of Integrated Pollution Prevention and Control. This is certainly a very major change from current practices with Seveso sites, where there is no public involvement in the decision-making. Therefore, as regards the applicability of Article 6 of the Convention, it is worth considering the UNECE ‘case law’ from Communication ACCC/C/2006/17.

- *On the other hand, nor does the Committee consider that where several permitting decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is necessarily sufficient for the purposes of meeting the requirements of article 6 to apply the public participation procedure set out in just one of those permitting decisions. Where one permitting decision embraces all significant environmental implications of the activity in question, it might be sufficient. However, where significant environmental aspects are dispersed between different permitting decisions, it would clearly not be sufficient to provide for full-fledged public participation only in one of those decisions. Whether a system of several permitting decisions, where public participation is provided with respect to only some of those decisions, amounts to non-compliance with the Convention will have to be decided on a contextual basis, taking the legal effects of each decision into account. It is of crucial importance in this regard to examine to what extent such a decision indeed “permits” the activity in question.*

While this Communication against the EU as a Party to the Convention related to Integrated Pollution Prevention and Control and a landfill in Lithuania, there is useful insight in the above. Namely that if it is considered that there are significant environmental issues related to one of the ‘permitting’ type activities, then depending on the legal effect of this decision, it could potentially fall under the scope of Article 6 of the Convention. As the same Communication went on to clarify:

- *If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.*

In Articles 13 and 15 of the Seveso III Directive one can start to understand how the above is now carried through into EU law, but it isn’t very obvious what is intended in those Articles if they are read on their own. Essentially through Article 15 public participation now applies to specific projects related to: (a) planning for new establishments, (b) significant modifications to establishments and (c) new developments around establishments where the siting or developments may increase the risk or consequence of a major accident. Public participation procedures for (a), (b) and (c) are engaged when issues of land-use planning arise, which is what the EU seemingly foresaw as the significant environmental aspect of the Seveso Directive. The methodology to be applied for this, namely as specified in Article 15 paragraphs 2 to 7 of Seveso III, is essentially a transposition of the requirements in Article 6 of the Convention for public participation on *‘decisions on whether to permit proposed activities’*, with one exemption related to Article 6(6) of the Convention in that the relevant information shall include at least:

- (a) *A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;*
- (b) *A description of the significant effects of the proposed activity on the environment;*
- (c) *A description of the measures envisaged to prevent and/or reduce the effects, including emissions;*
- (d) *A non-technical summary of the above;*
- (e) *An outline of the main alternatives studied by the applicant; and*
- (f) *In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.*

The final paragraph (f) is to be seen in Article 15(3), but paragraphs (a) to (e) are not expressly laid out in the Seveso III Directive, even though they are applicable to such public participation procedures. It would be wise for any operator to ensure that an application for decision-making requiring such a public participation procedure is compliant with the above.

## **Pillar II – Experience to date and expected trends with Decision-Making on Permits**

As this public participation in decision-making in relation to Seveso projects is completely new, there is no direct experience to date. However, there is an increasing body of experience and case law with respect to equivalent decision-making concerning Environmental Impact Assessment and Integrated Pollution Prevention and Control. First of all it is necessary to

note what ‘taking due account of the outcome of the public participation in the final decision’ in Article 6(8) of the Convention amounts to. In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:

- *It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take “due account” under Article 6, paragraph 8, should be seen in the light of the obligation of Article 6, paragraph 9, to “make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based”. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.*

They further followed this up in communication ACCC/C/2008/29 (Poland), where the Compliance Committee observed that:

- *The requirement of Article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed.*

It is clear that the Convention and implementing Community legislation is silent as to the criteria, which will be used to define the final decision. The Seveso III Directive being limited to specifying that in the decision the competent authority shall make available: “*The results of the consultations held before the decision was taken and an explanation of how they were taken into account in that decision*”.

However, there is also a defined procedure to be followed in order to reach that point, which requires under Article 6(4) of the Convention that effective public participation takes place when all options are open. A ‘pro forma’ exercise where the public is told what is to be built and their input on the issues just collected and ignored, will certainly not suffice. The Maastricht Recommendations on Public Participation (UNECE, 2014), adopted at the July 2014 Meeting of the Parties, explain clearly, based on endorsed findings of the Compliance Committee, that:

- *In line with the Convention’s requirement for the public to have an opportunity to participate when all options are open, the public should have a possibility to provide comments and to have due account taken of them, together with other valid considerations required by law to be taken into account, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called “zero option”). This recommendation has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should not be provided only at a stage when there is no realistic possibility not to proceed.*

If we consider some relevant case law on this matter from the European Court of Justice, case C-416/10 related to Slovakia, the authorities there adopted an urban planning decision concerning the establishment of a waste landfill site in a trench used for the extraction of earth for use in brick-making. Subsequently, the Slovak environment inspectorate initiated an authorisation procedure, in the course of which, residents of the town of Pezinok requested publication of the urban planning decision. That body authorised the construction and operation of the landfill site without having first published the decision in question. Following an appeal brought through administrative channels, the environmental protection body at second instance confirmed that decision, after having published the urban planning decision. The matter then went to the Slovak courts and was referred to the European Court. In their judgement the European Court clarified that the public must have access to an urban planning decision concerning the establishment of an installation having significant effects on the environment.

- *“The refusal to make the urban planning decision available to the public cannot be justified by invoking the protection of the confidentiality of commercial or industrial information” Under the Aarhus Convention, when a decision-making procedure concerning the environment is initiated, the public concerned must be able to participate in it from its beginning, that is to say, when all options are still open and effective public participation can take place. Moreover, the public must, as a rule, be able to have access, free of charge, to all information relevant to the decision-making procedure and to challenge the legality of any decision resulting from that procedure.*

As regards operators and Seveso sites and the previous comments under Pillar I with respect to confidentiality of information, this is another consideration which must be strongly borne in mind by such operators, namely as to how it could potentially invalidate a decision on a project. In particular, as the European Court further clarified in C-416/10, that the decision of a national court, which annuls a permit granted in infringement of the abovementioned directive (*Integrated Pollution Prevention and Control*) is not capable, in itself, of constituting an unjustified interference with the developer’s right to property.

## Pillar II – Public Participation in Decision-Making – Plans, Programme and Policies

Article 7 of the Convention on public participation on plans, programmes and policies related to the environment, has never been specifically transposed into Community legislation, which as a result has led to some confusion. Since 2001 the EU has a Directive on Strategic Environmental Assessment (2001/42/EC), which is applicable in certain cases, such as programmes related to energy, industry, town and county planning, land use planning, etc. This requires a very defined and detailed environmental report to be prepared, in addition to the public participation requirements of the Convention. In this manner it goes beyond Article 7 of the Convention, whose requirement is limited to the provision of the ‘necessary information’, where this is understood as ‘necessary’ within the context of ‘effective public participation’. However, the scope of Article 7 is extremely broad, the plan, programme or policy simply has to be ‘related’ to the environment, which is far broader than the scope of Strategic Environmental Assessment. Indeed, the UK Parliamentary Office of Science and Technology in their January 2006 briefing paper (POST, 2006) on the implementation of the Convention was accurate when it pointed out:

- *Implementing the second pillar has been problematic. Given the many discrete policy areas involved and the need to meet EU time limits, the competence for public participation has been split between different legal instruments and thus different government departments. With public participation legislation mainly focusing on EIA, IPPC and planning, it provides insufficient coverage for other areas affected.*
- *Problems have to be highlighted early “when all options are open and effective participation can take place”. At the moment, however, consultations, which do not have to take account of the opinions given, remain the key instrument used by decision makers.*

In many respects, these issues still remain, it has taken until June 2015 and the introduction of Seveso III to reach the situation where these measures are now to be applied to control of major accident hazards. So what exactly is Article 7, which has two degrees of scope, the first engaging ‘plans and programme relating to the environment’:

- *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.*

Therefore, in relation to a plan or programme, when Article 7 of the Convention is engaged, it also requires application of Article 6(3) of the Convention in relation to reasonable time frames, Article 6(4) of the Convention in relation to effective public participation when all options are open and Article 6(8) in relation to taking due account of the outcome of the public participation in the final decision. However, one certainly wouldn’t get that impression from the first reading of the Seveso III Directive, where it is somewhat buried within Article 15(6):

- *Where general plans or programmes are being established relating to the matters referred to in points (a) or (c) of paragraph 1, Member States shall ensure that the public is given early and effective opportunities to participate in their preparation and modification or review using the procedures set out in Article 2(2) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.*

Where ‘matters referred to in points (a) or (c)’ are as previously, namely; (a) planning for new establishments pursuant to Article 13; (c) new developments around establishments where the siting or developments may increase the risk or consequences of a major accident pursuant to Article 13. If one then goes into the 2003/35/EC Directive on public participation, one will only then find the relevant requirements above related to Article 6 of the Convention.

If we go back to the second degree of scope of Article 7:

- *To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.*

The ‘Aarhus Convention: An Implementation Guide’ clarifies the intent somewhat better:

- *Article 7 covers public participation with respect to plans, programmes and policies. The obligations of authorities and the rights of the public are somewhat less clearly defined than in Article 6, although several of the provisions of Article 6 are expressly incorporated into Article 7, at least with respect to plans and programmes. Article 7 allows Parties more flexibility in finding appropriate solutions for public participation in this category of decision-making.*
- *Article 7 distinguishes between plans and programmes on the one hand and policies on the other. As far as plans and programmes are concerned, it incorporates certain provisions of Article 6 relating to the time frames and the effectiveness of opportunities for public participation, as well as the obligation to ensure that public participation is actually taken into account. There is also an express reference to the objectives of the Convention. With respect to policies there is no express incorporation of the provisions of Article 6.*

Therefore, in simple terms the robustness and extent of the public participation requirement is ‘tiered’ relative to whether the decision making is in respect of a project, a plan or a programme or a policy. One can also see how the EU transposed this into Article 13 of the Seveso III Directive, where:



- *1. Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment are taken into account in their land-use policies or other relevant policies.*
- *3. Member States shall ensure that all competent authorities and planning authorities responsible for decisions in this area set up appropriate consultation procedures to facilitate implementation of the policies established under paragraph 1. The procedures shall be designed to ensure that operators provide sufficient information on the risks arising from the establishment and that technical advice on those risks is available, either on a case-by-case or on a generic basis, when decisions are taken.*
- *Member States shall ensure that operators of lower-tier establishments provide, at the request of the competent authority, sufficient information on the risks arising from the establishment necessary for land-use planning purposes.*

It is also necessary to note when one reads Article 13(4) of Seveso III, that the door is left open for Member States to use a co-ordinated approach and integrate this Seveso procedure into the obligations inherent in other Directives requiring assessment and public participation. As the Compliance Committee has indicated, this could be seen as acceptable if the process is inclusive of significant environmental implications. Certainly in (a) and (c) above, where it is likely that other permitting procedures will be engaged, this is an avenue which should be explored with the regulator.

## Pillar II – Experience to date with Plans, Programmes and Policies

There is no doubt, even from reading as to how it is transposed into the Seveso III Directive, that the above is going to lead to a lot of confusion, in particular as to which ‘tier’ the decision-making engages and the resulting level of public participation. Not least as a failure to complete a sufficiently in-depth public participation exercise could lead in time to a legal challenge to the resulting decision. Some ‘case law’ has been already emerged in this regard from the Compliance Committee, such as on Communication ACCC/C/2005/12 (Albania):

- *Decision No. 8 on the industrial and energy park, on the other hand, has more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not). This would link it more closely with Article 7.*

In Communication ACCC/C/2004/8 (Armenia)

- *The extent to which the provisions of Article 6 apply in this case depends inter alia on the extent to which the decrees (or some of them) can be considered “decisions on specific activities”, that is, decisions that effectively pave the way for specific activities to take place. While the decrees are not typical of Article 6–type decisions on the permitting of specific activities, some elements of them are (as is mentioned in paragraphs 12 and 23 above) more specific than a typical decision on land use designation would normally be. The Convention does not establish a precise boundary between Article 6–type decisions and Article 7–type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that, in addition to containing Article 7–type decisions, some of the decrees do contain decisions on specific activities.*

Case C-53/10, was a reference to the European Court from the Federal Administrative Court (Bundesverwaltungsgericht) in Germany, which is illustrative of what has gone wrong in the past in relation to land use planning. A garden centre was planned to be built on the site of former scrap metal facility, located 250 meters from Merck KGaA in Darmstadt, a chemical installation falling within the scope of Seveso legislation and involving among others chlorine. There was no land use development plan and the city of Darmstadt gave preliminary planning for the garden centre. Merck subsequently lodged an administrative objection to this decision, which was then appealed by the developer. In the course of these new proceedings, an ‘expert report’ was drawn up in which ‘compliance boundaries’ were established in respect of potential hazards posed by Merck’s installations. The proposed garden centre lay completely within these compliance boundaries.

The Verwaltungsgericht (Administrative Court) and the Verwaltungsgerichtshof (Higher Administrative Court) ordered the Land Hessen to reject Merck’s objection. Merck and the Land Hessen therefore appealed on a point of law before the Federal Bundesverwaltungsgericht against the judgment on appeal delivered by the Verwaltungsgerichtshof. They claimed that the interpretation of national law, on which that court based its decision, was not in conformity with Directive 96/82/EC (Seveso II) in so far as the authorisation of garden centre was incompatible with Article 12(1) of that Directive. Namely, the land use planning requirements for appropriate distances to be maintained between establishments covered by the Seveso Directive and residential areas, buildings and areas of public use, major transport routes, etc.

The Judgement of the European Court was very clear in that the land use requirements in Seveso legislation:

- *Must be interpreted as meaning that the obligation of Member States to ensure that account is taken of the need, in the long term, to maintain appropriate distances between establishments covered by that directive and buildings of public use also applies to a public authority, such as the city of Darmstadt (Germany), responsible for issuing planning permissions, even when it has no discretion in the exercise of that prerogative.*

The Court also clarified that the requirement in Seveso legislation:

- *To take account of the need, in the long term, to maintain appropriate distances between establishments covered by that directive and buildings of public use does not require the competent national authorities to prohibit the siting of a building of public use in circumstances such as those of the case in the main proceedings. By contrast, that obligation precludes national legislation that provides that it is mandatory to issue an authorisation for the siting of such a building without the hazards connected with the siting of the building within the perimeter of those distances having been duly assessed at the planning stage or at that of the individual decision.*

One can only conclude, that such matters would have been better resolved by a proper land use plan involving proper public participation, which included ‘taking due account’ of the input of Merck, the relevant operator. However, it is instructive that Merck were able to utilise Pillar III of the Convention, which allows a legal challenge to the ‘acts and omissions’ of public authorities, which contravene provisions of the national law relating to the environment, and in this they were ultimately successful.

In the UK the Health and Safety Executive (HSE) operate a ‘Planning Advice for Developments near Hazardous Installations’ (PADHI). As regards this formal representation, the planning authority:

- Is legally required to take it into account when determining the application; and
- Is directed not to override it without the most careful consideration.

In the event that a Local Planning Authority refuses permission for proposed development on grounds which include HSE’s advice against it on public safety grounds, then the HSE provides the necessary support to the authority in the case of an appeal. On the very rare occasion where a Local Planning Authority resolves to grant permission despite the land use planning advice, the HSE can consider taking the matter further by writing to the Secretary of State to request that the case be “called in”, although this is something which in practice rarely occurs. By all accounts it appears to be a system which works well in a transparent manner and would not be impacted by the additional requirements imposed in relation to public participation.

### **Pillar III – Access to Justice**

The ‘Aarhus Convention: An Implementation Guide’ introduces this pillar of the Convention in the following terms:

- *The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention on access to environmental information and environmental decision-making, as well as national laws relating to the environment, enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. It also helps to strengthen the Parties’ implementation of, and compliance with, the Convention as well as the effective application of national laws relating to the environment. The public’s ability to help enforce environmental law adds important resources to government efforts.*

Further clarification on the manner in which this should be implemented is provided in the below:

- *A general characteristic of courts and court-like bodies is that they act independently and impartially outside the administration, i.e., without any instruction from the executive bodies on how to decide a specific case. While making the distinction between judicial and administrative procedures, certain general requirements are imposed on all reviewing instances and procedures within the scope of the Convention. First, they must be fair, equitable, timely and not prohibitively expensive. Second, they must provide adequate and effective remedies. Third, information on administrative and judicial review procedures must be disseminated to the public, and the Parties are encouraged to establish appropriate assistance mechanisms to remove or reduce financial and other barriers.*

The approach of the European Union to implementation of the above requirements has been piecemeal. There was originally in 2003 a proposal to develop a Directive on Access to Justice, but there was strong opposition from the Council of Ministers as Member States felt that such matters should be left to their own National legislation. Note: When Ireland eventually ratified the Convention in 2012, all Member States became Parties to the Convention, the others having ratified at about the same time as the EU, namely 2005. In essence then regardless of EU legislation, all Member States, as individual Parties to the Convention, have obligations in International Law to take the necessary legislative, regulatory and other measures, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

If we consider the Seveso III Directive, then this refers to Access to Justice provisions in Article 23 by cross referencing clauses from Directive 2003/4/EC on access to environmental information and the codified Directive on Environmental Impact Assessment 2011/92/EC; all very confusing and worthy of further clarification. Essentially Article 9(1) of the Convention provides that when a request for environmental information is refused there has to be:

- *Access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.*

In addition, final decisions shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph. These measures are directly transposed into

Directive 2003/4/EC and were required to be adopted by the Member States by 2005. Therefore, refusals for access to information related to Seveso installations will be treated by current procedures.

If we consider the second part of Article 23 of Seveso III and the reference to the Environmental Impact Assessment Directive, the latter was modified by the public participation Directive 2003/5/EC such that by 2005 it would contain the provisions enabling the relevant public to:

- *Have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*

Note: Such provisions above do not exclude the possibility of a preliminary review procedure before an administrative authority. However, all such procedures shall be fair, equitable, timely and not prohibitively expensive. This effectively transposes Articles 9(2) of the Convention with regard to decisions on whether to permit proposed activities, i.e. the 'projects' referred to in Article 15(1) of the Seveso III Directive. However, while the EU didn't refer to it in Seveso III, the Convention's scope is much broader, in that under Article 9(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.*

In essence it is not just decisions to permit a proposed activity, but any breach of environmental law, whether it is by the public authority or the operator, which can be challenged and such procedures must be fair, equitable, timely and not prohibitively expensive.

### **Pillar III – Experience to Date with Access to Justice**

There is no doubt that this is the most problematic Pillar of the Convention with regard to implementation. If we consider appeals on access to information, then all Member States have provisions for administrative appeals in place, sometimes through the lower administrative courts or special bodies set up for this purpose. In the UK there is an Information Commission and an Information Tribunal, the case law of which is both growing and available on the internet. For example, the decision of the Information Commissioner's Office on case FS50117924 in April 2008 where:

- *The complainant requested access to 11 files held by the United Kingdom Atomic Energy Authority (UKAEA). UKAEA disclosed the contents of four of the files to the complainant but refused to disclose the remaining seven files under regulation 12(5) (a.). The Commissioner has considered the issues and found that regulation 12(5) (a) of the EIR did apply and that in all circumstances the public interest in maintaining the exemption outweighs the public interest in disclosure. However the Commissioner also found that the refusal notice issued was in breach of regulation 14.*

This issue concerned release of a safety case and exception 12(5)(a) related to 'International Relations, defence, national security or public safety'. As the appeal shows: "*The Commissioner considered the document 'Finding a Balance: Guidance on the Sensitivity of Nuclear and Related Information and its disclosure' issued by the Office for Civil Nuclear Security April 2005*". The Commissioner then concluded that the public interest in maintaining the exemption outweighed any public interest in disclosing the information. In reaching this decision the Commissioner considered the strong public interest inherent in safeguarding national security and was persuaded that the potential harm from disclosure of the information outweighed the public interest in promoting public understanding of the health and safety issues associated with the storage of special and fissile nuclear material.

In Ireland the current situation is in contrast simply dreadful. A Commissioner for Environmental Information exists, whose task is to complete the role above, but fails to do so as the office has no funding. For instance in 2014 no appeals were resolved. While this may facilitate an unaccountable administration, it is not in the interest of either the public or the operators to have such a situation; it creates a vacuum, which in the absence of accurate information, will be filled by agendas. No such problems are occurring in other Member States.

The EU has a section on its website dedicated to the Aarhus Convention, which includes 'studies' on the state of play of implementation by 28 Member States of access to justice provisions of the Aarhus Convention. There is also an e-justice portal on the EU's website, which has a very good section on 'access to justice in environmental matters' with a fact sheet for each Member State. There is no doubt that those Member States with a 'civil law' tradition are doing better than those with a 'common law' system, i.e. UK and Ireland, not least in relation to the cost barriers to access the Courts. As the French fact sheet explains about its system based on 'civil law':

- *Considering the inquisitorial nature of the proceeding, the administrative judge, who has significant investigatory powers, actually contributes significantly in establishing the facts. If need be, he / she may impose the communication of documents or proceed him / herself to certain investigations by directly examining acts or documents, by visiting locations, by attending hearings or expert assessments.*
- *The judge is never bound by the result of an expert. He must always evaluate the studies with a critical eye. His solution may be based on other elements of the case which challenge the conclusions of an expert report.*

Furthermore, as the German fact sheet clarifies: *“The courts are independent and free to review the evidence, to judge whether there is a breach of law and to evaluate how severe the infringement is”*. In contrast, as Ireland explains about its ‘common law’ legal system, a system similar to that in the UK:

- *The legal system is adversarial rather than inquisitorial. The onus lies on the parties to present evidence to the court in support of their case. In judicial review proceedings, the High Court reviews the legality of the contested decision. Such review will, therefore, involve a consideration of whether all statutory requirements were met and fair procedures observed. The Irish courts recognise the technical expertise of decision-makers such as planning authorities, ( ....etc.) as the courts are not experts on planning and environmental matters. Under legislation, Parliament has vested the task of making planning and environmental decisions in these expert administrative bodies. Where the substance (merits) of a planning or environmental decision is challenged in judicial review proceedings, the High Court may quash (annul) such a decision where the decision in question is found to be “unreasonable” or “irrational”.*

So unless the State’s experts are behaving in a manner which is irrational, the substance of their reports, decisions, etc. cannot be challenged. This certainly flies in the face of the rights under Aarhus to *“challenge the substantive or procedural legality of decisions”*. Not surprisingly as it has been a Party to the Convention since 2005, there has been a string of Communications against the UK in relation to access to justice. To reiterate, as each Member State is now a Party it has direct obligations in International Law to UNECE. The Compliance Committee upheld the inadequacies of the UK’s legal system, which were endorsed in the July 2011 Meeting of the Parties and thereafter followed by compliance proceedings. While some legal reform was completed by the UK to bring down the cost of access to justice, it was further determined by the Compliance Committee that these measures were not adequate enough, a matter endorsed by the July 2014 Meeting of the Parties. Additional compliance proceedings are occurring. In Case C-530/11 (Commission v UK), the European Court also determined in early 2014 that the UK had failed to ensure that judicial proceedings must not be prohibitively expensive.

One can think of it as a simple quality control process, if the public or an operator cannot challenge the substance or the procedural compliance of the decision making, then any system of authorisation which considers itself infallible, is not only bad for business, but appalling in terms of democratic accountability.

## Some Conclusions as to the ‘Why’

The following are some conclusions, which are more a reflection of personal opinions and views. Germany was shaken in 2009 and 2010 by the massive protests in Stuttgart over the Stuttgart 21 project, a €6.5 billion rail construction project which is now estimated to lead to a 3% rise in every train ticket in Germany for the next ten years. Undoubtedly a prestige project, the massive disruption to the heart of Stuttgart over several years of construction, plus the project’s somewhat limited justification, led to enormous public protests, involving thousands repeatedly taking to the streets to demonstrate. Unfortunately in September 2010, when the police intervened with water cannons, etc. violent clashes left 34 police and 130 protestors injured. This had huge political implications, not least as the project was originally scoped and conceived with little or no public input. While after several court cases and a referendum, the project is now proceeding, there is a huge realisation that this is not the ‘way to do business’. On a smaller scale in Germany, the construction of a 30 km carbon monoxide pipeline in Germany’s Rheinland in 2007, between two Bayer production sites, led to similar protests and court actions. The court halted the construction, as seismic considerations in its permitting had not been adequate, a permitting process which to a greater extent had not engaged the public. Currently a Forum over the safety of the pipeline is engaged in its work, but why wasn’t this done at the conception phase of the project?

My own experience in implementing Seveso in Romania (Swords, 2009) was not long after the failure in 2000 on the mine tailings pond in Baia Mare, which led to hundreds of kms of downstream river systems being polluted with cyanide and heavy metals. Was it surprising that in 2013, tens of thousands took to the streets all around Romania to protest, after their Romanian government proposed a draft law, giving extraordinary powers for the Rosia Montana Gold project? This law to declare the commercial mine proposal at Rosia Montana of overriding national interest, provided powers to relocate citizens, whose homes were on the perimeter of the mine, and directed state authorities to grant the necessary permits within set deadlines regardless of national legislation, court rulings or public participation requirements. The scale of the project, to extract 300 tonnes of gold and 1,600 tonnes of silver over 17 years would have involved the destruction of three villages and four mountains and used annually 12,000 tonnes of cyanine. A parliamentary commission finally voted down the draft bill in 2013 recommending that the developer’s 1999 licence be declassified and made public. The commission, in its report, also suggested the need for a better legal framework covering such matters.

The German Federal Institute for Risk Evaluation (BfR, 2007) has produced a guide on risk communication, as it quite rightly pointed out the impression should not be given that it is *“just a matter of communicating risks ‘in the right manner’ and then any dissent would disappear”*. I would certainly agree with their observation that: *“The fact that a decision has been taken democratically is no longer enough to secure acceptance by the stakeholders. Furthermore, citizens call for transparency when it comes to the arguments and conflicts that led to the decision”*. *“In democratic systems most people accept even unpopular decisions, if they are convinced that their arguments have been given a fair hearing and the decision-making process has been conducted according to the best of the participants’ knowledge and belief”*.

## References

The Aarhus Convention set a requirement for active and systematic dissemination of information on the environment, which was transcribed into Directive 2003/4/EC. As a result at all levels, UNECE, EU and Member State; legislation, environmental reports, case law, etc., have become publically available, in many cases electronically on the internet. Indeed, all the UNECE documentation on the Convention, such as Communications, is directly to be found on its website, while there is also a “Case Law of the Aarhus Convention Compliance Committee (2004-2011)” prepared by the European ECO Forum legal team in January 2011, which is to be found on the UNECE website.

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