

IPPC ISSUES IN THE EUROPEAN COURT OF JUSTICE AND THE AARHUS CONVENTION COMPLIANCE COMMITTEE

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1 INTRODUCTION

Thanks for invitation

I spoke before this Forum some years ago, in The Hague, about the Aarhus Convention. The topic of today somehow relates to the Aarhus Convention as well.

While I will consider ECJ and ACCC, main focus on jurisprudence of the ECJ.

IPPC and Aarhus Convention:

- Both acts contain provision on public participation in decision-making and access to justice in environmental matters
- IPPC significantly amended as a means of implementing the Aarhus Convention
- IPPC also contains provision concerning criteria for permits, updating of permits and compliance with permit conditions.
- The Aarhus Convention is silent on these issues.

I will follow the format of your questionnaire, and see to what extent these issues have been addressed in the ECJ or the ACCC. That is:

- Role of the courts in the system of issuing IPPC permits,
- Relationships between IPPC and EIA,
- Right to appeal? Who? What criteria?
- Permit conditions and BAT
- Time limitations, reviews and new permits when activities are changed,
- Existing plants, and
- Supervision and sanctions

IPPC cases in ECJ:

- Not so many cases in ECJ on IPPC.
- The few cases either concerns obvious lack of implementation on time or interpretations of which activities are covered by IPPC:
 - On “poultry”, C-473/07, *Association nationale pour la protection des*

eaux et rivières v French Ministry of Ecology,

- On “incineration plant” and “co-incineration plant”, C-251/07, *Gävle Kraftvärme v Länsstyrelsen i Gävleborgs län*
- While perhaps important in other contexts, I leave these cases aside.
- Instead consider some cases on EIA of relevance for IPPC.
- Also cases concerning EQS that have some impact.
- Yesterday, a decision by the ECJ, which is highly relevant for IPPS, although it dealt with EIA:
 - C-263/08, *Djurgården-Lilla Värtan Miljöskyddsförening v Stockholm Municipality*

Cases in the ACCC:

- Some cases on access to justice.
- ACCC/C/2005/11 *Belgium*

Before addressing some more specific IPPC issues in the ECJ:

some more general remarks on the role of the courts in the implementation of EC law in general and the IPPC Directive in particular:

- *First*, national courts are obliged to apply EC law, including directives, provided they are sufficiently clear and unconditional;
 - They must review administrative decisions in light of EC law, e.g. C-72/95, *Kraaijeveld*
 - They are even obliged to set aside national law that runs counter to EC law. this is what expect the Swedish Supreme Court will do in the pending case related to C-263/08, *Djurgården-Lilla Värtan Miljöskyddsförening*
- *Second*, MS cannot rely on courts’ practice and discretion as a means of complying with EC law.
 - Well established that directives need not be transposed word by word.
 - Sufficient that a “general legal context” reflect the content of directives; again provided they are sufficiently clear and precise.
 - However, mere court practice, based on discretion does *not* suffice, e.g. C-427/07, *Commission v Ireland* (with respect to costs).
- *Third*, the IPPC Directive and the Aarhus Convention contain several concepts that are not very clear:
 - “public concerned”, “sufficient interest”, “prohibitively expensive”
 - These concepts must be implemented both by a sufficient legal framework *and, I submit*, clear and convincing court practice.
 - This is a challenge in implementing and complying with the IPPC Directive as well as the Aarhus Convention
- *Fourth*, as regards the balancing of “competing rights” or of “interest”, such exercises by national courts cannot justify the ineffective implementation or the ineffectiveness of a system of control or enforcement; C-215/06, *Commission v Ireland*.
- *Thus*:
 - Courts are obliged to act for full compliance with the IPPC Directive as

well as the Aarhus Convention through their jurisprudence,

- Yet, court practice through the use of discretion is not sufficient
- ACCC: In this respect, one can expect the ACCC to reason in a rather similar way as the ECJ.

2 ROLE OF THE COURTS IN THE SYSTEM OF ISSUING IPPC PERMITS

IPPC Directive:

- Refers to the “competent authority” as the body issuing the permit.
- Does not preclude courts from performing that function. (arts 3, 5, 6, 7, 8, ... 13).
- It requires that MS provide for access to justice before a court or court-like body separate from the permitting body (art 16)
- Yet, possible for MS to provide for a preliminary review procedure before an administrative authority.
- Relation?

ECJ:

C-263/08, Djurgården-Lilla Värtan Miljöskyddsförening:

- Where a court performs the function of a permitting body it exercises its “administrative powers”
- This does not prevent an association from exercising its right of access to a review procedure in order to challenge that decision
- While the case concerned EIA, this is of course also valid with respect to IPPC
- While the case concerns the rather special case of Sweden, it indicates that MS have some latitude in designing the permit body in relation to the review procedure.

ECJ has to my knowledge *not* dealt with the structure of the appeal body.

ACCC:

Several cases pending on access to justice, but not yet made any findings with regard to the structure of courts.

Neither IPPC Directive nor Aarhus Convention precludes the use of

- Ordinary courts,
- Administrative courts,
- Special courts

as appeal instances, provided the appeal body has court-like structure; IPPC Directive, art 16; Aarhus Convention, art 9(2).

3 RELATIONSHIPS BETWEEN IPPC AND EIA

IPPC Directive:

- IPPC measures designed to prevent and reduce emissions without prejudice to the EIA Directive (art 1).
- Close links between IPPC and EIA procedures. Also similar provisions, e.g. on public participation and access to justice.

ECJ:

Not much on how the two sets integrate.

C-215/06, Commission v Ireland:

- Failure of Ireland to comply with EIA Directive because of possibility of obtaining a retention permission which made it *possible to operate activities that were not properly authorised, and without adequate EIA*. This also implied a failure to ensure necessary enforcement.
- Similar reasoning with respect to IPPC.

C-263/08, Djurgården-Lilla Värtan Miljöskyddsförening:

- Clear parallels between IPPC and EIA with respect to right of appeal.

ACCC:

- Obviously no case on the relation between the directives.
- Yet, when considering whether the provisions for public participation apply, sometimes necessary to consider whether there are national provisions for EIA.

4 RIGHT TO APPEAL? WHO? WHAT CRITERIA? COSTS!

IPPC Directive:

- Provides for public participation and access to justice for the public concerned (arts 15 and 16).
- As regards access to justice, specified criteria for determining who is concerned.
- Interests of environmental associations deemed to be sufficient.

Aarhus Convention, arts 6 and 9(2)

ECJ:

Right to appeal:

C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening:

- Public participation in environmental decision-making is separate from and has a different purpose than legal review.
- Thus, members of the public concerned must have access to a review procedure to challenge a decision granting a development consent *regardless* of the role they might have played in the examination of the permit application.

- Also, while MS have some leeway in defining criteria for NGOs to have access to justice, even in terms of figures, “the number cannot be fixed at a level that runs counter to the objective of access to justice etc.
- Clear parallels with regard to IPPC.

Costs and access to justice

C-427/07, *Commission v Ireland*:

- Commission argued that Ireland has failed to transpose the requirement that access to a review procedure must *not be prohibitively expensive*; there is no applicable ceiling as regards the amount the unsuccessful applicant will have to pay.
- ECJ: EIA Directive does not prevent courts from making an order of costs provided the amount of costs cannot be perceived as prohibitively expensive.
- Mere discretionary practice of courts cannot be regarded as valid implementation.
- Ireland failed to comply in this respect.
- This is relevant for IPPC and costs for the counter party when challenging an IPPC decision. (art 16)
- Practical information: Ireland also failed to comply with the obligation to ensure that practical information on review procedures was made available.
- This, too, is clearly relevant for IPPC.

Costs/fees in environmental decision-making

C-216/05, *Commission v Ireland*:

- No provision on costs in EIA procedures
- ECJ: Fees for participation in administrative procedures for environmental decision-making acceptable, provided the costs does not create an obstacle to the exercise of the right to participation.
- Here, I find it difficult to follow the ECJ. Fees at the level of 20 EUR and 45 EUR in EIA procedures can indeed have an effect on the degree of participation.
- Parallels with regard to participation in IPPC procedures and fees.

ACCC:

Right to appeal:

- *ACCC/C/2005/11, Belgium*. The parties retain some leeway in setting criteria for what amounts to a “sufficient interest” when determining who has access to justice. Yet, these criteria must be compatible with the objective of granting the public concerned broad access to justice.

Costs:

The ACCC has not yet made any findings on costs, but there are some cases pending on this issue, with regard to the UK.

5 PERMIT CONDITIONS AND BAT

IPPC Directive: MS to ensure that when permits are granted the competent authority must ensure that BAT is used etc.

ECJ:

- I have not found any case dealing with this issue,
- It is clear that national courts in the MS must consider these provisions when granting permits, if there is a lack in national law.
- Permit conditions and the requirement on the use of BAT are issues that are challengeable under the IPPC Directive, when reviewing the “substantive legality” of the decision.
- While it is not further prescribed how far and comprehensive a legal review must be, it is clear that courts, when carrying out the review, must consider compliance by the conditions set in the permit with the criteria of the IPPC Directive and the BAT.

ACCC:

- No issue in the ACCC
- Yet, permit conditions and the requirement on the use of BAT are issues that are challengeable under the Aarhus Convention, too, when reviewing the “substantive legality” of the decision.

6 TIME LIMITATIONS, REVIEWS AND NEW PERMITS

IPPC Directive:

- MS to ensure that permit conditions are periodically considered
- This should be set out clearly in national legislation.
- It is also a matter to be taken into account by “competent authorities” regardless of such provisions in national law
- AND:
 - This is an issue to be taken into account by courts, when reviewing permits
 - This is part of the duty to take EC law into account
 - *if* no functioning “automatic review system, OR if “competent authorities” in practice do not reconsider or update the permit conditions,
 - *then* the courts, when reviewing permit, should make sure to limit the permits in time!
- MS to ensure opportunities for public participation when new permits are being issued.
- But also when permits are being updated (art 15).
- When permit conditions are being reconsidered, members of the public should have access to a review procedure. (arts 15 and 16)

ECJ:

No cases to my knowledge.

ACCC:

No cases as of yet.

7 SUPERVISION AND SANCTIONS

IPPC Directive:

- Only one remark:
- It is for the MS, as part of the general duty to fully implement directives, to make sure that there are effective means of supervision and enforcement.
- Not acceptable that “weighing of competing interests” entails ineffectiveness in the system of control and enforcement; see C-215/06, *Commission v Ireland*

ACCC:

Members of the public must have access to a review procedure – judicial or administrative – to challenge improper enforcement as a part of a violation of national environmental law. In this regard, national environmental law in the EU member states, may, depending on the content, include EC environmental law; see *ACCC/C/2006/18 Denmark*. While outside the scope of IPPC Directive, this is an important point in a forum like this.

8 SUM UP AND CONCLUSION

- The ECJ has not yet decided on the core parts of the IPPC Directive, but several judgements on related issues have a bearing on the interpretation and application of the IPPC Directive.
- National courts are to consider most provisions of the IPPC Directive regardless of national law.
- National courts have an important role for the effective implementation of the IPPC Directive,
- Thus national courts have an important role in the protection of human health and the environment.

Thank you.