

The Espoo Convention & Kiev Protocol: Implementation, Compliance & Enforcement in the EU

*Seminar on the Espoo
Convention:*

*20 Years of Law, Policy & Practice
Geneva, 21 June '11*

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Overview

- Introduction / definitions
- Findings of EU Dir. implementation reviews
- Findings of subsequent consultation / conference (EIA Directive)
- Findings of Convention implementation reviews
- Implementation gaps?
- Compliance / enforcement in EU (TEIA cases)
- Invoking direct application / effect where gaps?
- Other issues in relationship b/w international and EU law: transposition / dispute settlement

Introduction

- Convention & Protocol mixed agreements: ratified by both EU & MS
 - Convention all, Protocol 15 MS
- Implementation & compliance expected from both, subject to Declarations made by EU & MS upon adoption:
 - MS responsible for obligations not covered by secondary law (Convention)
 - EU responsible for obligations covered by EU law (Protocol)

Introduction (cont)

- Implementation & compliance expected from both EU law (Commission) & international law (Implementation Committee / MOP)
- Focus here on the former
- Enforcement also considered (ECJ)

Implementation, Compliance & Enforcement: Relationship, Definitions

- Implementation – transposition
- Compliance – fulfilment of obligations
- Enforcement – to bring into compliance
- See international law documents:
 - ECE Kiev Guidelines '03 / UNEP Manual '06
- And EU documents:
 - Commission, Annual Reports on Monitoring the Application of Community law ('09 latest) / A Europe of Results—Applying Community Law '07

Implementation Reviews

- EU reviews 5-yearly for EIA, PP & SEA Dir's
 - Most recent '09 (EIA & SEA), '10 (PP)
- TEIA matters raised in EIA Dir' Review inc:
 - Define minimum timeframes for consultation
 - Require coordinated / joint / single procedures
 - Improve link with Protocol for SEA
- PP Dir' Review focused on plans & programs
 - No specific reference to TEIA implications
 - Relationship b/w EIA & SEA Dir's considered
 - Potential extension to other plans & programs

Implementation Reviews (cont)

- TEIA matters in SEA Dir Review inc:
 - Consultation when proposal advanced inadequate (NGOs)
 - Unclear boundaries: projects, plans, programs & application of EIA & SEA Dir's
 - No recommendation for consolidation of Dir's (Commission)
 - How to address policies & legislation?
- New Commission proposal expected '12, 'realistic policy options' cited:
 - No change, technical adaptation, amendment

EIA Dir Rev: Consultation / Conference

- For EIA Dir, public consultation & conference (Leuven, '10) explored reform options for TEIA:
 - 53% of consultees favoured more detailed consultation (timeframes, translation)
 - 48% of consultees favour specific framework for TEIA consent procedures
 - Leuven participants recommend:
 - bilateral agreements
 - public scoping for alternatives
 - Most replies from practitioners in support of merging EIA / SEA process & Dir's

EIA Dir Rev: Consult. / Confer. (cont)

- Other specific matters raised:
 - Introduce obligation to make bilateral agreements (Netherlands EIA Commission / Sauer)
 - Reform Art 7 so notification when sig impact likely (obj), not when MS is aware of this (subj) (ClientEarth)
 - Reform Art 5(3) to require proponent to consider reasonable alternatives (FoE, Greenpeace, EEB)
 - Implement PP requirements in transboundary context fully (Bonvoisin, Otawski, Okoburo)

Implementation Reviews: Convention

- Findings of Convention reviews may be different (Opinions of the IC, '01-'10)
 - Separate provisions on SEA / EIA preferred
- As to form:
 - PP to be included in legislation, not implementing regulations
 - Domestic implementing legislation needed for monist as well as dualist states

Implementation Gaps

- EIA Dirs '85 & '97 and PP Directive '03 imple. most aspects of Convention, but:
 - PP - distinct opportunities needed, concerned parties responsible, transboundary differences, non-discrimination & public concerned
- SEA Dir '01 imple. most aspects of Protocol, but:
 - Health effects
 - Regional development, mining additional sectors
 - Policies & legislation

Compliance / Enforcement

- Role of ECJ
 - Actions for failure to fulfil obligations
 - References for preliminary rulings
- See: Commission, 'EIA of Projects – Rulings of the Ct of Justice', '10
- TEIA case law
 - Screening:
 - C-133/94, *Commission v Belgium*
 - C-205/08, *Umweltanwalt von Kärnten* (Austria)
 - Participation / review:
 - C-216/05, *Commission v Ireland*
 - C-263/08, *Djurgården* (Sweden)

Compliance / Enforcement

- Invoking direct effect & application

‘...a provision in an agreement concluded by the [EU] with a non-Member country must be regarded as being directly *applicable* when, regard being had to its wording & the purpose & nature of the agreement, the provision contains a clear & precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.’

C-213/03, *Syndicate v EDF*, para 39

N.B. For ‘applicable’ here, read ‘effective’ b/c intention to confer rights on individuals in the case

- Potential to apply this interpretative technique to unimplemented provisions of Convention / Protocol?

Compliance / Enforcement

- Case law on use of technique:
 - C-213/03, *Syndicat v EDF* (Athens Protocol)
 - C-239/03, *Commission v France* (as above)
 - C-308/06, *Intertanko & others v Sec of State for Transport* (UNCLOS)
 - C-240/09, *LZ v Slovak Env Ministry* (Aarhus)
- But, conflict between Court & Parliament:
 - Unimplemented provisions best addressed by law reform rather than judicial interpretation
 - If not reformed or interpreted in this way, given Declarations to mixed agreements, MS are responsible for unimplemented provisions

Relationship b/w International /EU law

- View of international law on unimplemented provisions different to that of EU law
 - Provisions must be transposed for all Parties
- Does this mean no direct effect / application in monist jurisdictions like EU?
 - See IC, 'Opinions of the IC, '01-'10' regarding Romania & Armenia
 - Note Moldova & Ukraine also report reliance on direct app / effect in current Review of Implementation

Relationship b/w International & EU law (cont)

- Implications of C-459/03, *Commission v Ireland (Mox Plant)* - disputes b/w MS to be settled by ECJ
 - Non-compliance of a MS raised by another MS – can submissions be made to NCPs like the IC?
 - IC Chair request for confirmation from Commission that EU law doesn't prevent this (Jan 2011)
 - Unlikely to be a problem, as IC does not settle disputes
 - However, check bilateral agreements between MS:
 - Are provisions in these for disputes to be heard by the ICJ e.g. still acceptable following *MOX Plant*?

Conclusions

- Implementation, compliance & enforcement with the Convention & Protocol a matter for both EU & international law
 - EU reforming secondary law to fulfil obligations
- If gaps remain & direct application / effect are not invoked by ECJ
 - MS are responsible as Parties to the mixed agreement
- *MOX Plant* should not prevent MS referring matters to IC – avoids disputes
 - But reference to non EU dispute settlement in bilateral agreements may be an issue