

Jerzy Jendrośka

ACCC case law and the EIA Directive  
recast process

Current issues regarding the EIA and  
SEA Directives

**WORKSHOP**

November 21, 2012, Brussels

# Issues addressed

- Scope of analysis
- Importance
- Issues of concern
  - Scope of application
  - Procedural details of public participation
  - Access to justice
  - Integration with
    - IPPC (IED) permit
    - Habitat assessment

# Scope of analysis

- Applicable ACCC opinions
  - Related to EU directly
  - Related to EU Member States
  - General opinions
- Direct and indirect relation to Aarhus
- Issues addressed and not addressed by the recast

# Importance

- 49. This may have some consequences for the implementation of the Convention, as **most Member States seem to rely on Community law when drafting their national legislation** aiming to implement international obligations stemming from a treaty to which the Community is also a Party. Moreover, **the provisions of the EIA Directive, including those relating to public participation, are being directly invoked in some legal acts concerning provision of Community funding**, for example in Annex XXI to Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund. Thus in practice they may be applied directly by European Community institutions when monitoring compliance with the EIA Directive on the occasion of taking decisions concerning Community funding for certain activities.
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para. 49)*

# Scope of application – Aarhus Annex 1 and EIA Directive Annex 1

- 23. The Party concerned maintains that although indeed neither Annex I of the EIA Directive nor Annex I of the IPPC Directive are identical with annex I of the Convention, in combination they cover it comprehensively... The Party concerned ....maintains that the Convention, as part of Community law, has direct application in such cases, putting Member States under an obligation to carry out the assessment with the requirement for public participation also in relation to such activities listed in Annex II of the EIA Directive which are covered by annex I of the Convention...
- 53.... Committee does not make any conclusions ... concerning the precise correlation between the list of activities contained in annex I of the Convention and those contained in the respective annexes to the EIA and IPPC Directives.

• *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, paras 23 and 53)*

# Procedural details - notification

- Notwithstanding the distinctive structure of the European Community, and the nature of the relationship between the Convention and the EC secondary legislation, as outlined in paragraph 35, the Committee notes with concern the following general features of the Community legal framework:
- (a) **Lack of express wording requiring the public to be informed in an “adequate, timely and effective manner”** in the provisions regarding public participation in the EIA and IPPC Directives
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para 59)*

# Procedural details – access to information

- Art. 6.6 Aarhus Convention
  - Each Party shall require the competent public authorities to give the public concerned access for examination.... as soon as it becomes available, to **all information relevant to the decision-making**
- Art.6.3 EIA Directive
  - (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to **environmental information** , information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

# Procedural details – submission of comments under Aarhus

- Whereas the Convention requires in article 6, paragraph 7, that “public participation procedures shall allow **the public** to submit **any** comments, information, analyses or opinions”, Lithuanian legislation limits the right to submit comments to the public concerned... In this respect, Lithuanian law fails to guarantee the full scope of the rights envisaged by the Convention.
- *(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, para. 80)*

# Procedural details – submission of comments under EIA Directive

- Art.6 4
  - 4. The **public concerned** ....shall, for that purpose, be entitled to express comments and opinions
- Art.6.7 (EC proposal)
  - The time-frames for consulting the **public concerned** on the **environmental report** referred to in Article 5(1) shall not be shorter than 30 days or longer than 60 days.

# Procedural details - informing

- Art.
  - With regard to the allegation as to the failure to publicize the final decision., the Committee wishes to underline that the Convention ...requires that the public ...shall be **informed “promptly”** and “in accordance with the appropriate procedures”. (*Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, para. 81*)
- **Art.9.1 (EC proposal)**
  - 1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the appropriate procedures, and shall make available to the public the following information

# Procedural details – reasonable timeframes

- Aarhus
  - The Committee is convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention.
- EIA Directive (EC proposal)
  - The time-frames for consulting the public concerned on the environmental report referred to in Article 5(1) **shall not be shorter than 30 days or longer than 60 days**. In exceptional cases, where the nature, complexity, location or size of the proposed project so require, the competent authority may extend this time-frame by a further 30 days;

# Access to Justice - screening

- Committee considers the outcome of the EIA screening process to be a determination under article 6, paragraph 1(b). Article 9, paragraph 2, of the Convention requires Parties to provide for access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of article 6. This necessarily also includes decisions and determinations subject to article 6, paragraph 1(b). The Committee thus finds that.... members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process (ACCC/C/2010/50 Czech Republic)

# Access to justice - remedies

- 32... the communicant alleges that the Public Participation Directive, when amending the EIA and IPPC Directives, failed to introduce provisions that oblige the Member States to provide the public concerned with effective remedies, including injunctive relief.
- 33. The Party concerned maintains that the relevant provisions are in line with the respective provisions of article 9 of the Convention, bearing in mind the scope of competence of the European Community.
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, paras 32 and 33)*

# Access to justice - remedies

- Notwithstanding the distinctive structure of the European Community, and the nature of the relationship between the Convention and the EC secondary legislation, as outlined in paragraph 35, the Committee **notes with concern** the following general features of the Community legal framework:
  - ....
  - (b) **Lack of a clear obligation** to provide the public concerned with **effective remedies, including injunctive relief**, in the provisions regarding access to justice in the EIA and IPPC Directives.
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para 59)*

# Integration with habitat assessment

- Annex 1 para 20 or Art. 6.1 b) ?
- Current form
  - -no details of public participation
    - no access to justice
- ..the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, **if appropriate, after having obtained the opinion of the general public (Article 6.3 habitat Directive)**

# Integration with IPPC(IED) permit

- 51. The requirement for “early public participation, when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. ...Such stages may involve .....various individual decisions under article 6 of the Convention **authorizing the basic parameters and location of a specific activity**, its technical design, and finally **its technological specifications** related to specific environmental standards
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para*

# Integration with IPPC(IED) permit

- 30. The Party concerned maintains that the relevant procedures ensure early and effective participation when all options are open, **although the range of options differs according to the scope of both procedures which address slightly different aspects.**
- *(European Community ACCC/C/2006/17, ECE/MP.PP/2008/5/Add.10, 2 May 2008, para 30*