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LEGAL EXPERTISE

EU law implications of the Aarhus Convention Compliance Committee decision with regard to non - compliance of Slovakia as to the NPP Mochovce 3/4

Background

Both the EU and the Slovak Republic are parties to the Aarhus Convention. In December 2010 the Aarhus Convention Compliance Committee (ACCC) adopted its findings and recommendations on compliance of the Slovak Republic with regard to permitting procedures in the framework of the extension of a nuclear power plant (NPP) in the Slovak town Mochovce. The Committee found that the Slovak Republic has breached the Aarhus Convention since it failed to provide for early and effective public participation in crucial permitting procedures for the NPP.

Legal question

Now the question arises what are the legal implications of the Compliance Committee decision with regard to EU law. The key assumption of this expertise is that a breach of the public participation provisions of the Aarhus Convention is by the same time a breach of the EU EIA directive that transposed the Convention in EU law. This assumption is based on the decisions of the ACCC with regard to the EU and Lithuania (with regard to IPPC directive). Respective decisions were adopted by the third Meeting of the Parties of the Aarhus Convention unanimously – including the EU and the Slovak Republic - in Riga in 2008 and are therefore legally binding.

The decision of the Compliance Committee as to NPP Mochovce

In 2008 the Slovak Republic carried out three permitting procedures with regard to the NPP Mochovce without having conducted public participation. The Slovak Republic argued that the 1986 permits were still valid and therefore neither the Aarhus Convention nor the EIA directive was applicable. However, the Compliance Committee found respective decisions significantly changed the 1986 permits and therefore the Convention is applicable. In more detail the ACCC found as follows:

55. Based on the information given by the communicant and the Party concerned, including the translation of the three decisions in question, it is clear that the UJD Decision 246/2008 in itself, but even more so in combination with Decision 266/2008 and Decision 267/2008, regardless of whether it involved any significant change or extension of the activity, amounted to a reconsideration and update of the operating conditions by a public authority of an activity (a

nuclear power plant) referred to in article 6, paragraph 1(a), of the Convention. Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2-9, were applied, "mutatis mutandis, and where appropriate". In this context, the Committee wishes to stress that, although each Party is given some discretion in these cases to determine where public participation is appropriate, 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.

56. The Committee considers that the clause "where appropriate" introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that "access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns" and aiming to "further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment". Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the given case.

57. The Committee finds that when the authority reconsidered or updated the operating conditions for an activity of such nature and magnitude, and being subject of such a 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. This conclusion is not countered by the fact that most, if not all, changes in the 2008 construction permit lead to stricter requirements than those set in the 1986 permit. Thus, by failing to provide for public participation according to article 6, paragraphs 2 to 9, the Party concerned failed to comply with article 6, paragraph 10 of the Convention.

58. The Committee also considers that if the Mochovce NPP had been in operation since 1986 under the conditions set at the time, the changes of the activity required by the 2008 decisions would have met the criteria set out in annex I, paragraphs 1 and 22, of the Convention. In this context, the Committee wishes to stress that while for many activities listed in annex 1 to the Convention there are certain criteria or thresholds envisaged below which the requirements of article 6 paragraph 1 (a) would not apply, for some of the activities listed (including nuclear power stations) the Convention does not establish any criteria or thresholds. This means that these activities, regardless of their size, are subject to article 6 paragraph 1 (a) and thus provisions of article 6 must be applied with respect to decisions of whether to permit such activities. By virtue of the first sentence of paragraph 22 of annex 1 the same applies to a change or extension of such activities. Thus, in principle, all changes or extensions to such activities are subject to article 6. However, bearing in mind that a change or extension to already permitted activities requires reconsideration or updating of the existing permit, the provisions of article 6 would apply "mutatis mutandis, and where appropriate", as stipulated in article 6, paragraph 10.

59. The Committee concludes that the Party concerned was obliged to ensure public participation in the decision-making process leading to the UJD decisions adopted in August 2008 for the Mochovce NPP.

68. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

69. The Committee finds that by failing to provide for early and effective public participation in the decision-making leading to the 2008 UJD Decision 246/2008, Decision 266/2008 and

Decision 267/2008 of 14 August 2008 concerning Mochovce NPP, the Party concerned failed to comply with article 6, paragraphs 4 and 10, of the Convention (para 64).

B. Recommendations

70. The Committee, pursuant to paragraph 35 of the annex to decision I/7 and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to:
(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to review its legal framework so as to ensure that early and effective public participation is provided for in the decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Convention;
(b) Invite Slovakia to submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012 in achieving the recommendation above

Status of the Aarhus Convention in EU law

The Aarhus Convention is a mixed agreement ratified by the EU (Council decision 2005/370/EC) and most of its Member States. In the *Etang de Berre* case (ECJ C-239/03), referring to an international treaty concluded by the EU and its Member States, the ECJ concluded in paragraphs 24 to 26 as follows:

"24. The Convention and the Protocol were concluded by the Community and its Member States under shared competence.

25. In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9, and Case C-13/00Commission v Ireland [2002] ECR I-2943, paragraph 14).

26. From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Demirel, cited above, paragraph 11, and Commission v Ireland, cited above, paragraph 15)."

This means non-compliance of a Member State with a mixed agreement is also an issue of compliance with the EU Treaty. This is clearly the case for the Aarhus Convention. The Slovak Republic is obliged to correctly apply the public participation provisions of the Aarhus Convention since the Convention has the same legal status as EU legislation. A breach of the Convention is at the same time a breach of EU legislation. The European Commission is therefore – as guardian of the treaty – obliged to take measures against the Slovak Republic with regard to the issue in question.

Competences and status of the Compliance Committee

Next to what was said above the question arises what are the legal implications of Compliance Committee decisions. The Meeting of the Parties has the competence to establish "Establish any subsidiary bodies as they deem necessary" (Article 10 paragraph 2 subpara d)). The Compliance Committee of the Aarhus Convention was established on the base of Article 15 of the Convention by decision I/7 (ECE/MP.PP/2/Add.8) on review of compliance by the first

meeting or the parties in Lucca in 2002. According to this the Compliance Committee has the following functions:

"III. FUNCTIONS OF THE COMMITTEE

13. The Committee shall:

(a) Consider any submission, referral or communication made in accordance with paragraphs 15 to 24 below;
(b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and
(c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention; and act pursuant to paragraphs 36 and 37.

14. The Committee may examine compliance issues and make recommendations if and as appropriate"

The Compliance Committee is a subsidiary body of the Convention that has the mandate from the Meeting of the Parties to monitor, assess and examine compliance of the Convention by the parties. Decisions of subsidiary bodies have – basically - the same legal effect as the treaty that established them (ECJ 30/88, Greece vs Commission; Schweitzer/Hummer/Obwexer, Europarecht (2007), para 1013 to 1018 with further evidence). The same applies for direct effect of such decisions. Until today all decisions and interpretations of the Compliance Committee were confirmed, endorsed and adopted by the Meeting of the Parties that is at the same time the highest authoritative body of the Convention. This applies to decisions as well as findings and recommendations on compliance of the ACCC and the Meeting of the Parties do have legal effects.

Furthermore the interpretations of the Compliance Committee shall be used for interpreting the provisions of the Convention. Article 31 para 3 of the Vienna Treaty Convention and reads as follows:

"3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties."

There is no doubt that the ACCC has established interpretations as to the correct application of the Convention and the Meeting of the Parties has confirmed this. In addition to this there is an agreement of (the Meeting of the) Parties of the Convention as to how certain provisions have to be interpreted and applied when endorsing findings and recommendations of the ACCC and by adopting decisions on non-compliance. Such practice and decisions are valid legal sources for the interpretation of international law (see Neuhold/Hummer/Schreuer, Handbuch des Völkerrechts (2004), para 536 to 539) and can eventually lead to customary international law. This applies in particular for international bodies, tribunals and courts established to interpret and assess compliance with international treaties.

Interpretation of the EU competences by the ACCC

In June 2008 the Meeting of the Parties adopted and endorsed decisions of the ACCC with regard to compliance of the EU (ECE/MP.PP/2008/5/Add.10) and Lithuania (ECE/MP.PP/2008/5/Add.6). The following quotations refer to the decision regarding EU.

A communicant from Lithuania filed two communications based on the same/similar facts addressing Lithuania and the EU. The ground case was about a landfill in Lithuania that falls both under the EIA and the IPPC-Directive of the EU. The main issues were whether the public was adequately informed about the decision making processes (Art 6 par 2), public participation was early and efficient when all options are open (Art 6 par 4) and whether there were effective remedies including injunctive relief (Art 9 par 4). The Committee found Lithuania under non-compliance as to various provisions of Article 6, but that the EU was in compliance with the Convention.

The Compliance Committee had, since both the EU and Lithuania are parties to the Convention, to make a decision, what is the competence and responsibility of the EU and what of the Member State with regard to Aarhus related issues: *"(...) the structure of the European Community and its legislation differs from those of all other Parties to the Convention in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member States to implement Community directives" (para 44).* This argument was used when analysing different aspects of the case. The Committee basically assessed whether the public participation provisions of EIA and IPPC directive are sufficient to comply with the Convention.

<u>Multiple permits (tiered decision making) – multiple participation</u>
One of the issues was that in the concrete case there were different decisions permitting different aspects at different stages that fall under Article 6 (multiple permits). The Committee stated that the public shall have the right to participate in any significant environmental permitting procedure relating to Art 6. For that purpose the parties should conduct a "significance test", whether Art 6 applies for a specific decision or not (the Committee indicated how this can be done). However, it is the obligation of the Member State to that and not the EU.

The Committee ruled as follows: "(...) *Neither the EIA Directive nor the IPPC Directive seem to prevent multiple permit decisions in the Member States."* (para 45). "*Bearing in mind the above characteristic features of the Community law and the fact that under EIA and IPPC directives public participation is mandatory in case of the two main permitting decisions applicable to landfills covered by annex I to the Convention, the Committee is of the opinion that as far as application of article 6 of the Convention in relation to multiple permits applicable to landfills is concerned, the Community legal framework in principle properly assures achievement of the respective goals of the Convention*" (para 46). This means the EC Directives do not "prevent" Member States from correctly applying the Convention, because there is sufficient room for "correct" interpretation and application on Member State level.

<u>Early and effective participation (Art 6 par 2 and Art 6 par 4)</u>
A similar statement as above follows with regard to the need of early and effective participation in different Art 6 decision making stages. Furthermore the communicant claimed that European legislation lacks the Convention's wording that the public has to be informed in an "adequate, timely and effective manner" (Art 6/2). The Directives use the term "early and effective" participation. The Committee considers the Directive's wording sufficient since it has more or less the same objective (para 48). However, the Committee noted that "*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." (para 49). "*Moreover, although a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention, bearing in mind the specificity of European Community directives, the fact that the terms "adequate, timely and effective manner" are not used in the Directives does not in itself amount to non-compliance with the Convention.*" (para 50)

Furthermore, "*The communicant maintains that the EIA Directive and IPPC Directive fail to comply with the Convention because they fail to provide for "early public participation, when all options are open and effective public participation can take place" on account of the fact that the participation may take place after the construction has commenced.*" (para 52). The Committee argued that since the Directives provide for "early and effective participation" the national system has to guarantee that this is the case in practice". "*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*" (para 54). "*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.*" (par 55). Again the Committee argued that the Directive's wording is sufficient, but it is the responsibility of the Member States to apply and implement in the sense of the Convention.

<u>General issues of transposition and conclusions</u>

"The Committee notes the point made by the Party concerned (para 23) 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." (para 58)

"*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;

(b) Lack of a clear obligation to provide the public concerned with effective remedies, including injunctive relief, ..." (para 59)

Furthermore the Committee notes with concern that the abovementioned features would not lead to non-compliance of the EC, but "*it considers that they may adversely affect the implementation of article 6 of the Convention."* (para 59). Finally the Committee concludes that "*based on the assumption that the IPPC Directive is interpreted in a way that allows an IPPC permit in relation to newly established installations to be granted after the construction is completed only if the public had an opportunity to participate at an earlier stage of the procedure when all options where open, in particular the options regarding those features that cannot realistically be altered after the construction is finalized*"(para 60).

Implications of the ACCC interpretations for the Mochovce case

The Committee found that the EU was in compliance with the Convention even though the EIA and IPPC directives lack certain (crucial) provisions of the Convention. The main reason for being in compliance despite incomplete transposition was that it is the Member States that have to correctly apply the EU directives whereas it was the first duty of the EU to enact legislation with regard to Article 6 of the Convention. Correct application means application in compliance with international agreements concluded by the EU.

The ACCC stressed "*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.*" With other words, Member States are obliged to apply the Convention directly and interpret the EU directives in concordance with the Convention respectively since the Convention takes precedence over the directives. This is in line with ECJ jurisprudence in the Etang the Berre case and other cases quoted above. In the Lithuanian case the ACCC found that Member States could "cure" the incomplete transposition of the EU by using the Convention to correctly interpret the directives.

In case Lithuania does not interpret the EU directives in accordance with the Convention the directives are incorrectly applied and constitute a breach of EU law since (mixed) international agreements take precedence over legal acts adopted by the EU. On the other hand, in case the shortcomings of the directive are of such a nature that it can not be interpreted in accordance with the Convention, the EU itself would be in non-compliance with the Convention.

The same applies to the Mochovce case. The ACCC found the Slovak Republic to be in non-compliance with the Convention due to a breach of article 6 para 4 and 10 of the Convention. Article 6 of the Convention was transposed to EU law by the EIA directive (amended by directive 2003/35/EC). When breaching article 6 of the Convention the Slovak Republic breaches by the same time the EIA directive since the latter has to be interpreted in accordance with the Aarhus Convention that takes precedent over the EIA directive. The Slovak Republic is therefore breaching the EU treaty and the European Commission is obliged to take legal measures against the Slovak Republic. Without analyzing this in more detail, in case the EIA directive can not be interpreted in accordance with the Convention in this case the EU itself would be in non-compliance with the Convention.

Concluding remarks

The Aarhus Convention is a mixed agreement concluded both by the EU and its Member States, including the Slovak Republic. The Aarhus Convention Compliance Committee (ACCC) is a subsidiary body of the Convention established to assess, monitor and review compliance with the Convention. The Meeting of the Parties (MoP) has confirmed, endorsed and adopted all findings of the ACCC until now. The interpretations of the ACCC and the confirmation by the MoP are a legal source of for international law and its interpretation in accordance with article 31 of the Vienna Treaty Convention as well as the principles of international customary law.

In a case regarding both Lithuania and the EU the ACCC found the EU to be in compliance with the Convention though the EU directives on EIA and IPPC lack certain provisions of the Convention. The ACCC found the EU competence as to the Convention refers to enacting

legislation with regard to public participation, whereas it is the competence of the Member States to correctly apply this legislation. Furthermore the ACCC followed the arguments of ECJ jurisprudence that mixed agreements take precedence over legal acts adopted by the EU and EU law has to be interpreted in accordance with such agreements.

The ACCC found that the Slovak Republic breached article 6 of the Convention when permitting changes to the NPP Mochovce in 2008 without having conducted an early and effective public participation procedure. Since Article 6 is transposed into EU law by the EIA directive Slovakia would have been obliged to carry out an EIA with early and effective public participation before the three decisions in 2008 where issued and constructions started. The EU directive would need to be interpreted in this way. The Slovak Republic is therefore in breach with EU law.