

Ref. ACCC/C/2012/71

Communicant: In my communication and also in my oral submissions during the discussion with the Committee on 26 March 2013, I referred to the Spanish Aarhus Case Law that there should be no submission period during holidays. I would like to ask for clarification whether the Spanish Aarhus Case Law is binding in the German Federal State Bavaria too.

As to timing and timeframes already referred to in the communication with the Committee in relation to the party concerned, the Czech Republic, the same problems appear with Bavaria, which is representing the Republic of Germany in Temelin EIA.

The time given to comment on the EIA documentation in 2010 was just 30 days in August and 30 days in September. We argue that August shall not count, as this is vacations period. There is the Committee's case law on this in the above mentioned Spanish case already. 30 days in September 2010 is not enough given the nature of the project, referring to significant case law of the Committee on duration of public consultations in complex cases. This should be seen as a Bavarian violation of Article 6.3 (reasonable timeframes).

Additionally it has to be said that Bavarian summer holidays ended in 2010 on exactly the 13 of September. So there were left only 17 days for public participation.

Furthermore, the submission period in 2012 only lasted from 07 May until 18 June and after four days a formal hearing already followed in Ceske Budejovice on 22 June 2013 with around 40 000 submissions that were sent to Praha. After checking the EIA Temelin submission period in 2012 once more, it became clear, there were only 27 days of period, because there were holidays too. (1)

The Bavarian submission period 2012 in EIA Temelin was from 07-05-2012 until 18-06-2012. That means 43 calendar days, 13 days more than the 30 days the public of Czech Republic did have. 43 days sound good, but there were holidays in Bavaria from 26-05-2012 until 10-06-2012. That means that the Bavarian public only had 27 days of submission period.

Taking into account, that the public in the border districts of Hof and Wunsiedel was definitely informed the first time by local newspaper on 29-05-2012 (2), meaning a full 22 days after the beginning of submission period, there was only a submission period left of 8 (in words: eight!) days! Nobody except of a few persons looked on the website of the Bavarian Environmental Ministry. And these persons were not able to inform the public until the newspaper informed the two districts. The ministry breached Aarhus 6.3, but also all the relevant articles that demand to inform the public.

The Legal Expertise "public participating in EIA Temelin 3 and 4" (3) ordered by the Greens of Bavarian Parliament complains about bad public information praxis in Germany at all as well a lack of access to justice in Germany (violating Aarhus 9.2) and the black box procedure (see separate attached document).

4. Conclusions (Excerpts) of Legal Expertise:

1. *The Czech authority has missed in the scoping procedure to identify the public concerned.*
2. *On the website of German BMU with date of 12-06-2012 there was no information about the EIA Temelin to be found. Therefore: The German public did know anything about the EIA Temelin. The BMU website did also not contain information about the websites of Bavaria and Saxony either.*
3. *The entire German public should have been informed about the EIA Temelin. But information was restricted. It is not understandable why only the border districts in Bavaria were informed. For example the districts of Deggendorf or Rottal-Inn are quite as far away from the planned units 3 and 4 of NPP Temelin as the district of Wunsiedel. The decision to only include the border districts is logical and objectively not comprehensible.*
4. *Much more dramatically than in Bavaria is the case of the Federal State of Saxony's violation of the rights to public information. In Saxony each second person over 50 years is not using internet, but in Saxony the paper version of the EIA documentation was only in one place accessible to public.*
5. *A hearing in Germany would have been necessary on the basis of Espoo 2.6. Nobody of the public concerned was able to reach and to follow the whole formal hearing in Ceske Budejovice on one day. Therefore one has to suppose the venue was chosen to keep as many as possible persons of the concerned public away. The opinion of the MZP cannot be followed.*

Because of the submission period of EIA Paks II in Hungary (4) I have asked the Bavarian Environment Ministry about their opinion about the Spanish Aarhus Case Law "no submission period during holidays".

The EIA Paks II submission period took place in Bavaria from 13-03-2013 until 15-04-2013, during the Easter holidays which took place during 23-03-2013 to 07-04-2013. After pressure from the public the Bavarian Ministry demanded to extend the 21 days of submission period to nearly five weeks, which is still too short for the public, given the amount of documentation involved.

What is interesting for ACCC/C/2012/71 and for the submission period of EIA Temelin in 2010 and 2012 is, that the Bavarian Ministry does not consider Aarhus Case Law relevant at all.

Here is the answer from the Bavarian Environment Ministry:

Excerpt of the Bavarian Ministry's answer from Friday, April 26, 2013:

By the mentioned decision of the Aarhus Compliance Committee, that Spain has violated the demands of the Aarhus Convention with a submission period during Christmas Holidays, the validity of the German EIA Law will not be affected. The national law of the concerned state will not be cancelled by a decision of the Committee, because the state can only be asked to adapt its law to the Aarhus Convention. Neither the Aarhus Convention, nor the EU Directive 2003/35/EG which inter alia regulates public participation, contain provisions, that holidays have to be excluded generally from submission periods. In German Law weekends and a

(single) holiday will be excluded under Administrative Procedure Law paragraph 31.2 at the end of the submission period. Moreover, it cannot be assumed that the decision made concerning Christmas time can generally be used for other holidays. Original German text (5)

The Bavarian Ministry is in breach with art. 3.2 of the Aarhus Convention not giving the public any guidance about their rights under the Aarhus Convention in the public explanations on its website "Public Participating EIA Temelin" (1) as well as on the website of EIA Paks II. (4)

EIA Temelin: Excerpt of explanations for public participating (EIA Temelin – submission period 2012 - Bavarian Environment Ministry) (1)

The EIA procedure is not performed in accordance with German law, but according to the Czech law. In particular, the regulations of the German regulation on the procedure for licensing of plants under § 7 of the Atomic Energy Act (Nuclear Licensing Procedure Ordinance - AtVfV) are not applicable to this proceedings. Furthermore, the other in German administrative proceedings and litigation opened legal options are not applicable.

Furthermore the information implies in breach with art. 9.5 of the Aarhus Convention that there is no access to justice at all. This is relevant for ACCC/C/2012/71 concerning EIA Temelin, because Germany signed the Convention on 21 December 1998 and the ratification date was 15 January 2007. Below the declaration (6) which can be found on UNECE Website.

The problem is that the Aarhus Convention is not yet recognized as existing and binding law in Germany at all. Following examples for explanation:

An important example is the EIA Hinkley Point C in the United Kingdom. The BMU as relevant public authority did not identify the German public as public concerned and therefore breaches Aarhus art. 6.5 and art.7. Refusing to assist and provide guidance to the public in seeking access to information the BMU also breaches art. 3.2.

The BMU argued that the German public will not be concerned because the operator does not expect a design based accident. After Fukushima the BMU must take a beyond design based accident into account. The German Ethic Commission for Energy Transition did so.

The BMU breached art. 3.9, the German public was clearly discriminated. Art. 1 shall guarantee the rights of access to information, public participating in decision making, and access to justice in environmental matters and was breached as well as 6.2, the public concerned was not informed early in a decision making procedure and when all options were open (art. 6.4) or could participate while all options were open (art.8). Also breached was art. 6.6., the public concerned was given no access for examination and art. 6.7, the public was not allowed to submit. Also art.9.2 was breached because no participating means no access to justice at all.

The next example for not recognising Aarhus as existing law in Germany is: The BMU also refused completely any public information from the annual Czech/ German Commission meeting on 12 November 2012 in Berlin. The public's request was of high safety interest for the public because it concerned the dangerous welding 1-4-5 in Temelin 1 which can lead to an explosion and an impact onto the properties of the public concerned as well as a danger

for their health. This complete refusal to give the public any information breached Aarhus art. 4.4.h. It takes not into account that a refusal should be interpreted in a restrictive way, that the public interest is served by disclosure and that the information requested relates to emission into the environment.

And further: All German Environment ministries do not understand the use of MOX fuel – highly Plutonium enriched fuel – to be done under public participating. Fact is: No originally EIA of any German NPP was done with the option of using MOX fuel. No originally permission licence included MOX as fuel. Today, after an operator decided to use MOX, the public concerned is not identified in a correct way. It is not only the extension of power that is of interest for the public, it is the knowledge, that a meltdown with high enriched Plutonium fuel is more dangerous for the health and the environment than the usual fuel used with the originally permission. Therefore, before using MOX fuel, the public has to be included in all “possible affected areas” under Espoo 2.6. By not identifying the public concerned in a correct way the German ministries breach Aarhus art. 6.5 and art. 7 and by not identifying when all options are open they breach art. 6.4. Of course there is a discrimination of the public which is excluded and that means a breach of art. 3.9 too.

Also the transport of the fuel to the NPP is not done under public participating. An accident on the road is a real high danger for the concerned public. This public is not identified at all. Again a breach of the above mentioned paragraphs.

(1) Excerpts: Explanations for public participating (EIA Temelin – submission period 2012 - Bavarian Environment Ministry)

Public Participation in Bavaria was part of a transboundary EIA procedure to which the Parties of the Espoo Convention have committed. According to the Espoo Convention the concerned citizens have to be given the opportunity to participate as well as to the Czech public. According to the Czech law a period of 30 days is laid down, therefore this submission period was originally also given here. Bavaria had applied for an extension of another 30 days to the Czech Ministry of Environment. The Czech Ministry of Environment has granted this request a deadline extension until 18.06.2012.

The EIA procedure is not performed in accordance with German law, but according to the Czech law. In particular, the regulations of the German regulation on the procedure for licensing of plants under § 7 of the Atomic Energy Act (Nuclear Licensing Procedure Ordinance - AtVfV) are not applicable to this proceedings. Furthermore, the other in German administrative proceedings and litigation opened legal options are not applicable.

Erläuterung zur Öffentlichkeitsbeteiligung (EIA Temelin - German original)

<http://www.stmug.bayern.de/umwelt/reaktorsicherheit/temelin/>

Die Öffentlichkeitsbeteiligung in Bayern erfolgte im Rahmen eines grenzüberschreitenden UVP-Verfahrens, zu dem sich die Vertragsstaaten der Espoo-Konvention verpflichtet haben. Nach der Espoo-Konvention sind den betroffenen Bürgern ebenso wie der tschechischen Öffentlichkeit Gelegenheit zur Beteiligung zu geben. Entsprechend der im tschechischen

Gesetz vorgesehenen Frist von 30 Tagen war deshalb auch hier ursprünglich diese Einwendungsfrist eingeräumt. Bayern hatte beim Tschechischen Umweltministerium eine Fristverlängerung von weiteren 30 Tagen beantragt. Das Tschechische Umweltministerium hat auf diesen Antrag hin eine Fristverlängerung bis zum 18.06.2012 gewährt.

Das UVP-Verfahren wurde nicht nach deutschem Recht, sondern gemäß dem tschechischen Recht durchgeführt. Insbesondere die Vorschriften der deutschen Verordnung über das Verfahren bei der Genehmigung von Anlagen nach § 7 des Atomgesetzes (Atomrechtliche Verfahrensverordnung - AtVfV) sind nicht auf dieses Verfahren anwendbar. Auch die sonstigen im deutschen Verwaltungsverfahrens- und Prozessrecht eröffneten rechtlichen Möglichkeiten sind nicht anwendbar.

(2) <http://mobil.frankenpost.de/lokal/hofrehau/hof-stadt/Abstimmung-ueber-Temelin-noch-moeglich;art2390,2009639> German newspaper Frankenpost – text in German

(3) http://www.gruene-fraktion-bayern.de/sites/default/files/gutachten_temelin_original_2.pdf

(4) *Excerpts: Explanations for public participating (EIA Paks - Bavarian Environment Ministry)*

The current procedure is a transboundary public participation procedure, to which the Parties of the Espoo Convention have committed. According to the Espoo Convention interested citizens as well as the Hungarian public have to be given the opportunity to participate. Provided in accordance with the Hungarian Act the 21 days submission period therefore is also given here.

The EIA procedure is not performed in accordance with German law, but according to the Hungarian law. In particular, the regulations of the German regulation on the procedure for licensing of plants under § 7 of the Atomic Energy Act (Nuclear Licensing Procedure Ordinance - AtVfV) are not applicable to this proceedings. Furthermore, the other in German administrative proceedings and litigation opened legal options are not applicable.

Erläuterung zur Öffentlichkeitsbeteiligung (EIA Paks II -German original)

<http://www.stmug.bayern.de/umwelt/reaktorsicherheit/paks/>

Das gegenwärtig durchgeführte Verfahren ist eine grenzüberschreitende Öffentlichkeitsbeteiligung, zu der sich die Vertragsstaaten der Espoo-Konvention verpflichtet haben. Nach der Espoo-Konvention ist den betroffenen Bürgern ebenso wie der ungarischen Öffentlichkeit Gelegenheit zur Beteiligung zu geben. Entsprechend der im ungarischen Gesetz vorgesehenen Frist von 21 Tagen ist deshalb auch hier diese Einwendungsfrist eingeräumt.

Das UVP-Verfahren wird nicht nach deutschem Recht, sondern gemäß dem ungarischen Recht durchgeführt. Insbesondere die Vorschriften der deutschen Verordnung über das Verfahren bei der Genehmigung von Anlagen nach § 7 des Atomgesetzes (Atomrechtliche Verfahrensverordnung - AtVfV) sind nicht auf dieses Verfahren anwendbar. Auch die sonstigen im deutschen Verwaltungsverfahrens- und Prozessrecht eröffneten rechtlichen Möglichkeiten sind nicht anwendbar.

(5) Original German text of the Bavarian Ministry's answer from Friday, April 26, 2013:

Durch die genannte Entscheidung des Aarhus Compliance Committee, Spanien habe durch eine Öffentlichkeitsbeteiligung während der Weihnachtsferienzeit gegen die Anforderungen der Aarhus-Konvention (AK) verstoßen, wird die Gültigkeit des deutschen UVPG nicht berührt. Durch eine Entscheidung des Committees wird das nationale Recht des betroffenen Staates nicht aufgehoben, sondern der Staat kann nur aufgefordert werden, sein Recht an die AK anzupassen. Weder die AK noch die EU-Richtlinie 2003/35/EG, die u. a. die Beteiligung der Öffentlichkeit bei der Umweltverträglichkeitsprüfung regelt, enthalten Vorgaben, wonach generell Ferien von Auslegungs- und Beteiligungsfristen auszunehmen seien. Im deutschen Recht werden nach § 31 Abs. 2 Verwaltungsverfahrensgesetz beim Ende einer Frist die Wochenende und Feiertage ausgenommen.

Im Übrigen ist nicht davon auszugehen, dass die genannte Entscheidung bez. der Weihnachtszeit generell auch für andere Ferienzeiten herangezogen werden kann.

(6) Text UNECE website:

http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec

Germany

Upon signature:

Declaration:

The text of the Convention raises a number of difficult questions regarding its practical implementation in the German legal system which it was not possible to finally resolve during the period provided for the signing of the Convention. These questions require careful consideration, including a consideration of the legislative consequences, before the Convention becomes binding under international law.

The Federal Republic of Germany assumes that implementing the Convention through German administrative enforcement will not lead to developments which counteract efforts towards deregulation and speeding up procedures.

Marktredwitz, 13 May 2013

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