



19.12.2018

NOTICE TO MEMBERS

Subject: Petition No 2040/2014 by Heinz Schnobel (Germany) regarding the possibility that Germany has breached Council Directive 96/82/EC

1. Summary of petition

The petitioner claims that Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (known as the Seveso II Directive) was breached during the demarcation of roads within Germany. These breaches apparently concerned a failure to observe the required intervals between installations associated with biogas.

2. Admissibility

Declared admissible on 25 June 2015. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 29 September 2015

The petitioner claims that the German authorities have, in the planning decision for the new major transport route B3 (Celle bypass), not respected the 80 meter minimum safety distance towards an existing biogas facility (in Celle/Altenhagen), in breach of Directive 96/82/EC¹ on the control of major-accident hazards involving dangerous substances (Seveso II), as replaced, since 1 June 2015, by Directive 2012/18/EU² (Seveso III).

According to the information in the Commission's possession, the biogas facility would contain more than 12 tonnes of biogas. If the biogas has been processed in accordance with applicable standards for purified and upgraded biogas ensuring a quality equivalent to that of natural gas, it may be classified, for the purpose of determining whether it falls within the scope of the Seveso Directive, in the same entry as liquefied flammable gases (including natural gas). In that case, the

¹ OJ L 10, 14.1.1997, p. 13

² OJ L 197, 24.7.2012, p.1

minimum threshold for applying the Seveso Directive would be 50 tonnes. If on the other hand, the biogas does not comply with the above criteria of upgraded biogas, it could, depending on the concentration of hydrogen sulphide, be classified within the general hazard category of acute toxic substances, to which a threshold of 5 tonnes applies under the Seveso Directive. In the latter case, the biogas facility concerned would be covered by the Seveso Directive.

The Seveso Directive (Article 12 of the Seveso II Directive, now replaced by Article 13 of the Seveso III Directive) obliges Member States to ensure that their land-use policies take account, in the long term, of the need to maintain appropriate safety distances between establishments covered by the Directive and new developments including transport routes, or, in the case of existing establishments, to take additional technical measures so as not to increase the risks to human health and the environment.

As results from the judgement of the Court in Case C-53/10 on the interpretation of Article 12 of the Seveso II Directive 96/82/EC (with similar wording as Article 13 of the Seveso III Directive), such an obligation, however, does not imply that competent authorities must establish such distances as the sole criterion for authorisation or refusal in the light of the location of projects for new sitings in the vicinity of existing establishments.

Nevertheless, the Court also held that, the ‘taking into account’ of appropriate distances requires that, during the risk assessment, those distances are actually taken into consideration with other factors, whether generally at the time when land-use plans are drawn up or, in the absence of planning, specifically, inter alia, when decisions on planning permissions are adopted.

It is also worth referring to Article 15 of Directive 2012/18/EU which includes detailed provisions on public participation in the case of projects subject to the obligations of Article 13, including the obligation for public authorities to take into account comments formulated by the public concerned before a decision is taken and to explain how these comments were taken into account in the final decision. Article 23 furthermore provides for access to justice, in case of infringement of these provisions on public participation.

Conclusions

In the absence of detailed information regarding the characteristics of the biogas present at the biogas plant subject of the petition, and of further details regarding the B3 Celle bypass construction project, the Commission has no reason to assume that EU legislation has not been correctly applied in the framework of the planning of that major transport route.

The Commission is also of the opinion that the national administrative and/or judicial bodies in charge of the implementation of the Seveso Directive are primarily responsible to verify specific situations of non-compliance and have the means appropriate to address the problem if the concerns are found justified. In the light hereof, the Commission will not give further follow-up to this petition.

4. Commission reply (REV), received on 30 July 2018

In addition to the general claim that the planning decision for a new major transport route B3

(Celle bypass) would not have respected the 80 meter safety distance towards an existing biogas plant, in breach of Directive 2012/18/EU¹ (Seveso III Directive on the control of major-accident hazards involving dangerous substances), the petitioner now claims the biogas plant would have been substantially expanded, increasing its capacity to 27 182 kg, thus changing its status, without informing the public. At the same time it is indicated that the 3rd construction phase is on hold due to objections. Further, the peripheral road would, according to the current planning, be located only 40 m away from the biogas plant rather than 80 m. The draft plan for the peripheral road would be available for consultation to the public until 16 June 2018 and objections could be made until 13 July 2018.

The Commission's observations

The Commission considers that its initial reply to the petition is still valid and relevant.

Article 15(1)(b) of Directive 2012/18/EU provides that, in case of significant modifications to establishments under Article 11, where such modifications are subject to obligations provided for in Article 13, competent and planning authorities must set up appropriate consultation procedures to facilitate the implementation of land-use policies with the aim of preventing major accidents and limiting their consequences for human health and the environment. This implies that the public concerned shall be given an early and effective opportunity to express its opinion. The alleged increase of biogas capacity from 12 000 kg (as indicated in the initial petition) to 27 182 kg does not necessarily suggest a change of status under Directive 2012/18/EU. This would depend on the composition of the biogas as outlined in the initial reply. No evidence is provided that would allow understanding why the increased quantity would constitute a significant modification. The petitioner did not indicate whether or not an appeal was launched against the decision to expand the biogas plant.

It appears from the information provided that the new planning for the road is subject to a public consultation process thus suggesting that the necessary procedures have been respected.

The Seveso-III-Directive does not provide for specific safety distances. The rules on safety distances cited by the petitioner seem to stem from national legislation on which the Commission cannot comment.

There is no indication how the petitioner would be affected by the alleged changes.

Directive 2012/18/EU contains specific provisions on access to information, public participation and access to justice, in addition to a detailed set of rules on inspections. In general the petitioner has the possibility to lodge a complaint against decisions taken subject to the relevant national rules and conditions.

Conclusion

The Commission considers that its initial reply to the petition is still valid and that the additional information provided by the petitioner does not give any reason to assume that EU law has not been correctly applied.

¹ OJ L 197, 24.7.2012, p.1

In line with the policy approach presented in its 2016 Communication ‘EU Law: Better results through better application’¹, the Commission prioritises its enforcement efforts as Guardian of the Treaty on those cases which reveal a systematic breach of EU law in a Member State. Based on the above, the Commission does not have at this stage elements pointing to such a systemic breach of Directive 2012/18/EU in Germany. It thus encourages the petitioner to further enquire the matter with the competent German authorities to urge them to take action at local level, as appropriate.

5. Commission reply (REV II), received on 19 December 2018

On 26 September 2018 the petitioner provided another set of additional information where the petitioner indicates again that the minimum safety distances between the Seveso establishment in question (a biogas installation from Bioenergie Knoop GmbH) and the beltway/connecting road B3 are ignored in the decision of the local authorities in Celle. The petitioner claims that the planning decision does not respect an 80 meter safety distance from the existing biogas plant and would therefore constitute a breach of Directive 2012/18/EU² (Seveso III Directive on the control of major-accident hazards involving dangerous substances).

The additional information submitted confirms that the biogas plant has been substantially expanded, increasing its capacity to 27,182 kg, thus changing its status. At the same time, the petitioner indicates that the third construction phase is on hold due to objections. Furthermore, the peripheral road would, according to the current planning, be located only 40 meters away from the biogas plant rather than the required 80 meters. The draft plan for the peripheral road would have been available for consultation to the public between 16 June 2018 and 13 July 2018. The petitioner did not indicate whether or not objections were made already in an earlier stage, or if an appeal was launched against the decision to expand the biogas plant before 13 of July. It appears from the information provided, however, that the new planning for the road has been subject to a public consultation process, thus suggesting that the necessary procedures have been respected.

The Commission considers that its initial replies concerning the petition are still valid and relevant. The applicable EU legislation in question is indeed the Seveso III Directive (2012/18/EU). However, Article 13.2 of that legislation does not give any concrete indications how big the appropriate safety distance should be. The Commission assumes that the minimum safety distance of 80 meters stems from the German national implementing guidelines "*KAS 18 of the Commission for Plant Safety*"³ with the title *Recommendations for distances between operating areas according to the Major Accidents Ordinance and areas subject to protection in the context of urban land use planning - Implementation of §50 Federal Immission Control Act*".

As the Seveso-III-Directive itself does not provide for specific safety distances, the Commission cannot comment on safety distances stemming from national implementing legislation.

¹ C/2016/8600, OJ C 18, 19.1.2017

² OJ L 197, 24.7.2012, p.1

³ Leitfaden 18 der Kommission für Anlagensicherheit: Empfehlungen für Abstände zwischen Betriebsbereichen nach der Störfall-Verordnung und schutzbedürftigen Gebieten im Rahmen der Bauleitplanung – Umsetzung von §50 BimSchG.

It is to be noted in this context that article 13.3 of the Seveso III Directive states: "*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*".

Furthermore, article 15(1)(b) of Directive 2012/18/EU provides that, in case of significant modifications to establishments under Article 11, where such modifications are subject to obligations provided for in Article 13, the competent authorities and planning authorities must set up appropriate consultation procedures to facilitate the implementation of land use policies with the aim of preventing major accidents and limiting their consequences for human health and the environment. This implies that the public concerned shall be given an early and effective opportunity to express its opinion.

Conclusion

The Commission considers that all its earlier replies to the petition are still valid and that the additional information provided by the petitioner does not give reason to assume that EU law has not been correctly applied.

In line with the policy approach presented in its 2016 Communication 'EU Law: Better results through better application'¹, the Commission prioritises its enforcement efforts as guardian of the Treaties on those cases which reveal a systematic breach of EU law in a Member State. Based on the above, the Commission does not, at this stage, have any elements pointing to such a systemic breach of Directive 2012/18/EU in Germany. It thus encourages the petitioner to further enquire with the competent German authorities (*Staatliches Gewerbeaufsichtsamt Celle - Behörde für Arbeits-, Umwelt und Verbraucherschutz*) to urge them to take action at local level, as appropriate.

¹ C/2016/8600, OJ C 18, 19.1.2017.