24 June 2020

Request for Reconsiderations of the Aarhus Convention Compliance Committee inadmissibility regarding complaint ACCC/C/2019/171

The authors of the complaint kindly request the Aarhus Convention Compliance Committee ("the Committee") to reconsider its admissibility decision on the following grounds:

A) Regarding the Committee's finding that the activity in question is not listed in Annex 1 of the Convention and thus does not fall in the Convention's scope of application

The authors concede that the object of the complaint (the construction of the children's playground in the "Green Crown of Tirana" protected area which has been declared as an "area of national importance") is not among those listed *expressis verbis* in Annex 1 to the Aarhus Convention ("the Convention"). The question that therefore needs to be answered is whether the impugned activity can be held to fall within the scope of Article 20 of Annex 1 to the Convention, i.e. whether such a project triggers an EIA process on the basis of domestic legislation.

The authors note that in their submission on admissibility dated 4 November 2019, the Albanian Government refer approvingly to the European Commission's *Interpretation of definitions of project categories for annex I and II of the EIA Directive,* an instrument that the Albanian state has transposed. According to that document,[1] most EU states have transposed the relevant category of Annex II (12) (e) regarding "theme parks" verbatim *without* specifying any threshold criteria (e.g. project size or purpose) that would trigger the obligation to conduct any form of an EIA. The document also notes that theme parks are parks serving "recreational, educational, or informative purposes" and adds that "a park that has a specific theme or attractions, like an amusement park, should be considered a theme park". Referring to EU members' states' EIA requirements for golf courses, the Government suggest that due to the playground's size, this does not fall within the scope of the relevant domestic law – yet no such threshold criteria are referred to *anywhere* in the applicable domestic law, which merely repeats verbatim the text of Annex II to the Directive, nor was such an argument advanced by the domestic courts. Indeed, long standing European Court of Justice jurisprudence suggests that even the existence of threshold criteria will not be dispositive of the issue whether an EIA is required in relation to a project. According to the ECJ, "even a small-scale project [that does not meet the threshold criteria] can have significant effects on the environment" due to its location, while if the relevant project is part of a bigger project, then it is the *cumulative* impact of that project on the environment that should be taken into account when assessing whether an EIA is called for,[2] rather than the *individual* impact of the small-scale projects that make up the wider project. Similarly, the ECJ has held that threshold criteria in the domestic legislation that effectively serve to exclude from the application of Annex II to the EIA Directive to an entire class of projects and prevent in advance the assessment of their impact are in violation of the EIA Directive, as in any case domestic courts should assess whether even projects not meeting the threshold criteria nevertheless are *likely*, due to their "nature, size or location", to have significant effects on the environment and should therefore be subject to an EIA procedure.[3]

[1] At: https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf , page 56

[2] **Annex 1**, *Commission v. Ireland*, C 392/96, 21 September 1999, paragraphs 66, 73, 76. See also **Annex 2**, *Commission v. Spain*, C-227/01, 16 September 2004, paragraphs 52-54.

[3] **Annex 3**, *Kraaijeveld and Others v. Holland*, C-72/95, 24 October 1996, paragraphs 50 – 51.

All the above elements are applicable in the instant case: as the authors have already noted and stressed in their original submission (at paragraphs 1-2, 14) as well as before the domestic courts, the area in which the playground is constructed has been designated as one of "national importance" (falling in either or both categories II (National Park) and III (Natural monument or feature) of IUCN's list of Urban Protected Areas[4]) and any development in it should be in conformity with a Detailed Plan and a Development Regulation, instruments which had not, as of the date of filing of the complaint. Moreover, the playground was part of a wider development project (the Grand Lake Master Plan), consisting of four pilot projects (at paragraph 8 of the complaint) and therefore the *cumulative impact* of all four pilot projects should have been taken into consideration; interestingly, recently yet another playground (of a surface of 5,500 square meters) which does not appear to be part of the original master plan was constructed.[5] As for the likely prejudicial effect on the environment, the authors did adduce evidence to that effect in the domestic proceedings, which was however rejected on formalistic grounds (complaint, paragraph 9). Last, the playground is clearly a "theme park" for the purposes of the EU EIA Directive and therefore of domestic law. As a result, by virtue of its nature and location, it should have been subject to a preliminary EIA, all the more since no Detailed Plan and Development Regulation had been drafted.

B) Regarding the Committee's finding that the authors had not been denied access to judicial procedures

The authors assert that they enjoyed only formalistic, rather than substantive access to justice. **First,** it is recalled that domestic courts consistently held in their case that the children's playground *cannot* be considered a theme park because it is not *explicitly* mentioned therein – in blatant violation of the authoritative interpretation of Annex II to the EIA Directive referred to above. It is recalled that the domestic courts did not hold that the playground did not meet the relevant threshold criteria, as no such criteria are foreseen under domestic law, nor did they take into account the *cumulative impact* on the projects foreseen under the Master Plan, even though this was raised explicitly by the authors (complaint, paragraph 8). **Second**, even when confronted with expert evidence as to the environmental impact of the playground (complaint, paragraph 9), the domestic courts refused to take it into account by advancing a purely formalistic argument (the non-renewal of the expert's relevant license; it is noted here that the expert in question is one of the most well-known environmental experts in Albania), without examining the possibility of *propio motu* commissioning another expert report. **Third**, the domestic courts refused to recognise that the authors had legal standing (complaint, paragraph 10). Indeed, the impression is given that the courts had decided from the outset not to grant standing to the authors and merely allow the process to take place. Had the authors been considered as having legal standing from the outset, the domestic courts would have highlighted any shortcomings in their submissions (such as the presentation of a report by an expert who had not renewed his / her license) and allowed them to remedy them. Instead, the courts declared the lack of standing only at the end of the judicial proceedings, thereby depriving the authors of any possibility of addressing them.

[4] IUCN *Urban Protected Areas: profiles and best practice guidelines Series No. 22,* 2014, at: https://portals.iucn.org/library/sites/library/files/documents/PAG-022.pdf page 2.
[5] See article at: https://www.tika.gov.tr/en/news/july_15_democracy_park_built_in_tirana_albania-52148