

# Recent developments under the Aarhus and Espoo Conventions

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# Education and background

- LLM Wrocław University
- Ph.D – Institute of Law of Polish Academy of Sciences
- Managing Partner at Jendroska Jerzmański Bar and Partners. Environmental Lawyers
- Director, Postgraduate European Environmental Law Studies, Opole University

# International

- Member of the Permanent Court of Arbitrage in the Hague
- Member of the Compliance Committee of the Aarhus Convention
- Member of the Implementation Committee of the Espoo Convention

# Issues

- Introduction to Aarhus and Espoo Conventions and their compliance mechanisms
- Permitting extension of lifetime - legal nature in the light of recent verdicts of CJEU and Espoo/Aarhus compliance bodies
- Defining the public concerned
- Relationship between Aarhus and Espoo legal regimes

# UNECE Aarhus Convention

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
  - 1998 - adopted and signed in Aarhus (Denmark)
  - 2001 - entry into force
  - 2003 - PRTR Protocol adopted and signed in Kiev
  - 2005 - GMO Amendment adopted and signed in Almaty (Kazakhstan)

# 3 pillars

- **Access to information**
  - passive disclosure – Art. 4
  - active disclosure – Art. 5
- **Public participation**
  - decisions whether to permit specific activities „which may have a significant effect on the environment” - art 6
  - GMO decisions – Art. 6 bis
  - plans/programs „relating to environment” – Art. 7
  - policies „relating to environment” – Art. 7
  - normative acts/legally binding rules „that may have a significant effect on the environment” – Art. 8
- **Access to justice**
  - redress in case of abusing right to information - art.9.1
  - redress in case of abusing right to participate - art.9.2
  - separate right to file a public interest law suit - art.9.3

# Aarhus Convention – status and role in Europe

- Aarhus Convention as a benchmark
- Aarhus Convention in EU
  - part of the acquis
  - Member States implement Aarhus via EU law
  - European Commission and ECJ as enforcers

# Direct effect of Aarhus Convention

- Direct effect at EU level
  - Case C-240/09 Lesochranarske: art.9.3 has no direct effect but standard test of direct effect applicable
- Direct effect in Member States
  - no direct effect because of article 3.1 („Each Party shall take the necessary legislative, regulatory and other measures..”) – verdicts in Czech Republic and Poland
  - each provision separately judged (ie. paragraphs 1,2,3 and 7 of Art.6 produce direct effect according to Conseil d’Etat in France)



# Aarhus Compliance mechanism

- Compliance Committee
  - nine independent members
  - elected to serve in personal capacity
  - regional balance
- Compliance procedure - triggers
  - Submission by Party about another Party
  - Submission by Party about itself
  - Referrals by secretariat
  - Communications by the public (60 hitherto)

# Legal effect

- Findings and recommendations of CC
  - Findings
    - compliance or non-compliance
  - Recommendations
    - steps to be taken Party concerned
    - steps to be taken by MOP
- Adoption by MOP
  - possible sanctions

# New documents under Aarhus

- Implementation Guide 2013
  - Available online
  - Hard copies
  - C-182/10, Solvay and Others and C-279/12
- Recommendations on Public Participation
  - Developed under TF on PP
  - To be adopted by MOP

# Espoo Convention

- Adopted and signed in Espoo in 1991
  - entered into force 10 September 1997
  - status: 45 Parties (including EU)
- First amendment - MOP II
  - definition of the public
  - open to non-UNECE countries
- Second amendment - MOP III
  - scoping
  - extended list of activities on Appendix I
  - review of compliance

# Espoo Convention compliance mechanism

- Legal basis
  - MOP Decisions
  - Article 14bis (added in 2004 by MOP III)
- Implementation Committee
- Reporting system
- Compliance procedure

# General obligation and procedural tool

- General obligation (Article 2.1)
- *„The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”*
- Transboundary EIA as a procedural tool to implement the above general obligation
- Espoo Convention requires transboundary EIA for
  - proposed activity
  - which may have significant adverse transboundary impact
- Prior to a decision to authorize or undertake a proposed activity

# Espoo obligations and sovereign rights

- „initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure’s outcome in the final decision” (EIA/IC/S/1, para 56 - ECE/MP.EIA/10 )

# Specific obligations

- Related to national EIA procedure
  - **Establishing proper framework for national EIA procedure**
  - Conducting in practice national EIA procedure
- Related to initiating transboundary EIA procedure - notification
- Related to conducting transboundary EIA procedure
- Two aspects
  - as the affected Party
  - as the Party of origin



# Who is obliged - Party of origin vs affected Party

- "Party of origin" means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place;
- "Affected Party" means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity;
- (iv) "Concerned Parties" means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention;

# Transboundary procedure

- Stage I initiation of the procedure
  - Notification
  - Confirmation from affected country
- Stage II – full procedure
  - Provision of information and documentation
  - Possibility for commenting (authorities and public)
  - Consultation
  - Final decision and Information about the decision
  - Post-project analysis (if applicable)

# Controversial verdicts of CJEU

- The **definitive decision relating to the carrying on of operations at an existing landfill site**, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Landfill directive) does not constitute a 'consent' within the meaning of Article 1(2) of EIA Directive unless that decision authorises a change to or extension of that installation or site, through **works or interventions involving alterations** to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive (C-121/11, Pro-Braine and Others, paragraph 38)
- The **renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction'** within the meaning of point 7(a) of Annex I to Directive 85/377 (C-275/09, Brussels Hoofdstedelijk Gewest and Others, paragraphs 27-30)

# Art.6.10 of Aarhus Convention

- 10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

# Approaches

- Changes interpreted broadly – not only to cover physical change in the project itself (AG Kokot in Case Krizan)
- Extension of lifetime as new activity (Espoo IC in case Rivne)
- ACC in case Slovakia

# ACC in Case ACC/41/Slovakia

- the clause “mutatis mutandis, and where appropriate” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation
- “the clause ‘where appropriate’ introduces an objective criterion to be seen in the context of the goals of the Convention,
- “when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate.”

# Broad interpretation of changes

- to interpret provisions regarding changes to cover not only physical change in the activity itself but also changes in the surrounding environment, including the cumulative effect with other activities, as well as changes in the applicable legislative framework, in particular in relation to safety measures or environmental protection requirements (opinion of Advocate General Kokott in Case C-416/10 *Križan*)
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# Espoo – Rivne case (EIA/IC/CI/4)

- The Committee considered that there could be many reasons why Parties to the Convention would decide that the final decision on a proposed activity should be issued only for a limited period of time. Among the reasons, the Committee could identify:
  - The risks associated with such proposed activity;
  - The changes in the state of the environment;
  - The changes in the density of population;
  - The possible effects on human health;
  - The advancement of scientific knowledge as well as relevant developments in the regulatory framework
  - The development of the state of art in relation to mitigation measures.
- Clearly then, when the limited period of time expired, the Party of origin would have to re-evaluate such reasons and make the decision to extend the initial period of time or not.



# Espoo – Rivne case (EIA/IC/CI/4)

- On the basis of the above, it was the view of the Committee that the decision to authorize a proposed activity subject to the Convention, according to the national procedure, only for a limited period of time meant that any subsequent decision to extend that limited period of time, whether in the form of a new license or amendment or renewal of the existing one, would, under the Convention, be another decision of a competent authority to authorize or undertake a proposed activity, triggering obligations under the Convention. In that context it becomes less relevant whether it is a new activity or a major change to an activity.

# Public and public concerned

- Public
  - One or more
  - Natural or legal persons
  - Including NGOs
- Public concerned
  - Affected or likely to be affected, or
  - Having an interest
  - Including NGOs:
    - Promoting environmental protection
    - Meeting any requirements under national law

# Foreign public

- Art. 3.9
  - Within .. this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.
- Obligation to translate the notification and other documents into English? – (ACC/15/Romania)

# cases

- ✦ Foreign public (*ACC/71/Czech Republic*) *Temelin NPP*
  - Non-discrimination - equal opportunities to participate
- ✦ Espoo and Aarhus (*ACC/71/Czech Republic*) *Temelin NPP*, *Hinkley Point NPP case*