

From: Pat Swords
Sent: 04 July 2020 12:59 PM
To: ECE-Aarhus-Compliance; Fiona Marshall
Subject: Fwd: ACCC/C/2013/96 (EU) - Chair's agreement to request for extension

Dear Fiona

As I have been afforded the extension below I would just like to make two short observations. The first, if yourselves are not already aware of it, is an important CJEU judgement of last week on Case C-24/19. As you know the interplay between Article 7 at the plan / programme level and Article 6 at the project level has been a concern of mine at a number of Communications and it is encouraging to see the CJEU in their judgement reinforce these rights, see for example below:

80 By sub-questions (h) and (i) of its second question, the referring court asks, in essence, whether and under what conditions, if it is found that an environmental assessment within the meaning of Directive 2001/42 should have been carried out prior to the adoption of the order and circular on the basis of which the consent, which is contested before it, was granted for the installation and operation of wind turbines, with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent.

81 First of all, as stated in Article 1 of Directive 2001/42, the fundamental objective of that directive is to ensure that (certain) plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment when they are being prepared and prior to their adoption.

82 In the absence of provisions in that directive on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all 'plans' or 'programmes' that are likely to have 'significant environmental effects', within the meaning of that directive, are subject to an environmental assessment, in accordance with the procedural requirements and the criteria laid down by that directive (see, to that effect, judgment of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraph 30 and the case-law cited).

83 Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are required to eliminate the unlawful consequences of such a breach of EU law. It follows that the competent national authorities, including national courts hearing an action against an instrument of national law adopted in breach of EU law, are therefore under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment. That may, for a 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment, consist, for example, in adopting measures to suspend or annul that plan or programme (see, to that effect, judgment of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraphs 31 and 32), or in revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgment of 12 November 2019, Commission v Ireland (Derrybrien Wind Farm), C-261/18, EU:C:2019:955, paragraph 75 and the case-law cited).

In reality the Party concerned, the EU, had a legislative structure for adopting its plan / programme on the Projects of Common Interest namely the Directive on Strategic Environmental Assessment, 2001/42/EC. Given that the TEN-E Regulation closed all considerations related to the necessity of the project (the 'zero option'), provided fast track planning and considerable funding arrangements, this legislative procedure should have been adopted. However, it wasn't and be that as it may, Article 7 of the Convention still applied.

In my comments on the draft findings of 17 May I referred to the "*complex relationships and responsibilities in International law, which exists between the EU, as a Regional Economic Integration Organisation and a Party to the Convention and its Member States*", the latter also Parties to the Convention. As many in the EU are now realising, there has been a very significant transfer of sovereignty from the Member States to the EU, which has enabled a range of decision making to occur, outside the previous normal checks and balances, which would have occurred at National level. Access to Justice and the ongoing ACCC/M/2017/3 being a case in point. This is leading to increasing tensions, both within the EU and with respect to its external relationships, such as at UNECE and the multilateral environmental agreements there. A constant

recurring theme is emerging, in that in the manner above in which the Member States have set up the EU and its division of powers, they are demanding special recognition for its structure.

This then leads to the simple concept of equivalence, if the EU and its Member States want to share competencies, then the sum total of both should be absolutely equivalent to what applies to an individual Party, which is not part of any Regional Economic Integration Organisation. For example, in an analogy to C-96, if two or more Parties not belonging to such an Organisation wished to pursue transboundary projects, then not only would there be obligations under the Aarhus Convention but also most likely, as with EU Member States, with respect to the Espoo Convention and its protocols. That key decisions related to approval of these transboundary projects, including its necessity, could be taken without effective public notice, without adequate environmental information being available, with the limited 'public participation' occurring being conducted in a language considerable numbers of the citizen cannot understand, all of this is simply outrageous, and an affront to the concept of environmental democracy. Yet it is the very essence of what the EU Commission and its Member States consider it as their entitlement, as they have created this unique concept of the Regional Economic Integration Organisation to facilitate it.

Regards and best wishes for your Compliance Committee meeting next week

Pat