

A case study on public participation and legal standing - Focus on Industrial Emissions Directive

ANSWERS

General remarks

The case study is a fictional one. It should help the participants to understand and discuss various aspects of public participation concerning a large project with plausible transboundary impact.

'Transboundary' projects create challenges for the usual EIA procedure (when applicable) and raise new issues that have to be addressed using the existing legal provisions and instruments, mainly the UNECE Espoo Convention and the EIA Directive. Similar or more detailed provisions may be found in other bilateral and multilateral agreements and legal instruments.

As regards public participation, there could be more applicable rules beside the EIA Directive. Large industrial installations in particular, require a specific permit under the IED Directive, which is the main EU instrument regulating pollutant emissions from industrial installations.

Both directives provide basic rules for public participation (see the presentation for details). However, the legal regulation does not address all the aspects of the permitting procedure and may cause practical issues.

The scope of the international and EU legislation

EIA

The EIA Directive includes special provisions for cases in which a project implemented in one Member State is likely to have significant effects on the environment of another Member State (Article 7). Similarly, the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, known as the Espoo Convention, introduces specific rules for conducting an EIA of activities located on the territory of one contracting party, defined as the Party of origin, and likely to cause significant adverse transboundary impact in another contracting party, defined as the affected Party (Article 2). Environmental impact assessment of transboundary projects has been carried out for many years under the EIA Directive and the Espoo Convention. The most common situation involves two countries - one where the project is situated and another on whose territory it may cause significant environmental effects. In recent years, we have seen more large-scale projects physically located in more than one country (mainly large-scale infrastructure projects, e.g. roads, pipelines, etc.). These 'transboundary' projects cover at least two countries, are likely to have significant environmental effects in each, and involve many stakeholders (national, regional and local authorities, NGOs, the public). The countries responsible for authorising such projects often have different legal systems and EIA procedures and some are not parties to the Espoo Convention. In addition, the environmental and socio-economic impacts of transboundary projects go beyond local, regional and national borders. Multilateral cooperation is therefore usually required.

There are 7 key steps in the EIA procedure carried out for large-scale 'transboundary projects':

- Notification and transmittal of information (Articles 7.1 and 7.2 of the EIAD; Article 3 Espoo);
- Determination of the content and extent of the matters of the EIA information – scoping (Article 5.2 of the EIAD);
- Preparation of the EIA information/report by the developer (Articles 5.1, 5.3 and Annex IV of the EIAD; Article 4 and Appendix II Espoo);

- Public participation, dissemination of information and consultation (Articles 6, 7.3 EIAD, Article 3.8, 2.2, 2.6 and 4.2 Espoo);
- Consultation between concerned Parties (Article 7.4 EIAD, Article 5 Espoo);
- Examination of the information gathered and final decision (Article 8 EIAD, Article 6.1 Espoo);
- Dissemination of information on the final decision (Article 9 EIAD, Article 6.2 Espoo).

It is important that the Parties concerned ensure that the public of the Parties of origin and the affected Parties is informed and provided with possibilities of commenting on or objecting to the proposed project. These should be submitted to the competent authority in the Party of origin. The Parties concerned are responsible for distributing the EIA documentation to the authorities and public in areas likely to be affected and for submitting any comments to the competent authority in the Party of origin. They should do this within a reasonable timeframe and before the final decision on the proposed project/activity is made. It is recommended that the Member States involved in decision-making for large-scale transboundary projects take particular care to ensure that public consultations are widely open by using appropriate means of communication, e.g. the internet, press, notice boards, open discussions, workshops, and hearings.

IED

Large industrial installations usually require the EIA procedure. Furthermore, a specific permit under the IED Directive is needed. It prescribes the best available technologies and sets specific condition for the activity of the installation.

The IED Directive sets specific rules for the installations with the transboundary effects in Article 26:

Transboundary effects

1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State which is likely to be significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 20(2) was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex IV at the same time as it makes it available to the public.

Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between the two Member States on a reciprocal and equivalent basis.

2. Within the framework of their bilateral relations, Member States shall ensure that in the cases referred to in paragraph 1, the applications are also made available for an appropriate period of time to the public of the Member State likely to be affected so that it will have the right to comment on them before the competent authority reaches its decision.

3. The results of any consultations pursuant to paragraphs 1 and 2 shall be taken into consideration when the competent authority reaches a decision on the application.

4. The competent authority shall inform any Member State which has been consulted pursuant to paragraph 1 of the decision reached on the application and shall forward to it the information referred to in Article 24(2). That Member State shall take the measures necessary to ensure that that information is made available in an appropriate manner to the public concerned in its own territory.

1) How would you decide on the arguments of NUN concerning the information and the time limit provided?

See the IED Directive:

Art. 24(1): shall ensure that the public concerned are given early and effective opportunities to participate

Annex IV 2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:

(a) in accordance with national law, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;

(b) in accordance with Directive 2003/4/EC, information other than that referred to in point 1 which is relevant for the decision in accordance with Article 5 of this Directive and which only becomes available after the time the public concerned was informed in accordance with point 1

3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time to inform the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to this Annex.

How would you decide on the arguments of NUN concerning the information and the time limit provided?

The language issues are not directly addressed by the Directives. And the situation differs among the Member States. As a general rule, at least the most important information or a summary is translated to the languages of the states affected or provided in English. Some bilateral treaties are dealing with this question. Nevertheless, the information should be effectively accessible to the public concerned.

The Member States are sometimes forced to translate the documents indirectly. See for example the Aarhus Convention Implementation Guide:

In the light of concerns that environmental and social impact assessments were sometimes made available in English only, with just the non-technical summary being translated, the European Bank for Reconstruction and Development has since the mid 1990s required the full environmental and social impact assessment to be made available in the local language. This enables more meaningful public participation because local people potentially affected by the project are able to read the full document and not just the technical summary.

2) Would you consider the court fee too restrictive? Which aspects would you take into account? What would be the fee in your country in this case?

There is no precise answer. According to the Aarhus Convention and the EIA and the IED Directives, *Any such procedure shall be fair, equitable, timely and not prohibitively expensive.*

In some countries, the fee would be considered low meanwhile in others, it could be found expensive or even *prohibitively expensive*. Still, according to the case law of the CJEU, high fees do not interfere with the Aarhus requirements necessarily if they can be lowered or some form of legal aid is provided.

See in particular:

C-260/11: Ordinary member of public concerned

C-530/11: Forseeable costs of proceedings

GA in C-260/11, C-530/11: Not excessive because of the size of the project, not cumulative

C-427/07: Legal aid

ACCC: United Kingdom ACCC/C/2008

However, some additional considerations are worthy from the perspective of the ECHR case law on access to justice:

Art. 6(1) ECHR is applicable in some administrative matters: Bursa Barosu Başkanlığı and Others v. Turkey

Some fees are too restrictive – especially at the beginning of the proceedings, at the first level instance, not taking into account chances for success

And some considerations should be made upon the fact that the national law seemingly treats the EU law in less favourable way than national law:

CJEU: C-115/09, C-570/13, C-416/10: *... in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).*

3) What would you do (as a national judge) if you found the court fee contrary to the requirements of the Aarhus Convention or the IED Directive?

First, the court should attempt to interpret the national law in line with the Aarhus requirements and the IED Directive – and for example lower the fee if possible. If such interpretation is not possible, it should consider direct applicability of the Directive. Last resort is liability of the State.

Nevertheless, see:

C-167/17 (Klohn): No direct effect

Given that the provisions of Directive 85/337 as amended at issue do not have direct effect and were transposed belatedly into the legal system of the Member State concerned, the national courts of that Member State are required to interpret national law so far as possible, once the time limit for the Member States to transpose those provisions has expired, with a view to achieving the objective sought by those provisions, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive (see, to that effect, judgment of 4 July 2006, Adeneler and Others, C-212/04, EU:C:2006:443, paragraph 115 and operative part).

4) Would you consider the stipulations of the Hungarian Code of Administrative Justice to comply with the Aarhus convention or the IED Directive?

A stipulation which effectively restricts any possibility of injunctive relief would be probably considered not in compliance with the Aarhus requirements.

The Aarhus Convention: Article 9(4) requires that judicial review procedures to challenge decisions, acts and omissions shall provide adequate and effective remedies, including 'injunctive relief' as appropriate. This is an auxiliary requirement to those of Article 9(1),(2) and (3) of the Aarhus Convention.

CJEU: C-416/10: In Križan, the CJEU also recalled that the possibility of interim measures is a general requirement of the EU legal order. In the absence of EU rules, and in line with the principle of procedural autonomy, it is up to Member States to lay down the detailed conditions for granting interim measures.

As regards stipulation which states that the annulment of administrative decisions is only available to those cases where an infringement of an individual public-law right has been established, see:

IED Directive 25(3): What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a).

Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b).

5) Would you grant FOM participatory rights in the administrative liability proceedings? Despite the answer, would you allow it to access the court (directly)?

The answer would be probably negative, since such requirement goes beyond the Aarhus Convention and EU Directives.

The IED Directive restricts the scope of participation to certain procedures:

Art. 24(1): Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures:

- (a) the granting of a permit for new installations;*
- (b) the granting of a permit for any substantial change;*
- (c) the granting or updating of a permit for an installation where the application of Article 15(4) is proposed;*
- (d) the updating of a permit or permit conditions for an installation in accordance with Article 21(5)(a).*

As regards criminal proceedings, see also the Aarhus Convention Implementation Guide:

Article 9(3) of the Aarhus Convention gives the public access to administrative or judicial procedures. This provision potentially covers a wide range of procedures for “citizen enforcement”. This may be ensured by granting members of the public standing to directly enforce environmental law in court. The obligation can also be met, for example, by ensuring a right for members of the public to initiate administrative or criminal procedures. Parties retain considerable discretion in designating which forums (court or administrative body) and forms of procedure (e.g., civil law, administrative law or criminal law) should be available to challenge the acts and omissions in question.

In most countries, criminal enforcement remains in the hands of the government. However, there are a few exceptions. For example, in Poland, the Petty Offences Code of 1971 authorizes some associations, including the Nature Protection Guard and the Animal Protection Association, to act as public prosecutors in cases of petty criminal offences under the Nature Conservation Act of 1991. This right to act as public prosecutor includes the right to appeal to the criminal court. The United Kingdom also allows for “private prosecutions”, which is a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions.

5) Or, based on the Aarhus Convention, do you think a civil action against Glassworx would be plausible?

See the Aarhus Convention Art 9(3): 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.

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the functions in article 6, paragraph 2 (d) (iv) and (v), and paragraph 6 need not always be placed on the authority competent to issue a decision whether to permit a proposed activity. In fact, in many countries the above functions are being delegated to various bodies or even private persons, for example the “planning inspector” in the United Kingdom or “commissaire d’enquête” in France. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a “public authority” in the meaning of article 2, paragraph 2 (b) or (c).

