

Legal analysis on the conformity of the EIA Directive with the provisions stated under the Aarhus Convention

EIA

Legal Analysis

Justice and Environment 2012

Legal analysis on the conformity of the EIA Directive with the provisions stated under the Aarhus Convention

EIA

Legal Analysis

Introduction

In 2010 a consultation procedure for a new amendment of the EIA Directive¹ was launched by the EC and a Commission proposal for amendment is expected in the next months. In order to promote the adoption of a stronger Directive that will ensure a higher level of environmental protection a **legal analysis on the compliance of EIA Directive with the Aarhus Convention** has to be conducted, especially as the EIA directive is one of the main EU instruments for public participation in decision making process. Decisions of the Aarhus Convention Compliance Committee (ACCC) show that there are gaps between the Conventions provisions and those of the Directive:

The EU should step up and narrow the margin of appreciation Member States have concerning decisions on whether to conduct EIA for certain projects to avoid international responsibility. Also, stricter rules governing the EIA procedure are needed. The EIA Directive should provide clear time-frames for public participation and review procedures. Access to justice must be broadened to include screening decisions. The Directive should clearly oblige the Member States to introduce effective review procedures, including injunctive relief.

Table of Contents

1	General Remarks	2
2	Access to Information	5
3	Public Participation	5
4	Access to Justice	11
5	Conclusions and Summary of Proposals for a new wording of the EIA Directive	15
6	Sources	15

1. General Remarks

1.1. Competences of the EU

The EU can only act within the limits of powers assigned to it by the Member States in the Treaties.² As a first step, it is thus necessary to analyse the Unions competences. The Directive discussed below is based on the environmental competence of the EU.

According to Art 4 (2) e TFEU and Art 191 TFEU, the EU shares its competence in the field of environment with the Member States. This means that the Member States can exercise their competence to the extent that EU has not (yet) done that.³ The environmental competence of the EU stretches to all areas mentioned in Art 191 TFEU, including preserving, protecting

¹ Directive 2011/92/EU of the European Parliament and of the Council of 13.12.2011 on the assessment of the effects of certain public and private projects on the environment, OJL 26, 28.1.2012, p. 1.

² Principle of conferral, Art 5 (2) TEU.

³ Art 2 (2) TFEU.

and improving the quality of the environment. The EU can conclude international environmental agreements.

When exercising its (shared) competences, the EU is bound by the principles of subsidiarity and proportionality. This means that the EU shall only act insofar as the objective of the proposed action cannot be sufficiently achieved by the Member States and will be better achieved at the EU level (Art 5 (3) TEU, subsidiarity). Also, the actions of the EU must not exceed what is necessary to achieve the objectives of the actions (Art 5 (4) TEU, proportionality). This second principle applies to the choice of action as well as to its content.

As stated above, the EU shares the competence in the field of environment with its Member States. As far as the EU has exercised its powers, it is also responsible for the implementation of the Aarhus Convention (AC). Concerning obligations arising from the Aarhus Convention (to which both the EU and its Member States⁴ are parties) the ACCC acknowledged that *“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”*.⁵ It is thus the responsibility of the EU to properly monitor the implementation of the legislation transposing the Convention.⁶

We thus recommend that the EU, in general, should minimize the margin of appreciation the Member States have when implementing the EIA Directive (EIAD) in order to ensure that strict and proper monitoring (through the European Commission) is possible and feasible. This would also ensure a minimal distortion of competition between the Member States. In the light of the obligations arising from the Aarhus Convention and the decision in the procedure ACCC/C/2010/54/EU, this would also comply with the principles of proportionality and subsidiarity: There are various pending compliance procedures against EU Member States. Some of these compliance procedures concern permitting procedures and the corresponding national laws implementing the EIA Directive. In order to fulfil its international obligations, the EU should act upon these deficits and enact union-wide standardised rules for the problematic issues identified below. Otherwise, problems of international responsibility, shared between the EU and its Member States, are going to occur. The compliance procedure ACCC/C/2010/54/EU, where the EU is held responsible for not properly monitoring the implementation of secondary legislation, is the best example for that.

1.2. The Aarhus Convention within the EU legal order

The Aarhus Convention is binding for the EU since May 2005.⁷ All Member States except Ireland are parties to the Convention. According to Art 216 (2) TFEU, international agreements concluded by the EU are binding on its institutions and its Member States.⁸

According to the case-law of the ECJ, the provisions of a treaty signed by the EU form an integral part of the EU legal order.⁹

⁴ Ireland ratified the Convention on 20.06.2012.

⁵ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 49.

⁶ Procedure ACCC/C/2010/54 (EU) Findings and recommendations of 29.06.2012 (official version not yet available), para 77 and 84.

⁷ Council Decision 2005/370/EC of 17.02.2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124 17.05.2005, p. 1 in connection with Art 17 Aarhus Convention.

⁸ Hence, Ireland is also bound by the Convention through EU law.

International agreements signed by the EU rank above the internal (secondary) legislation. Thus, Directives and Regulations must be interpreted in consistency with the obligations resulting from the Aarhus-Convention. This also applies to national legislation implementing the European secondary acts.¹⁰ While the Commission often argues with this duty to interpret European legislation in consistency with the Aarhus-Convention when confronted with claims of non-compliance,¹¹ the Aarhus Convention Compliance Committee explicitly elaborated on this point as follows:

“The Committee notes the point made by the Party concerned ... that under European Community law, an international agreement concluded by the Community is binding on the Community institutions and the Member States, and takes precedence over legal acts adopted by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement. In this context, the Committee wishes to stress that the fact that an international agreement may be given a superior rank to directives and other secondary legislation in European Community law should not be taken as an excuse for not transposing the Convention through a clear, transparent and consistent framework into European Community law (cf. article 3, paragraph 1, of the Convention).”¹²

Under certain circumstances, provisions of the Aarhus-Convention may be directly applicable, meaning that Courts and state authorities can base their decisions directly on those provisions (also: direct effect). As far as provisions of the Aarhus-Convention also grant individual rights, individuals may directly enforce those provisions before national Courts and state authorities. To decide upon whether certain provisions of the Convention have those attributes lies within the jurisdiction of the ECJ, and may not be decided solely by the national Courts of the Member States.¹³

According to the ECJ, a provision is directly applicable, *“when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”¹⁴*. Whilst direct applicability may be a possible solution to deficits in implementing the Convention, it most certainly does not meet the ACCCs standard of transposing the Convention *“through a clear, transparent and consistent framework”*. Thus, the following analysis tries to identify the deficits of the secondary legislation implementing the Aarhus Convention on European level, particularly the EIA Directive.

Upon approving the Convention, the EU declared that the legal instruments in force did not fully cover the implementation of the obligations arising from Art 9 (3) Aarhus-Convention. To cover these obligations, the Commission proposed a Directive on access to justice in environmental matters, which has not been enacted yet.¹⁵ The obligations concerning public participation (Article 6) and respective Access to Justice (Art 9 par 2 and 4) have been transposed by Directive 2003/35/EC¹⁶, amending existing environmental legislation, in particular the EIA Directive.

⁹ ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 30.

¹⁰ ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 50.

¹¹ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 23.

¹² Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 58.

¹³ ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 43.

¹⁴ ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 44.

¹⁵ COM (2203) 624 final; see current status of the proposal at

http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=fr&DosId=186297 (13.06.2012).

¹⁶ Directive 2003/35/EC of the European Parliament and of the Council of 26.05.2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.06.2003, p. 17.

1.3. Aarhus Convention Compliance Committees Decisions within the EU legal order

In order to properly identify possible deficits of the EIA Directive, one has to take into account the Case Law of the Aarhus Convention Compliance Committee (ACCC). The case law of the ACCC has the same legal status in the EU legal order as the Convention itself and thus must be observed when implementing the Aarhus Convention:¹⁷

According to the case law of the ECJ, a provision of an international treaty is directly applicable “*when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure*”¹⁸. The same test applies to decisions of an institution established by an international treaty,¹⁹ such as the ACCC.²⁰ The “findings and recommendations” of the ACCC, however, very often contain clear and precise obligations and/or criteria to be met by the Parties. Provisions of EU law thus can be directly tested on their consistency with the case-law of the ACCC and, if they contravene the obligations set out by the ACCC, they can be annulled by the ECJ (or are, at least, not applicable, since the principle of supremacy of EU law also applies to the – in relation to the EIA Directive higher-ranking – Aarhus Convention).

Furthermore, the case-law of the ACCC and the adoption of its decision by the Meeting of the Parties provides for relevant legal custom under international law,²¹ specifying the broad provisions of the Aarhus Convention. Also, as successive legal custom, the case-law has the potential to derogate the provisions of the Aarhus Convention.²²

The EU is thus obligated to follow the obligations and criteria laid out in the case-law of the ACCC; this holds true from the perspective of EU law itself as well as from an international legal perspective.

2. Access to Information

The provisions of the Aarhus Convention concerning Access to Information have been transposed into EU law by the Environmental Information Directive.²³ These provisions are therefore not subject of this analysis.

3. Public Participation

3.1. Scope of Application

3.1.1. General

The Aarhus-Convention prescribes mandatory public participation for certain acts. Concerning the EIA Directive, Art 6 of the Convention is the most relevant provision. All

¹⁷ See *Alge T*, RdU 2011, p. 140.

¹⁸ E.g. ECJ 08.03.2011, C-240/09 (*Lesoochránárske zoskupenie VLK*) para 44.

¹⁹ E.g. ECJ 20.09.1190, C-192/89 (*Sevince*) para 14, 15; ECJ 08.05.2003, C-171/01 (*Wählergruppe Gemeinsam*) para 54, 55.

²⁰ See *Alge T*, RdU 2011, p. 140.

²¹ See *Alge T*, RdU 2011, p. 141.

²² See *Alge T*, RdU 2011, p. 141.

²³ Directive 2003/4/EC of the European Parliament and of the Council of 28.01.2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.02.2003, p. 26.

decisions on projects falling within the scope of application of Art 6 (see below) must be taken with prior proper public participation. It is thus necessary to check whether the scope of application of the EIA Directive covers all projects covered by Art 6 of the Aarhus-Convention.

3.1.2. Art 6 (1) a and Annex 1 Aarhus Convention

“Each Party (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I”

According to Art 6 (1) a of the Convention, the provisions concerning public participation must be applied on procedures in which projects listed in Annex 1 Aarhus Convention are permitted.

According to the EIA Directive, projects likely to have adverse effects on the environment must be made subject to a requirement for development consent and undergo an environmental impact assessment with mandatory public participation (Art 2 (1)). Art 4 EIA Directive defines *“projects likely to have significant effects on the environment”*: EIA is mandatory for projects listed in Annex 1 of the EIA Directive (Art 4 (1) EIA-D). For projects listed in Annex 2 of the EIA Directive, Member States may decide either on a case-by-case examination (screening procedure) or through certain thresholds or criteria the Member States can establish by themselves whether the project must undergo an EIA procedure (Art 4 (2) EIA Directive). However, the Member States are not free to choose which projects must undergo EIA. They have to adhere to the criteria established in Annex 3 EIA Directive.

Not all projects listed in Annex 1 Aarhus Convention are included in Annex 1 EIA Directive. Nearly all of those projects which are not included in Annex 1 EIA Directive are listed in Annex 2 EIA Directive.²⁴ Also, some of the thresholds in Annex 1 EIA Directive exceed the thresholds in Annex 1 AC. This is problematic in two ways:

Responsibility for Projects listed in Annex 1 Aarhus Convention and Annex 2 EIA Directive:

The EU has established legislation governing those activities. Though the EIA Directive does not prescribe mandatory EIA and public participation for these projects, Member States are still obliged to consider the necessity of EIA for these activities and regard the criteria laid out in Annex 3 EIA Directive. They may **not** decide on this in absolute discretion.²⁵ The Commission supervises the application of Art 4 (2) EIA Directive.²⁶ Consequently, the EU is responsible for the proper implementation of the Aarhus Conventions obligations for these kinds of projects. This also means that the EU is responsible for establishing a clear and transparent framework transposing the Aarhus Convention. The current system, leaving the Member States the choice to either decide on the necessity of EIA on a case-by-case basis or set thresholds or other criteria does not establish such a clear and transparent legal framework. The implementation of the relevant provisions of the EIA Directive differs from Member State to Member State, even though it is not very reasonable to argue that certain activities do not have *“significant environmental effects”* in one Member State when other Member States qualify them as having such effects. The correct implementation of Art 4 (2)

²⁴ E.g. Parts of Annex 1 (2), (19) Aarhus Convention.

²⁵ ECJ 24.10.1996, C-72/95 (Kraaijeveld) para 53, 59, 61.

²⁶ Art 12 (2) and (3) EIA Directive.

EIA Directive and Annex 2 EIA Directive thus brings various legal uncertainties, as proven by the case law of the ECJ.²⁷

We propose that (at least!) all activities listed in Annex 1 Aarhus Convention be transposed through Annex 1 EIA Directive. This would mean that EU law provides for mandatory EIA and public participation for all projects governed by Art 6 (1) a Aarhus Convention and improve the comprehensibility of the overall system.

Public Participation in Screening Procedures for projects listed in Annex 1 Aarhus Convention:

If Member States decide on the applicability of the EIA procedure for projects listed in Annex 1 of the Aarhus Convention and Annex 2 EIA Directive, it is important that in these case-by-case examinations, the public has participation rights: Since the decision that the EIA Directive is not applicable often leads to the examined project not needing any project consent,²⁸ these decisions may amount to decisions permitting the project. As it is, the EIA Directive only obligates the Member States to make the decisions available to the public. For the activities listed in Annex 2 EIA Directive falling under Annex 1 AC, the Aarhus Convention thus prescribes mandatory public participation according to Art 6 (1) a AC.

To implement the Aarhus Convention, screening decisions under Art 4 (2) EIA Directive must be subject to mandatory public participation.

3.1.3. Art 6 (1) b Aarhus Convention

“Each Party ...

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions”

The activities listed in Annex 1 EIA Directive which do not fall under Annex 1 Aarhus Convention are subject to mandatory public participation according to Art 6 (1) b Aarhus Convention. Permitting procedures for these projects thus must meet the public participation standards of the Aarhus Convention.

Public Participation in Screening Procedures for projects not listed in Annex 1 Aarhus Convention:

If an activity is listed in Annex 2 EIA Directive, Member States may decide on a case-by-case examination whether to apply the EIA procedure laid out in the Directive (Art 4 (2) EIA Directive). If these activities are not listed in Annex 1 Aarhus Convention, Art 6 (1) a Aarhus Convention is not applicable. However, those screening decisions fall under Art 6 (1) b Aarhus Convention. The ACCC held that *“article 6, para. 1(b) of the Convention requires Parties to determine whether an activity which is outside the scope of annex I, and which may have a significant effect on the environment, should nevertheless be subject to the provisions of article 6. Therefore, when this is determined for each case individually, the*

²⁷ E.g. ECJ 24.10.1996, C-72/95 (Kraaijeveld); ECJ 13.06.2002, C-474/99 (Commission/Spain); ECJ 10.06.2004, C-87/02 (Commission/Italy); ECJ 08.09.2005, C-416/02 (Commission/Spain); ECJ 02.06.2005, C-83/03 (Commission/Italy); ECJ, 04.05.2006, C-290/03 (Barker); ECJ 04.05.2006, C-508/03 (Commission/United Kingdom); ECJ 23.11.2006, C-486/04 (Commission/Italy); ECJ 16.06.2009, C-427/07 (Commission/Ireland); ECJ 15.10.2009, C-255/08 (Commission/Netherlands); ECJ 12.11.2009, C-495/08 (Commission/United Kingdom).

²⁸ Or at least no EIA.

competent authority is required to make a determination which will have the effect of either creating an obligation to carry out a public participation procedure in accordance with article 6 or exempting the activity in question from such an obligation. (...) As such, the Committee considers the outcome of the EIA screening process to be a determination under article 6, paragraph 1(b).²⁹

To implement the Aarhus Convention, all screening decisions under Art 4 (2) EIA Directive must be subject to mandatory public participation.

Further it is problematic, that Member States can choose whether they apply a case-by-case examination or set certain criteria in order to determine whether a project listed in Annex 2 EIA Directive should undergo EIA: Most Member States set the mentioned criteria by generally-applicable legally binding norms, which, in most cases, are not or under very restricted circumstances, reviewable by the public concerned. Whilst it is understandable, that mandatory screening procedures for all projects in Annex 2 might exceed the capacities of national authorities, it is important – and obligatory according to the Aarhus Convention – that the processes in which generally-applicable legally binding norms setting thresholds are developed, the public can participate and has a right to review those norms.

Public Participation in Procedures for applying the exemption of Art 2 (4) EIA Directive

According to Art 2 (4) EIA Directive, Member States may, in exceptional cases, exempt a specific project from the application of the provisions of the EIA Directive. The reasoning laid out above for screening decisions (Art 4 (2) EIA Directive) also applies to these decisions. It follows that the public must be able to participate in these procedures. *Art 2 (4) EIA Directive should be deleted without substitution.*

We thus propose the following new wording of Art 4 and Art 2 EIA Directive:

Article 2

4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph.

Article 4

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination

²⁹ Procedure ACCC/C/2010/50 (Czech Republic) Draft Findings of 19.04.2012, para 82.

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. *The public participation provision of this Directive shall be applied to those procedures, irrelevant whether the determination is made according to lit (a) or (b).*

3.1.4. Precise division between “projects” and “plans and programmes”

The EU should strive to clearly and adequately divide the terms “project” (falling under the EIA Directive) and “plans and programmes” (falling under the SEA Directive³⁰ and Art 7 Aarhus Convention), since the provisions for public participation for plans and programmes are less strict. As the case-law of the Aarhus Convention Compliance Committee shows, legal acts very often cannot be clearly qualified as one or the other. This issue will be discussed in depth in the corresponding study concerning the SEA Directive.

3.2. Public Participation Procedure

3.2.1. Reasonable time-frames – Art 6 (3) Aarhus Convention:

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

The procedure and necessary steps for public participation in the EIA are specified in Art 6 EIA Directive. Some of the provisions of the Aarhus Convention are transposed literally. However, this does not automatically mean that the Convention is implemented correctly.

According to Art 6 (3) AC, the public participation procedures must include reasonable time-frames. In various decisions, the ACCC has specified what “reasonable time-frames” are. According to ACCC case-law, under normal circumstances 90 days are a reasonable time frame.³¹ In another procedure, the ACCC found a time-span of approximately 6 weeks (45 days) sufficient.³² In two other cases, the ACCC held that time-spans of 10 respectively 20 days do not fulfil the requirement of “reasonable time-frames”.³³ The ACCC also stated that the definition of reasonable time-frames may vary, depending on the size and complexity of the project.³⁴ Still, the case law of the ACCC provides a useful guideline for setting time-frames.

Whilst the characteristics of a project have to be taken into account when setting a time frame for public participation, a time-span of **at least 6 weeks (30 days)** should be provided for in the EIA Directive as a minimum standard.

³⁰ Directive 2001/42/EC of the European Parliament and of the Council of 27.06.2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p. 30.

³¹ Procedure ACCC/C/2004/4 (Hungary) Findings and recommendations of 18.02.2005 ECE/MP.PP/C.1/2005/2/Add.4 para 12.

³² Procedure ACCC/C/2007/22 (France) Findings and recommendations of 03.07.2009 ECE/MP.PP/C.1/2009/4/Add.1 para 44.

³³ Procedure ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70 and Procedure ACCC/C/2008/24 (Spain) Findings and recommendations of 08.02.2011, ECE/MP.PP/C.1/2009/8/Add.1 para 92.

³⁴ Procedure ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70.

We thus propose the following new wording of Art 6 (6) EIA Directive:

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article. *When providing time-frames for public participation, Member States shall take into account the complexity of the decision-making procedure and the project. As a minimum, the public concerned should be given 30 working days after all relevant information has been made available for them by the competent authority to prepare and participate effectively.*

3.2.2. Early and effective public participation, when all options are open – Art 6 (4) Aarhus Convention (relation to the IPPC Directive³⁵):

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

The Commission has argued that all activities listed in Annex 1 Aarhus Convention are covered by the EIA Directive and the IPPC Directive comprehensively. Even this, however, would not fulfil the obligations of the Aarhus Convention in all possible constellations.

Both the provisions of the EIA Directive and the IPPC Directive, however, can be interpreted in a way that allows for public participation to take place after the project is already constructed or construction works have already started: Art 6 (5) EIA Directive states that public participation must take place before the decision on the development consent is taken. According to Art 1 (2) c EIA Directive, development consent means *“the decision of the competent authority or authorities which entitles the developer to proceed with the project”*. The wording *“to proceed with the project”*, however, implies that certain steps, including construction works, have already been taken by the developer. Public participation at that stage cannot in all cases be qualified as *“early public participation, when all options are open and effective public participation can take place”* (Art 6 (4) AC): *“Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options. If a legal framework of a Party to the Convention is such that the only opportunity for the public to provide input to decision-making on technological choices which is subject to the public participation requirements of article 6 of the Convention is at a stage when there is no realistic possibility for certain technological choices to be accepted, then such a legal framework would not be compatible with the Convention.”*³⁶

In a decision concerning a permit for a Nuclear Power Plant, the ACCC found that *“providing for public participation after the construction permit can only be compatible with the requirements of the Convention if the construction permit does not preclude that all issues decided in the construction permit can be questioned in subsequent or related decision-making so as to ensure that all options remain open. Yet, a mere formal possibility, de jure, to turn down an application at the stage of the operation permit, when the installation is constructed, is not sufficient to meet the criteria of the Convention if, de facto, that would*

³⁵ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), OJ L 24, 290.1.2008, p. 8.

³⁶ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 54.

*never or hardly ever happen (ACCC/C/2007/22 (France) ECE/MP.PP/2009/4/Add.1, para. 39). The risk is obvious that providing for public participation only after the construction permit precludes early and effective public participation when all options are open. Rather, it is likely that once an installation has been constructed in accordance with a construction permit, political and commercial pressures, as well as notions of legal certainty, effectively foreclose discussions concerning the construction itself, as well as options with regard to technology and infrastructure”.*³⁷

The EIA Directive must provide a clear obligation to provide for public participation before any construction work has been done. The IPPC Directive should be amended accordingly; alternatively, projects covered by the IPPC Directive should be included in Annex 1 EIA Directive.

We thus propose the following new wording of Art 1 (2) c and Art 6 (5) EIA Directive:

Article 1

2. For the purposes of this Directive, the following definitions shall apply:

(c) ‘development consent’ means the decision of the competent authority or authorities which entitles the developer *to begin with the execution of the project*;

3.2.3. Outcome of public participation – Art 6 (8) Aarhus Convention:

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

Art 6 (8) Aarhus Convention obliges the parties to ensure that due account is taken of the outcome of the public participation procedure. The corresponding provision in the EIA Directive states that the results of the public participation procedure shall be taken “into consideration” by the competent authority. Whilst Art 8 EIAD could be interpreted in consistency with the Aarhus Convention, *“a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention”*.³⁸ We would welcome a stronger wording in the Directive.

We thus propose the following new wording of Art 8 EIA Directive:

Article 8

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into *due account* in the development consent decision.

4. Access to Justice

4.1. Art 9 (2) Aarhus Convention

“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for

³⁷ Procedure ACCC/C/2009/41 (Slovakia) Findings and recommendations of 11.05.2011, ECE/MP.PP/2011/11/Add.3, para 63.

³⁸ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 50.

under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.”

Art 9 (2) Aarhus Convention applies to all decisions that fall under Art 6 AC. For these decisions, access to a review procedure before a court and/or another independent body must be established for all members of the concerned public. The review procedure must address the substantial and procedural legality of the decision.

Art 9 (2) Aarhus Convention has been implemented through Art 11 EIA Directive. According to Art 11 EIA Directive, all decisions subject to the public participation provisions of the EIA Directive must be challengeable.

Art 11 EIA Directive, however, does not explicitly include screening decisions (Art 4 (2) EIA Directive, see above), since the current EIA Directive provisions do not provide for public participation in screening procedures. According to the ECJs case-law, “interested parties” must be entitled to access to a review procedure concerning decisions that no EIA is necessary for a project falling under Annex 2.³⁹ Whilst this interpretation of the EIA Directive must be welcomed in the light of the obligations arising from the Aarhus Convention, it must be stated that a clear provision in the EIA Directive, stating that screening decisions must be reviewable, is preferable.⁴⁰

Concerning screening decisions, the ACCC found that they fall under Art 6 (1) b Aarhus Convention (see above). The ACCC concluded that *“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, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1(b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process.”*⁴¹

The same holds true for decisions to exempt a project according to Art 2 (4) EIA Directive.

4.2. Art 9 (3) Aarhus Convention

“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.”

³⁹ ECJ 30.04.2009, C-75/08 (Mellor) para 58.

⁴⁰ See Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 58.

⁴¹ Procedure ACCC/C/2010/50 (Czech Republic) Draft Findings of 19.04.2012, para 82.

Art 9 (3) obliges the parties to ensure that members of the public have access to administrative or judicial procedures in order to challenge acts and omissions by private persons and public authorities contravening internal environmental law.

The EU has not yet enacted the Access to Justice Directive implementing Art 9 (3) Aarhus Convention. Still, if screening procedures (Art 4 (2) EIA Directive) would not be qualified as decisions falling under Art 6 Aarhus Convention (this would, however, contravene the ACCCs case-law) Art 9 (3) Aarhus Convention is applicable. The EU as well as the member states are thus responsible for establishing an administrative or judicial review procedure for these decisions.

4.3. Art 9 (4) Aarhus Convention

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

Though Art 11 (4) EIA Directive states that *“any such procedure shall be fair, equitable and timely and not prohibitively expensive”* Art 9 (4) Aarhus Convention is not properly implemented by the EIA Directive. Art 11 EIA Directive is too vague and leaves a too wide margin of appreciation to the Member States and their national laws. Art 11 thus does not fulfil the Art 3 (1) Aarhus Convention requirement of *“clear, transparent and consistent”* transposition of the Aarhus Conventions obligations.

4.3.1. Adequate and effective remedies, including injunctive relief:

“In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate...”

The ACCC further noted, that *„the EIA and the IPPC Directives lack provisions clearly requiring the public concerned to be provided with effective remedies, including injunctive relief”*.⁴² The only reason the ACCC did not conclude that the EU failed to comply with its obligations under the Aarhus Convention was because the Committee was not sure whether the EU itself or its Member States are competent for these procedural issues.⁴³

In order to properly implement the Aarhus Convention, it is necessary to establish a clear obligation to give the public concerned access to an effective remedy, including injunctive relief. As the ACCC stated, *“a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention”*.⁴⁴

4.3.2. Fair, equitable, timely and not prohibitively expensive procedure:

“... and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.”

Art 11 (2) EIA Directive states that Member States shall determine at what stage the decisions may be challenged. Regarding the requirement of timely remedies, the ACCC

⁴² Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 57.

⁴³ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 57.

⁴⁴ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 50.

stated that “if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question”.⁴⁵ The ACCC further found that “a decision on whether to grant suspension as a preventive measure should be issued before the decision is executed”.⁴⁶

There is an urgent need for unionwide standardised time-frames for those review procedures. This is proven by various ongoing compliance procedures against EU Member States.⁴⁷ In order to fulfil the requirement of “effective remedy” and “timely procedure”, those time-frames should include two major points:

First of all, there should be a minimum time-span awarded to the public concerned to raise objections against a decision and start review proceedings before a court or another independent body. Secondly, the EIA Directive should prohibit execution of decisions before the review procedure has been closed (of course, exemptions are possible).

We thus propose the following new wording of Art 11 EIA Directive:

Article 11

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

within at least 20 days after the content of the decision has been published pursuant to Article 9 have access to an effective 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 as well as the decisions taken pursuant to Art 4 (2).

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged. *The project shall not be executed before the review procedure has been closed. Exemptions from this provision have to be consistent with the objective of providing access to justice when it is still effectively possible to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

⁴⁵ Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 56; see also Procedure ACCC/C/2009/41 (Slovakia), Findings and recommendations of 11.05.2011, ECE/MP.PP/2011/11/Add.3, para 46.

⁴⁶ Procedure ACCC/C/2008/24 (Spain) Findings and recommendations of 08.02.2011, ECE/MP.PP/C.1/2009/8/Add.1 para 112.

⁴⁷ To mention only a few: Procedure ACCC/C/2010/51 (Romania); Procedure ACCC/C/2010/48 (Austria); Procedure ACCC/C/2012/69 (Romania); Procedure ACCC/C/2009/41 (Slovakia); Procedure ACCC/C/2004/4 (Hungary); Procedure ACCC/C/2007/22 (France); Procedure ACCC/C/2006/16 (Lithuania); Procedure ACCC/C/2008/24 (Spain).

Any such procedure shall be fair, equitable, timely and not prohibitively expensive *and include injunctive reliefs or suspension of the development consent*. 5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures *in accordance with Article 9*.

5. Conclusions and Summary of Proposals for a new wording of the EIA Directive

In conclusion, the following amendments to the EIA Directive are needed in order to fully comply with the Aarhus Convention, transpose the obligations through a clear and transparent legal framework and thus avoid international responsibility:

- narrow the margin of appreciation Member States have concerning decisions on whether to conduct EIA for certain projects;
- introduce stricter rules governing the EIA procedure;
- provide clear time-frames for public participation and review procedures;
- broaden access to justice include screening decisions;
- oblige Member States to introduce effective review procedures, including injunctive relief.

A summary of the proposed amendments to the EIA Directive can be found in the annexed table. Also, given the need for clear and precise provisions governing the EIA procedure on a European level, the European Commission should consider the possibility of transforming the EIA Directive into a Regulation.

6. Sources

Alge, Thomas, Der Aarhus Convention Compliance-Mechanismus – Aufgaben, Funktionen und Bedeutung für das nationale Recht, *Recht der Umwelt* 2011, pp 136 - 141

Craig/de Búrca, *EU Law – Text, Cases, and Material*, 5th edition (2011), Oxford University Press

Andrusevych/Alge/Konrad (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, 2nd edition (2011), RACSE, Lviv

All documents concerning compliance procedures and decisions of the Aarhus Convention Compliance Committee can be accessed via <http://www.unece.org/env/pp/pubcom.html>

Contact information:

name: Teresa Weber
organization: J&E
address: Volksgartenstraße 1, A-1010 Wien
tel/fax: 43 1 5249377/fax DW 20
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

