



# INTERNATIONAL CASE-LAW IN NUCLEAR MATTERS

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**Brief overview of the international and European case-law regarding access to information and public participation regarding nuclear power plants**

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## **1. Introduction**

Nuclear cases have consistently raised significant compliance and implementation challenges with regards to two UNECE multilateral agreements, namely the Aarhus Convention and the Espoo Convention. Furthermore, while these two Conventions establish independent and differing obligations on the Parties, the precise interactions and all potentials for synergies have to date not been fully clarified by the bodies set up to assist Parties with compliance, namely the Aarhus Convention Compliance Committee (ACCC) and the Espoo Implementation Committee (Espoo IC). Recent case-law of the European Court of Justice (ECJ) on the matter adds an additional approach to the issue of environmental impact assessments (EIA).

This paper will give an overview of the existing case-law regarding nuclear activities with respect to different practical issues in the areas of public participation, access to environmental information, and access to justice. It also focuses on the reoccurring issue of lifetime extensions (LTE) of nuclear power plants (NPP). Without any claim to be exhaustive, similar approaches of the three legal frameworks Aarhus, Espoo, and Environmental Impact Assessment (EIA) Directive shall be highlighted.

## 2. Legislative and procedural frameworks

Due to the peculiarities related to energy production and the potentially far-reaching environmental effects, especially in the case of accidents, different legal frameworks are applicable to nuclear projects.

### 2.1. UNECE Espoo Convention

The **Convention on Environmental Impact Assessment in a Transboundary Context** (Espoo Convention) provides a legal framework for the assessment of transboundary environmental impacts. Currently, there are 45 contracting parties to this UNECE Convention, including the EU and all its Member States. Article 2 (2) of the Espoo Convention stipulates that ‘proposed activities listed in Appendix I that are likely to have significant adverse transboundary environmental impact’ are to be subject to an EIA permitting public participation. Appendix I lists nuclear reactors in its paragraph 2 (b). According to article 1 (v), ‘proposed activities’ also include major changes to activities.

The Espoo IC functions as general contact point for contracting parties and members of the public and reviews compliance with the legal requirements. It considers compliance cases either upon submission by parties or at its own initiative when it becomes aware of possible non-compliance. The Espoo IC evaluates compliance with the Espoo Convention regarding procedural, technical or administrative matters. Arguments raised by members of the public can be of legal and/or technical nature. If the Committee is confronted with technical questions, it must develop the necessary expertise to evaluate a case, i.e. seek services of scientific experts and other technical advice or consult other relevant sources.

Decisions on the implementation of the Convention prepared by the Espoo IC are taken by the Meeting of the Parties (Espoo MoP). In December 2020, the Espoo MoP adopted a Guidance on the applicability of the Convention to the LTE of NPPs (Espoo LTE Guidance).

### 2.2. UNECE Aarhus Convention

Further mentioning requires the **Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters** (Aarhus Convention). There are currently 47 parties to this UNECE Convention, including the EU and all its Member States.

Activities that require public participation, according to its Annex I (1), include nuclear power stations and other nuclear reactors as well as, according to Annex I (22), changes to or extensions of the listed activities.

The ACCC is a non-confrontational, non-judicial and consultative body which monitors the implementation of the Convention and reviews submissions from parties as well as communications from members of the public. Its objective is to provide advice and facilitate the return of the party back to compliance as well as make recommendations to the Party concerned. It publishes findings on each case and presents draft decisions on compliance to the Meeting of the Parties (Aarhus MoP). In most cases, the decisions taken by the Aarhus MoP do not widely differ from the findings prepared by the Committee. The ACCC must start a compliance procedure if it is triggered by different entities, including by the party itself (self-trigger), another party, or the secretariat of the convention. The most common type of trigger is, however, submissions made by members of the public. A communication from the public must contain a description of the violation by the state. Communications to the ACCC may only be brought if the communicant has exhausted all legal remedies on national level.

### 2.3. EU Directive on EIA

At EU level, the most significant act is the **EIA Directive 2011/92/EU**, according to which certain projects listed in Annex I must be subjected to an EIA. This EU Directive, inter alia, aims at implementing the Aarhus and the Espoo Convention. According to its article 6, an EIA requires the involvement of the public and, according to article 7, the consultation of other states, if the respective project is likely to have significant effects on the environment in another Member State. Annex I includes in its paragraph 2 (b) nuclear power stations and other nuclear reactors and in its paragraph 24 any change or extension of such projects.

The ECJ decides, inter alia, on requests for preliminary rulings by member state courts as well as on complaints by the European Commission regarding the applicability of EU law. In its judgements, the Court takes into consideration the written and oral procedure as well as the advocate generals' opinions.

### **2.4. State Aid (107 TFEU)**

State aid is generally prohibited in the EU under article 107 (1) of the Treaty on the Functioning of the European Union (TFEU), as it may favour certain companies, economic sectors or industries over their competitors and thus distort free competition in the European single market. However, EU state aid law allows certain exceptions to this prohibition in principle. These exceptions to the general ban on state aid are contained in article 107(2) and (3) TFEU.

Article 107(2) TFEU lists exceptions that are considered compatible per se with the internal market. These include state aid of a social nature to individual consumers, disaster aid and aid resulting from the division of Germany.

Article 107(3) TFEU identifies aid that may be deemed compatible with the common market (e.g., 'regional aid', 'structural funds', or 'Community initiatives'). Member States are required to notify State aid to the Commission for compatibility assessment prior to granting. The Commission may exempt certain categories of State aid or aid not exceeding a certain threshold (de minimis aid) from this notification requirement. When monitoring state aid, the Commission assesses whether there is a balance between the positive and negative effects of the aid. In the past, the Commission has deemed state aid for the construction of nuclear reactors compatible with the common market and member states have and states have appealed these decisions to the European Court/ECJ.

### **2.5. Taxonomy Regulation**

On June 22, 2020, the Taxonomy Regulation 2020/852 was published. In December 2021, the European Commission published the associated Delegated Regulation 2021/2139, which sets out technical assessment criteria to determine under which conditions an economic activity can be considered to contribute significantly to climate change mitigation or adaptation, and to determine whether that economic activity avoids significant adverse effects on any of the other environmental objectives.

In July 2022, Delegated Regulation 2021/2139 was amended by Delegated Regulation 2022/1214. According to the amended Delegated Regulation 2022/1214 activities in the field of nuclear energy are to be considered as low CO<sub>2</sub> activities and do not fall into energy from renewable sources according to article 10 (1) (a) Taxonomy Regulation.

Individual Member States, most notably Austria, considered several violations of Union law in the EC's approach and line of reasoning and brought an action for annulment before the ECJ, which has been pending since October 2022.

### 3. The ‘public concerned’

*Relevant references: e.g. ACCC/C/2010/50 (Czechia (formerly Czech Republic)), ACCC/C/2012/71 (Czechia (formerly Czech Republic))*

The public participation provisions in article 6 of the Aarhus Convention mostly refer to the ‘public concerned’, i.e., a subset of the public at large. Members of the public concerned are defined in article 2 (5) of the Aarhus Convention on the basis of the criteria ‘**affected or likely to be affected by**’ or ‘**having an interest in**’ the environmental decision-making. Similarly, the EIA Directive 2011/92/EU grants participatory rights within EIA procedures to the public concerned. **Non-governmental organisations** promoting environmental protection and meeting any requirements under national law are presumed to have an interest.

In a Czech case, the ACCC noted that, although it is narrower than the definition of ‘the public’, the definition of ‘the public concerned’ under the Convention is still very broad. Members of the public have an interest in the decision-making if their property and other related rights or interests relating to the environment may be impaired by the proposed activity (e.g. neighbours to a planned industrial site, or, under certain circumstances, community councils). Environmental NGOs are not required to prove that they have a legal interest in order to be considered members of the public concerned.

The question of whether a member of the public is affected by a project depends on the **nature and size of the activity**, which especially concerns NPPs. According to the ACCC, particular attention must be paid at the stage of identifying the public concerned in the case of decision-making on **ultra-hazardous activities** like an NPP, given the fact that they are activities of wide public concern.

**Tenants** who do not own, but hold or possess land or buildings for a certain time (usually renters), may also be affected by a project or activity. This is especially the case if they have been or will be tenants for a long period of time. Although the relationship of tenants to an object is always intermediated, they may be affected by the proposed activity. Hence, they should generally be considered to fall within the definition of the public concerned and therefore have the same rights.

The ACCC found that a legal system fails to provide for effective public participation during the whole decision-making process if a **restrictive interpretation of ‘the public concerned’** is applied during the phases of the decision-making to permit activities subject to article 6 that come after the EIA procedure. This, inter alia, leads to **non-compliance with article 6 (3) of the Aarhus Convention**. Members of the public concerned, including NGOs, must therefore be allowed to effectively participate and submit comments throughout the decision-making procedure subject to article 6.

#### 4. Public participation at an early stage

*Relevant references: ACCC/C/2009/41 (Slovakia), ACCC/C/2009/44 (Belarus), ACCC/C/2010/51 (Romania), ACCC/C/2012/71 (Czechia (formerly Czech Republic)), ACCC/C/2014/104 (Netherlands), ACCC/C/2015/2 (Belarus), ECJ C-411/17 (Belgium), EIA/IC/CI/5 (UK)*

According to article 6 (4) Aarhus Convention and, similarly, the EIA Directive, public participation must take place at an early stage, **when all options are open** and participation can still be effective. The Espoo Convention also addresses in its Preamble the need to consider environmental factors at an early stage in the decision-making process.

At the time when public participation is provided for, the authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. According to the Espoo IC, Parties are obliged to refrain from carrying out works until the transboundary EIA procedure is finalized.

In a case regarding the Slovakian NPP Mochovce, the ACCC stressed that public participation should be provided at an early stage of a procedure. Therefore, a merely formal possibility to turn down an application at the stage of the operation permit when the installation is already constructed, cannot be sufficient to meet the criteria. In the relevant *Mochovce* case, many decisions could no longer be challenged by the public once the plant construction was carried out. For these reasons, the Party concerned had failed to comply with article 6 (4) Aarhus Convention not having provided for public participation at the stage of the permitting procedure.

Regarding the Belarusian NPP Ostrovets, the ACCC found that, since the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, providing for such involvement at a following stage could not be considered as meeting the requirement of providing for 'early public participation when all options are open', established under article 6 (4). Also, precluding the public from having any input on the decision on whether the NPP installation should be at the selected site in the first place was not in line with article 6 (4) Aarhus Convention.

According to the ECJ case-law on the EIA Directive, the competent authority must **take effects on the environment into account at the earliest possible stage** in all the technical planning and decision-making processes. This makes it possible to prevent the creation of pollution or nuisances at source rather than counteracting their effects subsequently. An EIA, according to the Directive, must therefore be carried out as soon as it is possible to identify and assess all potential effects of the project on the environment.

## 5. Major change or update of operating conditions

*Relevant references: ACCC/C/2009/41 (Slovakia), ACCC/C/2014/104 (Netherlands) and related advice of ACCC relating to para. 3(a) of decision VII/8m, ACCC/C/2016/143 (Czechia), ECJ C-411/17 (Belgium), EIA/IC/CI/4 (Ukraine), Espoo LTE Guidance, EIA/IC/CI/9 (Belgium), EIA/IC/CI/10 (Czechia), EIA/IC/CI/8 (Bulgaria)*

According to article 6 (10) Aarhus Convention, the provisions regarding public participation must be applied *mutatis mutandis* and where appropriate if operating conditions of NPPs are changed or updated, whereas in the framework of the Espoo Convention, major changes in activities are treated in the same way as ‘new’ activities. According to Annex I (24) of the EIA Directive, any change to or extension of a project listed in the Annex (such as nuclear reactors) must be subject to an EIA.

### 5.1. Updates or changes in operating conditions

As the **permitted duration of an NPP is clearly an operating condition**, it falls under article 6 (10) of the Aarhus Convention if the operating period is not only extended for a minimal period of time. The application of article 6 is even more appropriate if the update in the operating conditions itself might have a significant effect on the environment. In a Dutch case concerning the NPP Borssele, the ACCC thus considered that it is appropriate for extensions of duration to be subject to public participation according to article 6 Aarhus Convention, except for cases in which a change to the permitted duration concerns a minimal amount of time and would obviously have insignificant or no effects on the environment.

The requirement of providing for public participation early in the procedure also applies to decision-making processes to reconsider or update old permits or to change or extend activities according to article 6 (10) Aarhus Convention. Although within the Aarhus framework, states have certain discretion to design the decision-making procedures covered by article 6 (10) Aarhus Convention, they are not entitled to entirely exclude public participation. The ACCC has found in different cases that – regardless of the questions whether it can be considered a project on its own – the LTE of a power plant implies a change in the operating conditions of an NPP. States must therefore apply public participation requirements according to article 6 Aarhus Convention appropriately.

In November 2023, the ACCC issued its advice on paragraph 3 (a) of decision VII/8m (ACCC/C/2014/104 (Netherlands)), i.e. regarding the recommendation to take necessary measures to ensure that when reconsidering or updating the duration of any nuclear-related activity, the provisions of article 6 (2)–(9) of the Aarhus Convention are applied.

According to the IAEA Safety Standards for protecting people and the environment, NPPs must be subject to safety reviews. These so-called ‘periodic safety reviews’ (PSR) necessarily entail a determination by the regulatory body as to whether, in the light of its review of the PSR report, the NPP should be permitted to continue to operate. This amounts to a decision, tacit or otherwise, under article 6. Accordingly, the requirements of article 6 (10) apply to that determination.

### 5.2. LTE as subject to environmental assessments

The Espoo IC reached a consensus that the **extension of the lifetime** of a NPP, even in absence of any works, was a **major change to an activity** and thus subject to the Convention. In its final findings in a Ukrainian case, the Committee agreed that the extension of the lifetime of an NPP originally designed to operate for 30 years for a further 20 years represents an activity that would require a comprehensive EIA of its effects according to the Espoo Convention. Therefore, the LTE of the NPP, subject to the

proceedings, after the initial license has expired, must be considered a proposed activity under article 1 (v) Espoo Convention, and is consequently subject to the provisions of the Convention.

The Espoo LTE Guidance contains a section on LTE as ‘major change’ to an activity. It clarifies that physical works and modifications in the operating conditions related to LTE of a NPP, may well result in a changed intervention in the environment that was not considered in the initial licensing procedure. Therefore, they may justify the classification of a LTE as a major change to an activity. According to the Guidance, changes or modifications are typically not major when considered in isolation. However, where a number of them occur, they may be regarded ‘as one major change that has been split up into multiple minor changes. Their impact on the environment must then be assessed as a whole’.

In case of an extension to the operating period of a NPP, a re-evaluation should have been conducted after having properly and comprehensively assessed the environmental impact, including any transboundary impact, of the activity subject to extension through the license renewal. According to the Espoo IC, the decision to authorize a proposed activity only for a limited period of time meant that any subsequent decision to extend that limited period of time was another final decision.

The Espoo MoP also stressed that when determining whether a LTE constitutes a major change, all activities carried out prior to the last license renewal in preparation for long-term operation must be taken into account.

In a case on the Belgian NPP Doel, the ECJ stressed that measures have the effect of extending, ‘by a **significant period of 10 years**’, the operating period of an NPP **combined with major renovation works** necessary due to the ageing of those power stations. The ECJ therefore found these measures comparable, in terms of the risk of environmental effects, to when those power stations were first put into service.

According to the Espoo Convention as well as the EIA Directive, an EIA is required, regardless of whether an activity originally has been subject to such an EIA or not. It does not depend on whether the relevant Convention or Directive had already been in place at the time the power plant was originally permitted.

If a LTE of a NPP is granted for a certain period of time, it is also likely to undermine the **conservation objectives for near-by protected sites** according to the EU Habitats Directive, especially in conjunction with the scale of the work involved.



## 6. Notification and information of the public

*Relevant references: ACCC/C/2009/44 (Belarus), ACCC/C/2010/50 (Czechia (formerly Czech Republic)), ACCC/C/2012/71 (Czechia (formerly Czech Republic)), ACCC/C/2013/92 (Germany), ACCC/C/2014/104 (Netherlands), ACCC/C/2014/105 (Hungary), ACCC/C/2015/2 (Belarus), EIA/IC/S/3 (Armenia), EIA/IC/CI/4 (Ukraine), EIA/IC/S/4 (Belarus), EIA/IC/CI/9 (Belgium), EIA/IC/CI/10 (Czechia), EIA/IC/CI/8 (Bulgaria)*

### 6.1. Information of the public concerned

According to article 6 (2) Aarhus Convention, the public concerned shall be informed, either by public notice or individually as appropriate, **early in an environmental decision-making procedure**, and in an adequate, timely and effective manner. Article 6 (2) EIA Directive also requires that the public is informed ‘early in the environmental decision-making procedures [...] and, at the latest, as soon as information can reasonably be provided’.

The ACCC noted that publishing the notice on the **internet** as well as in the **national and local printed media** is sufficient. However, it is not sufficient if the authority fails to give a hint that the full EIA report, next to the preliminary EIA report, is also online. Likewise, a notice on the Ministry’s web page would not in itself be enough in order to ensure effective notification, as it is not reasonable to expect members of the public to proactively check that website on a regular basis. The ACCC also referred to the Maastricht Recommendations, which provide that public notice should also be placed in ‘the newspaper(s) corresponding to the geographical scope of the potential effects of the proposed activity and which **reaches the majority of the public who may be affected** by or interested in the proposed activity’.

The requirement of informing the public ‘in an effective manner’ means that public authorities should seek to provide a means of informing the public which ensures that all those who could potentially be concerned have a **reasonable chance to learn about proposed activities**. It therefore might be insufficient to rely on the affected territorial self-governing units using locally specific ways of informing the public.

According to the ACCC, in the case of decision-making on ultra-hazardous activities like a NPP, being activities invariably of wide public concern, particular attention is necessary at the stage of selecting the means of notification in order to ensure that all those who could potentially be concerned have a reasonable chance to learn about the proposed activities and their possibilities to participate.

### 6.2. Notification of affected states

According to the ACCC, states must ensure that, when selecting means of notifying the public under article 6 (2), public authorities are required to select such means and to ensure effective notification of the public concerned, bearing in mind the nature of the proposed activity, and including, in the case of proposed activities with potential transboundary impacts, the **public concerned outside the territory of the Party** concerned. Furthermore, when conducting transboundary procedures in cooperation with the authorities of affected countries, the competent public authorities must make the necessary efforts to notify the affected public in an effective manner.

According to article 3 Espoo Convention, a state of origin, i.e. the state in which a nuclear activity is to be carried out, must notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about the proposed activity. ‘Affected Parties’ are all Parties to the Convention likely to be affected by the transboundary impact of a proposed activity. The Espoo IC considers **e-mail to be a widely used, commonly acceptable** and rapid means of

communication and information exchange, including in public international relations, and acknowledged the legal validity of electronic means of communication for the purposes of notifying.

Especially in the absence of diplomatic relations, the designation of an **intermediary** as well as the use of new technologies and innovative approaches for communication (such as automated e-mail functions and videoconferences) is recommended to solve the difficulties in communication.

According to article 3 (3) Espoo Convention, affected Parties must respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification. They must indicate whether they intend to participate in the EIA procedure. In case of a notification through an intermediary, the intermediary must inform the Parties of the contents of the response in a timely manner, which might also be done by e-mail. In this case, the fulfilment of the conditions set out in article 3 (3) Espoo Convention is to be established from the correspondence between the affected Parties and the intermediary. Any miscommunications between the Party of origin and the intermediary do not impact on the application of the provisions of the Convention. The Party of origin retains responsibility for any actions or omissions of the intermediary in the process of notification.

Adequate information under the Aarhus Convention requires a specific contact point in the public authority to be named and preferably an email address to be provided. Moreover, states must **adequately and effectively inform the public concerned of its opportunities to participate** either at the hearing or in writing. If a hearing is to be held, the public concerned should be notified of its opportunities to participate in that hearing, e.g., the format of the hearing, the format in which the public may make interventions, and any time limits on those interventions. This is particularly important in the case of a foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin. It is not sufficient if a state invites another state to provide the comments of its 'experts' regarding an EIA report, but a clear request or instructions to the affected state to notify its public of their opportunities to participate is necessary.

The 'Good Practice Recommendations on the Application of the Convention to Nuclear Energy-related Activities'<sup>1</sup> endorsed by the MoP<sup>2</sup> recommend a 'wide notification' beyond neighbouring countries.

### 6.3. Responsible Party

The obligation to ensure that the **requirements of article 6 Aarhus Convention** are met – whether in a domestic or a transboundary context – always rests with the **Party of origin**. According to the ACCC is clear from the wording of article 6 Aarhus Convention that the public participation obligations are not dependent on obligations stemming from other international instruments. In a case regarding the British NPP Hinkley, the ACCC thus found that Germany did not fail to comply with article 6 Aarhus Convention as there was no transboundary procedure under the Espoo Convention or EIA Directive within which the German authorities were required to carry out tasks under a joint responsibility.

In the absence of notification, in particular regarding NPPs, when a potentially affected Party considers that a significant adverse transboundary impact of a proposed activity cannot be excluded and **expresses the wish to be notified**, the Party of origin should apply the Espoo Convention. It is at minimum good practice to offer Parties that have indicated their wish to be notified an opportunity to receive a notification in line with the general provisions.

Parties to the Aarhus Convention are not necessarily required to always use all of the rights and competences that they have under international or national law with respect to a decision-making procedure in another country. However, the Aarhus Convention requires a level of effort appropriate to the actions open to it in the particular context. In the case of a formal notification from another country, when deciding whether to enter into a transboundary procedure under applicable international or EU regimes, a Party to the Aarhus Convention must take into account a **strong interest**

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<sup>1</sup> ECE/MP.EIA/2017/10, para. 28.

<sup>2</sup> MoP decision VII/6 (2017), ECE/MP.EIA/23.Add.2– ECE/MP.EIA/SEA/7.Add.2.

**of its own public** in the outcome of the decision-making subject to the EIA procedure – even without a clear request from its public, when deciding whether to enter into the transboundary procedure.

### 6.4. Relevant documents

Article 6 (6) Aarhus Convention lists the relevant documents to be made available within a public participation procedure. A similar list can be found in article 6 (2) EIA Directive or in article 3 Espoo Convention concerning notifications of other states. In this regard, the ACCC stated that that the **EIA report** is a crucial document containing important details about a proposed project and the possibility to examine the full report is vital.

Although an **analysis on the consequences of ending or continuing the operation** of an NPP after the end of the original operating period is highly relevant to any decision-making to grant a LTE of that plant beyond its lifetime, it is not necessary to give the public concerned access to *all* internally available information relevant to a decision-making procedure carried out if the information is more than six years old.

According to article 6 (8) Aarhus Convention, each Party shall ensure that in the **decision, due account is taken of the outcome of the public participation**. Article 8 EIA Directive lays down that the results of consultations and the information gathered must be taken into consideration in the development consent procedure. According to the ACCC, a format which summarizes, groups and responds to the comments received from the public is a useful example of how to deal with comments received from the public.

The Espoo Convention also requires Parties of origin to provide the **final EIA documentation** to the affected public in another state. A lack of clarity about the proposed activity referred to in the notification may lead to non-compliance with the Espoo Convention. A notification must also include a suggestion for a time frame within which the EIA procedure is to be carried out. Affected Parties must be informed of the availability of a final EIA report. The **description of locational alternatives** must be included in the EIA documentation, especially if an activity is planned near a city. The EIA documentation must provide sufficient information about the **reasons and considerations explaining the selection of a site** over the alternative locations to be taken into account in the final decision.

### 6.5 Public participation concerning plans, programmes and policies relating to nuclear activities

According to article 7 Aarhus Convention, appropriate **practical and/or other provisions for the public to participate** are also required during the **preparation of plans and programmes relating to the environment**, such as energy production plans or policies. This includes providing the necessary information to the public. In this respect, public participation requirements of article regarding reasonable timeframes, early participation, and taking due account of the process outcome are also applicable to plans and programmes. States are required to publish the facts and analyses of facts which they consider relevant and important in framing major environmental policy proposals.

In a case regarding the Hungarian NPP Paks, the ACCC found that, by not publishing the ‘assessment analysis’ of the draft energy policy 2007–2020, Hungary failed to comply with the Aarhus Convention.

## 7. Administrative aspects of public participation

*Relevant references: ACCC/C/2009/44 (Belarus), ACCC/C/2012/71 (Czechia (formerly Czech Republic)), ACCC/S/2015/2 (Belarus)*

### 7.1. Submission of statements

In general, the Aarhus Convention requires that, before a public participation procedure takes place, states must ensure that their officials provide **guidance to the public** so that the public has an adequate understanding of the relevant law, the decision-making procedure and its opportunities to participate. The relevant article 3 (2) Aarhus Convention obliging Parties to ‘**assist and provide guidance to the public** [...] in facilitating participation in decision-making’ also applies to decision-making procedures outside the territory of a Party where its authorities are not competent to take decisions. The ACCC noted that, in the case of decision-making on ultra-hazardous activities like a NPP, the obligation to take efforts to facilitate the public’s participation in decision-making must be given particular weight.

Procedures for public participation shall allow the public to **submit, in writing** or – as appropriate – at a **public hearing or inquiry** with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity (see article 6 (7) Aarhus Convention and article 6 (5) EIA Directive). According to the ACCC, making the developers rather than the relevant public authorities responsible for organising public participation, including the collection of comments, does not comply with this provision.

In selecting representatives to take part in a public hearing or other event with the public concerned, states must ensure that they have the necessary expertise to address the public’s questions. For a complex project like an NPP, there may also be technical questions for which its representatives would need to provide further information in writing after the event.

In a Czech case, the ACCC found a hearing in Cseske Budejovice regarding the NPP Temelín, which lasted from 10 am until 3 am the next day, not sufficient to comply with article 6 (3) if it were the last possibility for the public concerned in Germany to participate in the permitting procedure. Concerning the timing and duration of the hearing, the ACCC found that organising a hearing in such a manner was not acceptable as the public cannot be expected to participate effectively if its opportunity to be heard comes only after it has been already sitting in the hearing for more than a full working day. The ACCC furthermore noted that the time frame for submitting written comments should extend to a reasonable time beyond the date of any public hearing in order that the public concerned has the possibility to submit comments in the light of what it had learnt at the hearing.

The ACCC considered limiting the number of questions as an acceptable means for organising a hearing, if further questions can be submitted at a later stage. Such rules to be applied during a hearing must, however, be known and understood by the participants in advance.

### 7.2. Reasonable timeframes

According to article 6 (6) EIA Directive and article 6 (3) Aarhus Convention, reasonable timeframes 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. This also requires that public participation procedures include **reasonable timeframes for the different phases**. Article 4 (2) Espoo Convention requires the concerned Parties to arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments within a reasonable time before the final decision is taken on the proposed activity.

The requirement to provide reasonable timeframes implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A timeframe which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project such as an NPP. Regarding the construction of a NPP, a timeframe of 4 months was considered adequate by the ACCC.

Article 6 (3) of the Aarhus Convention, in conjunction with article 7 thereof on public participation concerning plans programmes and policies, requires that members of the public must have sufficient time to get acquainted with the relevant drafts and to submit comments. Regarding the Romanian 2007 Energy Strategy, the ACCC found that 11 days were not sufficient. A period of 60 days, however, to comment on the EIA documentation and 43 days to comment on the EIA expert report were sufficient to meet the requirements of article 6 (3).

## 8. Multitier decision-making process

*Relevant references: ACCC/C/2012/71 (Czech Republic (formerly Czech Republic)), ECJ C-411/17 (Belgium), EIA/IC/S/4 (Belarus), Espoo LTE Guidance*

According to the Maastricht Recommendations, if a particular tier of the decision-making process does not involve the public, then the next stage that does permit public participation should provide the opportunity for the public to also participate regarding the options decided at that earlier tier. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage, but leaves other options to be considered at a later stage without public participation, would not be compatible with the Aarhus Convention. Thus, according to the ACCC, if the permitting procedure continues and the public concerned was not provided with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6 (4). Likewise, if the public authorities were provided with any further information relevant to the decision-making than that made available to the public concerned, this would amount to non-compliance with article 6 (6) Aarhus Convention.

According to article 6 Espoo Convention, **the final decision on a proposed activity must take due account of the outcome of an EIA**, including the EIA documentation, as well as the **comments received within a transboundary procedure**. Parties of origin must furthermore provide the final decision on the proposed activity to the affected Parties along with the reasons and considerations on which it was based. If a Party splits the final decision on the NPP into one part on the location and another part on permitting the construction on this location, article 6 applies to both of these decisions as part of the final permitting decision.

**Measures and upgrading work inextricably linked to a decision**, e.g. on the extension of an NPP's lifetime, together constitute a single project as defined in article 1 EIA Directive. This is not changed by the fact that the implementation of those measures requires the adoption of subsequent acts or decisions.

The Espoo LTE Guidance clarifies that the **transboundary EIA** in respect of any proposed activity should, in principle, be carried out **as soon as it is possible** to identify and assess all potential significant adverse transboundary impacts that the proposed activity is likely to have on the environment.

In some national legal frameworks, one stage is a **principal decision** and another an **implementing decision** which cannot extend beyond the parameters set by the principal decision. In this case, the possible environmental effects of the project must, according to the EIA Directive, be identified and assessed at the time of the procedure relating to the principal decision. Therefore, if the essential characteristics of the project will no longer be a matter of debate or reconsideration, the EIA or nature impact assessment according to the Habitats Directive must extend to work inextricably linked to the measures at issue in the main proceedings. This can only be applicable if both the work and its potential effects on the environment were sufficiently identifiable at that stage of the consent procedure.

## 9. Transboundary impact

*Relevant references: ACCC/C/2012/71 (Czechia (formerly Czech Republic)), ACCC/C/2013/91 (UK), ACCC/C/2013/92 (Germany), ECJ C-411/17 (Belgium), EIA/IC/CI/4 (Ukraine), EIA/IC/S/4 (Belarus), EIA/IC/CI/5 (UK), Espoo LTE Guidance, EIA/IC/CI/9 (Belgium), EIA/IC/CI/10 (Czechia), EIA/IC/CI/8 (Bulgaria)*

Article 7 EIA Directive defines that a transboundary procedure is necessary where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected requests it. According to article 3 Espoo Convention, for a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin must notify any Party which it considers may be an affected Party about that proposed activity.

### 9.1. Precautionary principle

Early and appropriately wide notification plays an essential role in the transboundary procedure according to the Espoo Convention. The precautionary approach and the principle of prevention and the Convention's objective of enhancing international cooperation in assessing environmental impact, in particular in a transboundary context, must be taken into account. While the Espoo Convention's primary aim is to **'prevent, reduce and control significant adverse transboundary environmental impact from proposed activities'**, even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with article 3. This means that notification is necessary unless a significant adverse transboundary impact can be excluded.

Although the likelihood of a major accident, an accident beyond design basis or a disaster occurring for nuclear activities might be very low, the likelihood of a significant adverse transboundary environmental impact can be very high, if the accident occurs. Consequently, when assessing which Parties are likely to be affected by a proposed nuclear activity, for the purpose of notification, the Party of origin should make the most careful consideration on the basis of the precautionary principle and available scientific evidence. The Espoo LTE Guidance and the *Good Practice Recommendations on the Application of the Convention to Nuclear Energy-related Activities* emphasize the precautionary principle the importance of a wide notification: Parties of origin are encouraged to take into consideration whether a NPP was planned and constructed before the Espoo Convention's entry into force and that the risk perception may change over time and vary from case to case.

### 9.2. Likelihood of transboundary impacts

The Espoo IC found that **'notification is necessary unless a significant transboundary impact can be excluded'**. Thus, in absence of a transboundary EIA documentation arguing to the contrary, a Party cannot exclude the significant transboundary impact of a proposed activity.

A procedure regulated in article 3 (7) Espoo Convention for the case the Parties cannot agree whether there is likely to be a significant adverse transboundary impact does not substitute the obligations of a Party of origin. In line with the principle of prevention, Parties of origin should be 'exceptionally prospective and inclusive' and ensure that all parties potentially affected by an accident – however uncertain – are notified as well as take into account the worst-case scenario. The Espoo LTE Guidance encourages Parties of origin to notify widely, even if neither specific information on the likely significant adverse transboundary impacts nor any other general characteristics of the proposed activity are considered sufficient for a definite conclusion on whether significant adverse

transboundary impacts are likely, in order to reach a mutual understanding. It concludes that a 'wide notification may thus help to avoid long and burdensome procedures'.

The Espoo LTE Guidance furthermore clarifies that, generally, the extended lifetime of a NPP has impacts that are similar to those of a new one considered in its initial operation. These impacts include impacts resulting from operational states, including normal operation, as well as impacts resulting from accidents, including accidents within the design basis and within the design extension conditions.

According to the ECJ, projects covered by Annex I EIA Directive, present an **inherent risk of significant effects on the environment** and therefore a (transboundary) EIA is indispensable in those cases.

According to article 2 (4) EIA Directive, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. This exemption, however, may only be applied without prejudice to article 7 if a project is likely to have significant effects on the environment in another Member State.



## 10. Access to Justice

*Relevant references: ACCC/C/2009/44 (Belarus), ACCC/C/2010/50 (Czechia (formerly Czech Republic)), ACCC/C/2013/89 (Slovakia), ACCC/C/2013/106 (Czechia (formerly Czech Republic)), ACCC/C/2015/128 (European Union), ACCC/C/2016/143 (Czechia (formerly Czech Republic))*

The core provisions regarding access to justice can be found in article 9 Aarhus Convention. Regarding EIA procedures, article 11 EIA Directive requires that members of the public concerned have access to a 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 public participation.

Article 9 (1) Aarhus Convention requires that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, inadequately answered, or otherwise not dealt with, has access to a review procedure. According to the ACCC, qualifying redress procedures as being of economic nature, and therefore subject to rules for commercial disputes, may well lead to limiting effective access to justice as required under article 9 (1).

In a Czech case, the ACCC found the Party to be in non-compliance, arguing that NGOs fulfilling the requirements of article 2 (5) Aarhus Convention have the right to access review procedures regarding any procedure subject to the requirements of article 6. In this regard, they have standing to seek the review of not only the procedural but also the substantive legality of those decisions according to article 9 (2) of the Convention. This might include decisions regulated in EIA legislation, but equally any other decisions taken within a procedure requiring public participation according to article 6 Aarhus Convention, including assessments or reviews regulated in national Nuclear Acts.

Even if it is not immediately possible to challenge the binding EIA statement itself, a state can be compliant with article 9 (2) given that the EIA statement is fully reviewable within an appeal against any subsequent decision. Providing standing to challenge decisions subject to article 6 only as an exceptional occurrence falls short of meeting the requirements of article 9 (2). If a national Supreme Court takes a decision annulling the contested Nuclear Authority decision, the public concerned must be granted standing in the proceedings.

According to the ACCC, it is implicit from the wording of that provision that in a review procedure within the scope of article 9 Aarhus Convention that courts are required to consider any application for injunctive relief.

According to article 9 (3) Aarhus Convention, members of the public must be granted standing to challenge acts or omissions not falling under article 6 in conjunction with 9 (2). In a case regarding a decision by the European Commission on state aid for the British NPP Hinkley Point C, the ACCC noted that, as long as the principle of environmental protection embedded in EU law can be affected by a decision, members of the public, including NGOs, must be granted access to justice against these decisions.

## 11. Access to Environmental Information

*Relevant references: ACCC/C/2009/44 (Belarus), ACCC/C/2010/51 (Romania), ACCC/C/2013/89 (Slovakia), ACCC/C/2014/105 (Hungary)*

### 11.1. General provisions

The relevant provision on environmental information can be found in article 4 Aarhus Convention. Public authorities must respond to a request for environmental information by making such information available to the public.

The EIA Directive refers the provisions of EU Directive 2003/4/EC on public access to environmental information. It provides that additional information relevant for an EIA decision which only becomes available after the time the public concerned was informed must also be made available.

Where requested, the relevant information includes copies of the actual documentation unless the information is already publicly available in another form. This requires that the whole documentation is available close to the place of residence of the person requesting information, or entirely in electronic form, if this person lives in another town or city.

A Romanian case resulted in non-compliance with article 4 (1) in conjunction with (2) and (7) Aarhus Convention, because the relevant authorities did not respond at all to two out of three information requests submitted by the communicant in relation to the decision-making process regarding the proposed construction of a new NPP. With respect to the communicant's third information request, Romania failed to ensure that the requested information regarding the possible locations for the NPP was made available to the public, and did not adequately justify its refusal to disclose the requested information. This again led to non-compliance with article 4 (1) and (4).

In a Hungarian case, the ACCC noted that both the operator Paks Ltd. and the Hungarian Electricity Ltd. MVM who performed a feasibility study of the NPP perform public responsibilities. As both are indisputably under the control of a body falling within article 2 (2)(a) of the Convention, the ACCC found that Paks Ltd. and MVM are public authorities and are therefore subject to the requirements of article 4 Aarhus Convention.

### 11.2. Refusal of information

Article 4 (3) and (4) lay down exceptional reasons to refuse a request for environmental information. These include if the public authority addressed does not hold the information requested, the request is manifestly unreasonable, formulated too generally, or concerns material in the course of completion. A request for information may also be refused if the disclosure would adversely affect the confidentiality of the proceedings (where such confidentiality is provided for under national law), international relations, national defence, public security, or the confidentiality of commercial and industrial information where such confidentiality is protected by law in order to protect a legitimate economic interest and others.

In the abovementioned case regarding Romania, the ACCC found that states must provide a legal framework which requires that the exemptions on disclosure of nuclear-related information are to be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment. The Committee pointed out that the respective Nuclear Act required public authorities to take into account the public interest in *withholding* the information whereas the Convention requires authorities to do the opposite, i.e., to take into account the public interest in *disclosure*. An approach where whole categories of

environmental information are unconditionally declared as confidential and for which no release is possible is incompatible with article 6 (6), in conjunction with article 4 (4).

Requiring a certified electronic signature every time a request is filed by electronic mail would seriously limit access to information under article 4.

The ACCC made clear the ‘materials in the course of completion’ relates to the process of preparation of information or a document and not to an entire decision-making process. It thus considered the refusal to provide information merely because a programme on the feasibility of nuclear energy production was ongoing at the time a breach of article 4 Aarhus Convention.

## **12. Outlook**

Some case-law might be more general whereas other decisions provide specific examples. Although the regulatory frameworks of the Espoo Convention, the Aarhus Convention and the EU Directives might differ from each other, general conclusions can be drawn in various areas. This concerns, inter alia, the definition of likelihood of transboundary impacts, notification and information procedures or the crucial questions of when and how an EIA must be conducted.

Regarding the LTE of NPPs, general conclusions can also be drawn from the Espoo LTE guidance adopted in December 2020. Which additional conclusions will be drawn from the Espoo IC when continuing its deliberations on pending cases as well as from ECJ and ACCC side must yet be awaited.

### 13. Informative Sources

- Aarhus Convention  
<https://www.unece.org/env/pp/treatytext.html>
- Aarhus cases; Findings of the Aarhus Convention Compliance Committee (ACCC)  
<https://www.unece.org/env/pp/cc/com.html>
- Decisions of the Meeting of the Parties (MoP) to the Aarhus Convention  
<https://www.unece.org/env/pp/ccdocuments.html>
- Espoo Convention  
[https://www.unece.org/env/eia/about/eia\\_text.html](https://www.unece.org/env/eia/about/eia_text.html)
- Documents for meetings and events concerning the Espoo Convention  
[https://unece.org/info/events/unece-meetings-and-events?key=&title=&start\\_date=&end\\_date=&f%5B0%5D=area%3A42&f%5B1%5D=program%3A23](https://unece.org/info/events/unece-meetings-and-events?key=&title=&start_date=&end_date=&f%5B0%5D=area%3A42&f%5B1%5D=program%3A23)
- Good Practice Recommendations on the Application of the Espoo Convention to Nuclear Energy-related Activities  
<https://www.unece.org/index.php?id=47760>
- Background note on the application of the Espoo Convention to nuclear energy-related activities  
<https://www.unece.org/fileadmin/DAM/env/documents/2011/eia/ece.mp.eia.2011.5.e.pdf>
- Guidance on the applicability of the Convention to the lifetime extension of nuclear power plants  
[https://unece.org/sites/default/files/2020-12/ECE.MP\\_EIA\\_2020.9\\_Guidance\\_on\\_LTE\\_ENG\\_As\\_finalized\\_9.12.2020.pdf](https://unece.org/sites/default/files/2020-12/ECE.MP_EIA_2020.9_Guidance_on_LTE_ENG_As_finalized_9.12.2020.pdf)
- Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (EIA Directive)  
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02011L0092-20140515>
- Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention  
[https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364\\_E\\_web.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf)
- ÖKOBÜRO webpage on Nuclear Advocacy (including documents for download)  
<https://oekobuero.at/en/themen/klima-energie-biodiversitaet/anti-atomkraft/>

## 14. List of relevant cases

Case number	State concerned	NPP	Date	Relevant articles
<b>Aarhus Convention</b>				
<a href="#">ACCC/C/2009/41</a>	Slovakia	Mochovce	17 Dec 2010	6 (4) and (10)
<a href="#">ACCC/C/2009/44</a>	Belarus	Ostrovets	28 Jan 2011	4, 6
<a href="#">ACCC/C/2010/50</a>	Czech Republic	-	29 Jun 2012	6, 9
<a href="#">ACCC/C/2010/51</a>	Romania	Cernavoda	29 Mar 2014	4, 7
<a href="#">ACCC/C/2012/71</a>	Czech Republic	Temelín	13 Sep 2016	6
<a href="#">ACCC/C/2013/89</a>	Slovakia	Mochovce	9 Jun 2017	4 (4), 6 (4), 9 (2)
<a href="#">ACCC/C/2013/91</a>	UK	Hinkley	19 Jun 2017	6 (2)
<a href="#">ACCC/C/2013/92</a>	Germany	Hinkley	18 Jan 2017	3, 4, 6
<a href="#">ACCC/C/2014/102</a>	Belarus	Ostrovets	18 Jun 2017	3 (8)
<a href="#">ACCC/C/2014/104</a>	Netherlands	Borssele	21 Jan 2019	6
<a href="#">ACCC/C/2014/105</a>	Hungary	Paks	26 Jul 2021	7
<a href="#">ACCC/C/2013/106</a>	Czech Republic	Temelín	28 Aug 2019	6, 9
<a href="#">ACCC/C/2015/128</a>	European Union	Hinkley	17 Mar 2021	9 (3) and (4)
<a href="#">ACCC/C/2016/143</a>	Czech Republic	Dukovany	26 Jul 2021	6 and 9 (2)
<a href="#">ACCC/S/2015/2</a>	Belarus	Ostrovets	23 Jul 2021	3 (9) and 6
<b>Espoo Convention</b>				
<a href="#">EIA/IC/S/3</a>	Armenia	Metsamor	Feb 2019	3 (5) and (8), 4 (2), 5, 6
SEA/IC/INFO/2	Armenia	Metsamor	Apr 2017	SEA Protocol
<a href="#">EIA/IC/CI/4</a>	Ukraine	Rivne	Feb 2017	2 (2) and (3), 4 (1), 3, 6
<a href="#">EIA/IC/S/4</a>	Belarus	Ostrovets	Jun 2014/ Feb	2 (6), 3 (8), 4 (2), 5 (1),
<a href="#">EIA/IC/CI/5</a>	UK	Hinkley	Feb 2017	2 (4), 3 (1)
<a href="#">EIA/IC/INFO/26</a>	Spain	Santa Maria de Garoña	Dec 2018	3, 5
EIA/IC/CI/9	Belgium	Tihange	Jun/Dec 2023	2(3), 3(1)
EIA/IC/CI/10	Czechia	Dukovany	Jun/Dec 2023	2(3), 3(1)
EIA/IC/CI/8	Bulgaria	Kozloduy	Feb/Dec 2023	2(3), 3(1)
<b>European Union Law</b>				
<a href="#">C-411/17</a>	Belgium	Doel	Jul 2019	EIA dir., 2, 4, 6, 7

<a href="#">C-594/18 P</a>	European Union	Hinkley	22 Sep 2020	107 TFEU
<a href="#">T-101/18</a>	European Union	Paks II	30 Nov 2022	107 TFEU

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