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**The public participation and the Environmental Impact
Assessment with transboundary implications: effects and
limitations under EU Environmental Law**

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ABSTRACT

The present study discusses and examines the application of public participation in the Environmental Impact Assessment (EIA) with transboundary effects regime contained in Directive 2011/92/EU. From that previous assessment, the study analyses whether, with regard to International Environmental Law, such regime allows Member States to apply limitations or restrictions to public participation. In doing so, the study concludes Member States possess a clearly restrictive margin to implement such limitations or restrictions to public participation within a transboundary EIA. Finally, the study proposes two amendments to the EIA Directive seeking to codify the remedies against unlawful limitations or restrictions in such regime.

KEYWORDS

Environmental Impact Assessment – Transboundary – Public participation – EIA Directive

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ABBREVIATIONS

AG	Advocate-General of the European Union
CJEU	Court of Justice of the European Union
EC	European Commission
EIA	Environmental Impact Assessment
EU	European Union
ICJ	International Court of Justice
IEL	International Environmental Law
ILC	United Nations International Law Commission
MS	Member State
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNECE	United Nations Economic Commission for Europe

INTRODUCTION

In a more globalised, interconnected world, synergies and cooperation require a more detailed framework to ensure any international effort does not endanger the sustainable approach sought to the environment. In that regard, some areas namely, energy, water rely heavily on shared resources between one or more states, thereby stressing the need to effectively regulate on the use and prevention of any harm or implications to the environment. Although the regulation may provide for some appropriate measures to prevent any disproportionate harm or implications to the shared environmental resources between the two or more states involved thanks to the Environmental Impact Assessment (EIA), the interests of the individuals residing in those territories cannot be disregarded.

To that end, IEL acknowledges the role performed by the potentially affected individuals in the decision-making process behind any project submitted to EIA likely to have implications in shared resources. Moreover, under EU Environmental Law, public participation is inserted into specific provisions concerning the implementation of the EIA requirements under IEL, thus, reaffirming the significance of public involvement in projects likely to impact the environment in two or more states.

Notwithstanding the existing framework, the provisions regulating for public participation differ to some extent depending on the regulation that embeds them. Under IEL, public participation concerning an EIA with transboundary effects is regulated in two international instruments: the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention). On the other hand, EU law relies on the regulation under the TFEU and the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the EIA Directive).

The diverse framework reconciles and applies in three main cases (C-411/17, C-463/20 and C-121/21) brought to the attention of CJEU that examine the scope allowed under IEL and EU law to limit or restrict public participation during EIA with transboundary effects. Seeking to analyse and assess to what extent limitations imposed under national law can be lawful in connection with the applicable international and EU norms, the

present commentary elaborates on the significance of the three cases submitted to the CJEU.

Furthermore, the present study takes into consideration the responsibility regime comprising any breach or non-compliance by EU MS under IEL and EU environmental law. As restrictions or limitations imposed to public participation in the Union may be subject to judicial review, the analysis will consider the effects of such breach or non-compliance with the applicable international instruments, and the obligations arising from non-compliance to MS. Therefore, following the framework of responsibility, the present study would be best placed to examine the duties attributable to MS in relation to the legal consequences provided under IEL and EU Environmental Law for impeding the duly access and participation of the public in the EIA with transboundary effects within the Union.

Taking into account the aforementioned considerations, the present paper intends to answer the following question: **To what extent EU Member States can limit or restrict the application of public participation in relation to an EIA with transboundary effects?**

To respond to the research question proposed, the present study divides into four main sections: (1) Firstly, a discussion on how the different regulations under IEL and EU Environmental Law on public participation within EIA with transboundary effects are to be applied or implemented within the EU. (2) Secondly, a brief analysis on the institutional framework providing for the duties under EU Environmental Law towards public participation within an EIA with transboundary effects having recourse to the three aforementioned cases before the CJEU. (3) Thirdly, an examination, relying on IEL and the analysis of the CJEU, on the lawfulness of limitations or restrictions to public participation in EIA with transboundary effects. (4) Lastly, an elaboration of a brief proposal *de lege ferenda* on potential means to protect public participation within a transboundary EIA framework.

I. EIA WITH TRANSBOUNDARY EFFECTS: THE APPLICATION OF THE PUBLIC PARTICIPATION PRINCIPLE

1. INTRODUCTORY REMARKS

The present section discusses the different regulation of the public participation principle within the EIA with transboundary effects under International and EU Environmental Law. In doing so, the section intends to provide a clear, concise framework of the applicable law concerning the public participation principle within the EU by analysing the influence under EU Environmental Law of the main international environmental treaties on public participation. In that regard, the present section discusses the scope of application and the content of the public participation principle under the abovementioned legal regimes.

2. PUBLIC PARTICIPATION AND THE EIA WITH TRANSBOUNDARY EFFECTS: INTERNATIONAL ENVIRONMENTAL LAW

To start with, the main discussion cannot disregard the status of public participation as a principle of IEL. As noted by doctrine,¹ the origins of such principle lay down in the World Charter for Nature (1982).² In reference to the Charter, two main elements arise: (a) the duty to disclose essential elements of planning “to the public by appropriate means in time to permit effective consultation and participation”,³ and (b) the duty to guarantee “all persons, in accordance with their national legislation... the opportunity to participate, individually or with others” in the formulation of measures directly affecting the environment and their access to “means of redress when their environment has suffered damage or degradation”.⁴

Later, under the Rio Declaration, public participation, within the framework of the World Charter for Nature, was endorsed as Principle 10 insofar the Conference is aware that “environmental issues are best handled with the participation of all concerned citizens, at

¹ JUSTE RUIZ, José & CASTILLO DAUDÍ, Mireya (2014): *La protección del medio ambiente en el ámbito internacional y en la Unión Europea*, Tirant lo Blanch, Spain, p. 58.

² UNITED NATIONS (1982b), *World Charter for Nature*.

³ *Ibid.*, para. 16

⁴ *Ibid.*, para. 23

the relevant level”.⁵ However, the Declaration, when develops the public participation principle, differs from the Charter insofar it introduces the material element of access to environmental information.⁶

Consequently, public participation principle refers to three main material elements - likewise recognised, yet diffusedly, by the ILC-:⁷ (1) participation in decision-making process on environmental issues; (2) access to environmental information; (3) access to administrative and judicial proceedings.

However, the application of the public participation principle acquires meaning when interpreted in relation to the EIA with transboundary effects. To exemplify the previous assertion, following international jurisprudence, under international law there is a duty to undertake an EIA “when there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context”.⁸ Although the ICJ did not address whether public participation was embedded in the requirement under international law to undertake an EIA,⁹ the Court did assess whether the affected local populations affected were consulted beforehand.¹⁰ Notwithstanding the previous assertion, to the extent that the parties did not ratify the Espoo Convention —a regional instrument—,¹¹ and that no requirement under international instruments conceive the public participation principle, the Court’s decision does not impair the status of public participation under IEL.¹²

Taking into account the previous contentions, the public participation principle is construed under a two-fold approach that includes both the “duty to provide —and the right to obtain— access to information on the environment”.¹³ Notwithstanding the previous legal status, the ILC understood that, in the context of prevention of transboundary harm from hazardous activities, public participation is seen as a “growing

⁵ UN (1982a): *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1982, vol. I, resolution 1, annex I.*

⁶ VAN BEKHOVEN, Jeroen (2016): “Public Participation as a General Principle in International Environmental Law”, *National Taiwan University Law Review*, vol 11, issue 2, 219-270, p. 228.

⁷ INTERNATIONAL LAW COMMISSION (2001): *Draft articles on prevention of transboundary harm from hazardous activities, with commentaries*, Art.13, paras. 6-9.

⁸ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, ICJ Reports 2010, para. 204.

⁹ *Ibid.*, paras. 205, 215-216.

¹⁰ *Ibid.*, paras. 217-219.

¹¹ *Ibid.*, para. 205; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), signed on 25 February 1991 (entry into force 10 September 1997), UNTS vol. 1989, p. 309.

¹² VAN BEKHOVEN, Jeroen (2016): 255-256).

¹³ SANDS, Philippe; PEEL, Jacqueline; FABRA, Adriana & MACKENZIE, Ruth (2012): *Principles of International Environmental Law, 3rd edition*, Cambridge University Press, United Kingdom, p. 648.

right under national law as well as international law”.¹⁴ In that sense, public participation constitutes a primordial element in the effective implementation in both the States’ and public involvement in environmental matters, especially when the risk of degradation or harm arises. To clarify the previous considerations, reference will be made below to the content of the main instruments on public participation under IEL.

When considering the main relation existing between public participation and transboundary EIA, the Espoo Convention provides a first consolidated approach. In that sense, under the letter and intent of the Convention, public participation constitutes an obligation incumbent upon all States Parties.¹⁵ Moreover, according to Article 2(2) of the Convention, the States Parties are bound to

...take the necessary legal, administrative or other measures to implement the provisions of the Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation...

The previous duty is understood either as an individual or joint responsibility of the States involved in the transboundary EIA vis-à-vis ensuring public participation.¹⁶ But, in the wording of Article 2(6) of the Convention, the aforementioned duty is different from the obligation incumbent solely upon the Party of origin —where the proposed activity is envisaged to take place—¹⁷

...to provide... an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures... and...ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

The aforementioned provisions serve to reinforce the status of public participation within the EIA with transboundary effects. On one hand, the Convention imposes the duty to establish public participation in the EIA procedure when the proposed activities are likely to cause transboundary harm without excluding activities outside of the scope of Appendix I. Given that the Convention uses the wording “including” rather than expressly

¹⁴ ILC (2001: Article 13, para. 10).

¹⁵ UNECE (2002): *Report of the Second Meeting of the Implementation Committee*, MP.EIA/WG.1/2003/3, para. 9.

¹⁶ *Ibid.*, (2016): *Findings and recommendations with regard to communication ACCC/C/2012/71 concerning compliance by Czechia*, ECE/MP.PP/C.1/2017/3, para. 67.

¹⁷ Article 1(ii) of the Espoo Convention.

limiting the scope of application to “only” those activities, and that Article 2(5) of the Convention provides for discussions into the concerned Parties on whether a non-included activity should be treated as such, the interpretation of the duty to implement public participation in transboundary is not, in principle, subject to restriction.¹⁸

On the other hand, to the extent that the provision concerns only to the Party of origin and to an obligation to provide a framework for the public of the affected Party to participate in equal conditions with that of the Party of origin, it, hence, constitutes an autonomous duty in contrast to the common duty contained in Article 3(8) of the Convention.¹⁹ That is true in relation to the latter provision because it develops in more specific terms the common obligation (upon both the Party of origin and the Affected Party) to guarantee the public in the Party of origin is being informed of and the possibilities of such public to intervene in the decision-making procedure.

Furthermore, following the previous approach, it is noteworthy, as to complement the content of public participation under the Espoo Convention, to consider the opinions of the Implementation Committee. In that regard, the discussion cannot disregard whether such opinions are ascribed with certain legal value to interpret the Convention. On the basis of Article 14 bis(1) of the Convention, the Meeting of Parties established the Implementation Committee to review the States’ compliance with the Convention and assist them to fulfil their obligations.²⁰ Whereas the Implementation Committee is an internal body created by an organ of the Convention whose decisions are called upon to be by consensus—if possible—,²¹ the recommendations issued by the Committee may be relevant to interpret the Convention.²² The previous analysis can be applied likewise to the opinions of the Compliance Committee under the Aarhus Convention.²³ Thus, in a

¹⁸ *Territorial Dispute (Libyan Arab Jaramiyya/Chad)*, Judgement, ICJ Reports 1994, para. 41.

¹⁹ *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, paras. 161-162.

²⁰ UNECE (2001): *Report of the Second Meeting held in Sofia from 26 to 27 February 2001 at the invitation of the Government of Bulgaria*, ECE/MP.EIA/4, decision II/4.

²¹ *Ibid.* (2008): *Report of the Fourth Meeting of Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, in Bucharest from 19 to 21 May 2008*, ECE/MP.EIA/10, annex IV, decision IV/2, Rule 18(1).

²² *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgement, ICJ Reports 2010, para. 46.

²³ Article 15 of the Aarhus Convention; UNECE (2004): *Report of the First Meeting of the Parties. Addendum. Decision I/7. Review of Compliance*, ECE/MP.PP/2/Add.8, annex, para. 35.

manner consistent with interpreting the Convention provisions, the opinions of their compliance or implementation organs are relevant to construe their meaning and scope.

Following the previous paragraph, some precisions are needed to further understand the content of obligations arising from public participation in a transboundary EIA. For instance, regarding the implementation of public participation procedures, the responsibilities under Articles 2(6), 3(8) and 4(2) of the Convention required further clarification in a “case-by-case basis and bilateral and multilateral agreements”.²⁴ Certainly, failure to adopt such steps may result in significant disadvantage or negative effects in the fulfilment of such duties that affect the public’s ability to participate effectively. However, when interpreting the content of Article 2(6), the Committee underscores the Affected Party is responsible in case of failure to allow the Party of origin to provide the opportunity to the affected public to participate in a procedure equivalent to that of the Party of origin; but the Party of origin is encouraged to still offer such possibility.²⁵ Even in such cases where the provisions specify the Party responsible for a duty, public participation’s weight over transboundary EIA is transcendental to the extent that, in general terms, the responsibility to guarantee it relies on both the Party of origin and the Affected Party.²⁶

Nonetheless, the provisions related to public participation under the Espoo Convention cannot disregard the content of those included in the Aarhus Convention—a specific legal instrument regarding public participation—.²⁷ To contend the interpretation of certain provisions affecting or relating to public participation may be done in reference to another treaty that covers the same topic—entire or partly— (treaty *in pari materia*)²⁸ would not be against the rules of interpretation under international law (Article 32(3) of the Vienna Convention on Law of Treaties).

²⁴ UNECE (2008), “*Report of the Fourth Meeting ...*”, *op. cit.*, decision IV/2, annex III, para. 31.

²⁵ *Ibid.* (2010a): *Report of the Implementation Committee on its Eighteenth Session*, ECE/MP.EIA/IC/2010/2, para. 37.

²⁶ *Ibid.* (2006): *Report of the Ninth Meeting of the Implementation Committee*, ECE/MP.EIA/WG.1/2006/4, para. 16; *Ibid.* (2011c): *Report of the Meeting of the Parties on its fifth session*, ECE/MP.EIA/15, decision V/4, para. 6(c).

²⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), signed on 25 June 1998 (entry into force 30 October 2001), UNTS vol. 2161, p. 447.

²⁸ LINDERFALK, Uff (2007): *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Netherlands, p. 255.

In this case, the interpretation of the obligations arising on public participation under Article 6 of the Aarhus Convention in case of a transboundary EIA could benefit from the similarities found in Articles 2 and 3 of the Espoo Convention.²⁹ Consistent to ascertain such interpretation, the Compliance Committee of the Aarhus Convention has reiterated that, in case of transboundary context, the obligation to ensure the conditions of Article 6 are met rests solely on the Party of origin.³⁰ In light of the similarities shared between both Conventions, it is relevant to indicate that, should a State Party to both Convention fail to undertake the duties within a transboundary context, that action does not preclude the applicability of the rights recognised in the Aarhus Convention.³¹ Indeed, public participation in transboundary contexts, specifically in case of an EIA with transboundary effects, rely on two main safeguards: (1) the application *in totum* of the Espoo Convention; and, (2) the subsidiary application of the Aarhus Convention—insofar the Espoo Convention does not affect nor limit the rights contained therein—.

3. EU ENVIRONMENTAL LAW AND THE EIA WITH TRANSBOUNDARY EFFECTS

Having discussed previously the public participation principle under IEL, the following section concerns the application of the aforesaid principle under EU Environmental Law.

When addressing the question of EIA, the starting point relates to the question of environmental protection under the EU Treaties. To that end, environmental protection, as interpreted by the CJEU, constitutes an “essential objective” of the Union.³² Moreover, Article 11 of the Treaty on the Functioning of the European Union (TFEU) imposes a duty upon the Union to consider such protection in its acts and policies. On the other hand, Article 191(2) TFEU, related to the prevention principle, materialises in the EIA procedural requirements in a manner consistent with preventing irreversible harm to the

²⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgement, ICJ Reports 1996, paras. 27-28.

³⁰ UNECE (2017): *Findings and recommendations with regard to communication ACCC/C/2013/91 concerning compliance by the United Kingdom of Great Britain and Northern Ireland*, ECE/MP.PP/C.1/2017/14, para. 70.

³¹ UNECE (2018): *Findings and recommendations of the Implementation Committee on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention in respect of the Hinkley Point C nuclear power plant*, ECE/MP.EIA/2019/14, para. 106.

³² Case 240/83, *ADBHU*, EU:C:1985:59, para. 13.

environment.³³ Consequently, under the Treaties, EU primary legislation does not directly connect EIA with the public participation principle.

Nonetheless, under EU secondary legislation, the EIA is ascribed with the transboundary regime and a closer connection to apply the public participation principle. Following doctrine,³⁴ the 1985 Directive on the assessment of the effects of certain projects on the environment³⁵ constituted a milestone in the international regulation of the EIA, influencing the elaboration of the Espoo Convention. Likewise, the Directive was the first legal instrument to recognise public participation as a principle of environmental law.³⁶ Although the 1985 Directive constituted an important step to regulate EIA, the transboundary regime was not introduced until the adoption of the 2011 EIA Directive given the ratification by the Union of the Espoo Convention in 1997.³⁷ Under Article 7(2), (3)(b) and (5) of the 2011 EIA Directive, public participation, in the terms of the Espoo Convention, is consolidated.

Following the preamble of the Directive, the EU legislator expressed the intention to “lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level”.³⁸ In other words, the introduction of the transboundary regime to the EIA procedures responded to the adaptation of the Union to new standards under IEL in transboundary contexts. Referred to as “public concerned”, the Directive imposes obligations on the MS where the project is intended to start to make available the environmental information, and to allow them to intervene in the decision-making process. Additionally, Article 11 of the 2011 EIA Directive regulates the access to administrative or judicial proceedings pertaining to the decision-making process on the authorization to execute the project likely to have a transboundary harm.

³³ KLAMERT, Marcus (2019): “Article 191 TFEU”, in KELLERBAUER, Manuel, KLAMERT, Marcus & TOMKIN, Jonathan (eds.): *Commentary on the EU Treaties and the Charter on Fundamental Rights*, Oxford University Press, United Kingdom, pp. 1520-1521.

³⁴ SANDS, Philippe; PEEL, Jacqueline; FABRA, Adriana & MACKENZIE, Ruth (2012: 605).

³⁵ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985, p. 40–48

³⁶ JUSTE RUIZ, José & CASTILLO DAUDÍ, Mireya (2014: p. 59).

³⁷ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21, recital (15).

³⁸ *Ibid.*

Notwithstanding the aforementioned paragraph, the modification of the 2011 EIA Directive introduced more specific provisions pertaining to the transboundary regime. Under the 2014 EIA Directive,³⁹ Article 7(5) was amended to empower the MS concerned as to establish a timeframe for consultations regarding the implementation of the provisions that include, *inter alia*, the public concerned access to environmental information and participation in the decision-making process. Certainly, such modification, according to the preamble of the Directive, responds to the aim of safeguarding the “achievement of high standards for the protection of the environment, particularly those resulting from Union legislation on the environment other than this Directive, and effective public participation and access to justice”.⁴⁰ However, the 2014 EIA Directive did not innovate the scope of application of public participation, insofar the EIA process is controlled mostly by developers rather than by the public.⁴¹ The significant change introduced consisted of Article 8 imposing the duty to consider the information collected during public consultation within the EIA with transboundary effects for the purposes of the grant development consent.

Yet changes in the transboundary regime reflect the importance under EU environmental law of respecting such specific aspect when implementing projects subject to EIA. Seeking to ascertain the effectiveness of the EIA Directive, EU law does not confer discretion to MS to exclude or leave out of the EIA procedures the parts pertaining to transboundary context.⁴² When implementing the provisions on public participation at the EU level, according to the European Commission (EC), MS are required to ensure—following the content of the Espoo Convention—the public likely to be affected in both the Party of origin and the Affected Party “is informed and provided with possibilities of commenting on or objecting to the proposed project”.⁴³ Moreover, in contrast to the Espoo Convention, the EIA Directive clearly details on one hand, the activities subject to EIA (Annex I) and, on the other, the activities that may require an

³⁹ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014, p. 1–18.

⁴⁰ Directive 2014/52/EU, recital (36).

⁴¹ ARABADJIEVA, Kalina (2016): “‘Better Regulation’ in Environmental Impact Assessment”, *Journal of Environmental Law*, vol. 28, No. 1, 2016, 159-168. p. 167.

⁴² C-205/08, *Kärnten*, EU:C:2009:767, paras. 54-55.

⁴³ EUROPEAN COMMISSION (2013): *Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects*, https://ec.europa.eu/environment/eia/pdf/Transboundary_EIA_Guide.pdf [last accessed: 26/06/2022], p. 12.

EIA (Annex II).⁴⁴ When complementing the Convention, and reinforcing such regulation of public participation in the transboundary context, EU environmental law adopts a stable, clear approach aligned with IEL.

Having had clarified the content of the transboundary regime, it is noteworthy to address whether the EIA Directives may be influenced by IEL, specifically the Espoo and Aarhus Conventions. To that end, according to Article 216(2) TFEU, the international treaties or agreements ratified by the Union constitute binding instruments vis-à-vis the Union institutions, thus, prevailing over acts of secondary legislation.⁴⁵ However, from the perspective of MS, the operation of such principle concerns the interpretation, to the extent it is no longer possible, of the Directive with the provision of the international agreement or treaty.⁴⁶ In that regard, when interpreting a provision of the EIA Directive, in case of contradiction with the Espoo or Aarhus Conventions concerning the public participation or the transboundary EIA requirements, the Convention prevails unless it is possible to interpret the Directive accordingly.

Hence, the nature of obligations contained in the EIA Directive ought to be consistent with the provisions of the Conventions, otherwise, the terms of the Conventions apply instead, confirming the interconnection between EU Environmental Law and IEL.

⁴⁴ Ibid., p. 6.

⁴⁵ C-352/19 P, *Région de Bruxelles-Capitale*, EU:C:2020:978, para. 25.

⁴⁶ C-654/18, *Interseroh*, EU:C:2020:398, para. 44.

II. OBLIGATIONS ARISING FROM PUBLIC PARTICIPATION IN EIA WITH TRANSBOUNDARY EFFECTS UNDER EU ENVIRONMENTAL LAW

1. INTRODUCTORY REMARKS

The present chapter analyses the content of the obligations circumscribed to public participation within a transboundary EIA in the framework of the EIA Directive. To that end, the next section summarises the facts of the cases to be used in the present study. Afterwards, the following section analyses the *ratio* of the aforementioned cases with regard to the content and scope of the obligations under the public participation and the transboundary EIA regimes, respectively.

2. FACTS OF THE CASES

2.1. C-411/17: Inter-Environnement Wallonie case

The present case concerns the refusal to carry out an EIA by application of the Belgian law of 28 June 2015 that “introduced further changes to the timetable... for phasing out nuclear energy”, deferred “the end of industrial electricity production at the Doel 1 and Doel 2 power stations by 10 years” and provided that “Doel 1 power station could resume electricity production”.⁴⁷

Through a request for preliminary ruling formulated by the Belgian Constitutional Court, the CJEU is asked to interpret the Aarhus and Espoo Conventions in line with the terms of the EIA Directive given the action filed by environmental agencies against the Belgian law for allegedly violating the mandate to carry out an EIA to renew the operative framework of the nuclear reactors cited before.

2.2. C-463/20: Natur-Est Environnement ASBL case

In this case, the dispute arises from the objection of an environmental NGO, Namur-Est Environment, against the derogation decision that authorises a company, Sagrex, “to disturb certain protected plants and animal species, and to cause deterioration or destruction of certain areas of their respective natural habitats” of the Belgian Inspector General of the Department of Nature and Forests of the Walloon Region.⁴⁸

⁴⁷ C-411/17, *Inter-Environnement Wallonie*, EU:C:2019:622, paras. 50, 57.

⁴⁸ C-463/20, *Namur-Est Environnement ASBL*, EU:C:2022:121, paras. 22, 27.

The objection of the NGO is based on the grounds that such decision did not respect the obligations to allow the concerned public to effectively participate in the procedure to be taken into account by the competent authority, including the obligation to carry out the public consultation within the EIA before the adoption of the derogation decision.⁴⁹

2.3. C-121/21: Czech Republic v. Poland case

In the current case, the dispute arose from the decision of the Polish Ministry of Climate to authorise the extraction of lignite after a modification that was introduced into the Polish law on information over the environment was deemed to be contrary to the EIA Directive.⁵⁰

Nonetheless, the action for infringement was not assessed by the Court due to the settlement reached between the Parties beforehand a judgement was handed over.⁵¹ For that reason, only the AG Pikimäe’s opinion can be considered to assess the question of public participation and transboundary EIA regimes in this case.

3. ANALYSIS OF THE CASES: PUBLIC PARTICIPATION AND TRANSBOUNDARY EIA REGIMES

3.1. C-411/17: The Inter-Environnement Wallonie case

Concerning the need or obligation to implement the transboundary EIA procedure under Article 7, the Court reserved the examination of such question to an “*obiter dictum*”.⁵² In light of the Court’s examination, the question of whether a project, according to Article 2(1), falls into the obligation of undertaking the transboundary procedure (Article 7) relies on two main elements: (a) the project contains an activity included in Annex I and II of the Directive —thereby posing “an inherent risk to the environment”—,⁵³ and (b) the project is to be carried out “close to the border” of another MS.⁵⁴ The concurrence of both elements allows to conclude “the project could also have significant effects on the environment” of another MS.⁵⁵

⁴⁹ *Namur-Est Environnement ASBL*, para. 27.

⁵⁰ Opinion of AG Pikimäe, *Czech Republic v. Poland*, C-121/21, EU:C:2022:74, paras. 28-34.

⁵¹ C-121/21, *Czech Republic v. Poland*, Order of the President, 4/02/2022, paras. 1-2.

⁵² DE SADELEER, Nicolas (2019): « Prolongation de l’exploitation de centrales nucléaires et procédures d’évaluation des incidences », *Révue des affaires européennes*, vol. 10, No. 3, 611-625. p. 615.

⁵³ *Inter-Environnement Wallonie*, paras. 75, 80

⁵⁴ *Ibid.*, para. 81

⁵⁵ *Ibid.*, para. 93

When analysing whether exemptions may apply to the obligation incumbent upon Article 2(1), the CJEU relies on the interpretation solely of the Directive. As noted in the Court’s decision, the “exceptional cases” exemption under Article 2(4) does not affect or preclude the obligation to follow the transboundary regime under Article 7.⁵⁶ Indeed, such analysis is consistent with the consecution of the objectives of the EIA Directive,⁵⁷ thereby providing a reinforced protection to the application of the transboundary EIA within the EU—even in the case the exemption may apply under Article 2(4)—.⁵⁸

Notwithstanding the aforementioned considerations, the CJEU did not interpret the Aarhus nor the Espoo Conventions in the present case. In this question, the Court relied solely on the recitals of the EIA Directive to confirm both the Aarhus—recitals 18 to 20— and Espoo—recital 15— Conventions were taken “into account” when implementing the transboundary EIA and public participation regimes to the project in the case.⁵⁹ Certainly, the Court, after confirming the EIA Directive is applicable—thus an EIA is needed in this case—, limits itself to ascertain the implementation of the procedures set forth in the EIA Directive satisfy the fulfilment of the obligations under the Aarhus and Espoo Convention.⁶⁰ However, the Court did not address questions of interpretation of the EIA Directive in conformity with the text of the Conventions, especially regarding the exemption or derogation from the obligation to undertake the transboundary EIA and the public participation regime.

On the contrary, the Advocate-General (AG) Kokott’s opinion further complements the interpretation of the EIA Directive with the provisions of the Conventions, thus, ensuring the consistent interpretation under EU Environmental Law.⁶¹ In the view of AG Kokott, the Directive does not allow a MS to dispense from a transboundary EIA,⁶² an interpretation subsequently reaffirmed by referring to the provisions of the Espoo

⁵⁶ *Inter-Environnement Wallonie*, paras. 96, 101.

⁵⁷ *Ibid.*, para. 99.

⁵⁸ *Ibid.*, para. 102.

⁵⁹ *Ibid.*, paras. 160-166.

⁶⁰ DE SADELEER, Nicolas (2019: 622).

⁶¹ Opinion of AG Kokott, *Inter-Environnement Wallonie*, C-411/17, EU:C:2018:972, para. 39; BECHTEL, Sebastian (2019): “AG Opinion on Case C-411/17: EIA for existing installations and the CJEU’s struggle with international law”, European Law Blog, <https://europeanlawblog.eu/2019/06/17/ag-opinion-on-case-c-411-17-eia-for-existing-installations-and-the-cjeus-struggle-with-international-law/> [last accessed 20/06/2022].

⁶² Opinion of AG Kokott, C-411/17, para. 153.

Convention.⁶³ The aforesaid interpretation goes beyond the Court’s assertion of insisting on the wording “without prejudice” under Article 2(4) to reaffirm the scope of such obligation.

Also, concerning public participation, AG Kokott underscores, in contrast to the EIA Directive, the Aarhus Convention provides a different but only exception: national defence (Article 6(1)(c)).⁶⁴ Surprisingly, by having recourse to state of necessity under international law, AG Kokott examines whether the exemptions under the EIA Directive⁶⁵ may fulfil that criteria to dispense public participation; however, in her view, the EIA Directive’s exemptions do not meet such criteria, thus, public participation cannot be exempted from a transboundary EIA.⁶⁶

3.2. C-463/20: Namur-Est Environnement ASBL case

Regarding public participation, the CJEU did not rely on the Aarhus Convention to confirm whether, under the EIA Directive, it is possible to ensure public participation after, and not before, a decision authorising works in a protected area is issued. Whereas the AG Kokott’s opinion interprets the EIA Directive provisions following the content of the Aarhus Convention,⁶⁷ the Court adopts an interpretation based solely on the EIA Directive.⁶⁸

Taking into account the case-law did not incorporate fully the terms of the Aarhus Convention —as they interpreted the 1985 wording of the Directive—, AG Kokott explains, through Article 6(4), that public participation cannot be ascribed to a later phase after a decision is adopted.⁶⁹ In contrast to such view, the Court relied on its interpretation of Article 8 to reaffirm it is incompatible to ensure public participation only after a decision is taken given that the effectiveness of such participation relies on a moment in which “all options are open”.⁷⁰

Finally, bearing in mind the Court limits itself to “particularly Articles 6 and 8”,⁷¹ AG Kokott reaffirms Article 8’s interpretation affects Article 7 insofar contains the duty of

⁶³ Ibid., para. 154.

⁶⁴ Opinion of AG Kokott, C-411/17, para. 156.

⁶⁵ “Security of the country’s electricity supply and the avoidance of legal uncertainty”

⁶⁶ Opinion of AG Kokott, C-411/17, paras. 157-160.

⁶⁷ Ibid., paras. 63, 67.

⁶⁸ *Namur-Est Environnement ASBL*, para. 67.

⁶⁹ Opinion of AG Kokott, *Namur-Est Environnement ASBL*, C-463/20, EU:C:2018:972, para. 63.

⁷⁰ *Namur-Est Environnement ASBL*, paras. 69-72.

⁷¹ Ibid., para. 81.

the competent authority to consider the outcome of the public participation.⁷² Consequently, the interpretation of public participation within the transboundary EIA regime cannot disregard the outcome of the public effective intervention in the decision-making process concerning the consent. In that sense, even in transboundary EIA procedures, the competent authority cannot dismiss or not address appropriately the comments or objections of the public concerned in the final decision process.

3.3. C-121/21: Czech Republic v. Poland case

Firstly, the AG Pikimäe’s opinion analyses the scope of national law in relation to the EIA Directive. In the view of the AG, the transboundary EIA regime under Article 7 entails specific procedural obligations that are violated when a national law provision exempts activities that under Article 4(1) must undertake an EIA.⁷³ Secondly, the scope of public participation is connected to the safeguard within Article 7. Following the AG Pikimäe’s opinion, public participation under Article 7 covers the public concerned—located in the MS where the project will start and the MS likely to be affected—participation in the decision-making procedure and the access to judicial and administrative means.⁷⁴ However, in AG Pikimäe’s opinion—without resorting to the Aarhus Convention—, public participation can be dispensed of when the public likely to be affected already participated in the initial stage of the authorization process.⁷⁵

Furthermore, in the aspect of judicial protection of public participation the AG opinion enlightens on the scope of such principle. Article 11(1) only provides for having recourse to judicial action in cases of procedural violations of public participation known during the action against the final decision.⁷⁶ Additionally, public participation within a transboundary EIA require the MS where the project will take place to provide complete environmental information concerning the authorization “to the public and authorities of the neighbouring Member State” that would not require them to search *motu proprio* the details of the procedural regulations of the MS authorizing the project.⁷⁷

Moreover, to reinforce the protection under the transboundary regime, the AG views, under Article 9, that no MS can oppose its national rules to exempt from “the obligations

⁷² Opinion of AG Kokott, C-463/20, para. 65.

⁷³ Opinion of AG Pikimäe, *Czech Republic v. Poland*, C-121/21, EU:C:2022:74, paras. 80-81.

⁷⁴ *Ibid.*, para. 95.

⁷⁵ *Ibid.*, para. 101.

⁷⁶ *Ibid.*, para. 104.

⁷⁷ Opinion of AG Pikimäe, C-121/21, paras. 170-171.

of publication and communication to the interested public”.⁷⁸ Hence, under the transboundary EIA regime, the MS to authorise a project is subject to two main conditions under public participation: (1) the information to be facilitated must be complete and addressed to the circumstances of the public concerned; and (2) EU law is opposed to national practices that make it difficult or impossible for the public concerned to access administrative or judicial means against the decision.

Finally, when analysing the obligations arising from the Directive pertaining to public participation and transboundary EIA, the AG Pikimäe’s opinion does not analyse whether such interpretation conforms or respects the scope of the provisions under the Aarhus and Espoo Conventions.

⁷⁸ Ibid., para. 172.

III. IS IT LAWFUL TO LIMIT OR RESTRICT PUBLIC PARTICIPATION IN EIA WITH TRANSBOUNDARY EFFECTS?

1. INTRODUCTORY REMARKS

The present chapter examines, in the light of the previous analysis, the scope of application of the Member States' discretion to limit the implementation of public participation within a transboundary EIA. To achieve that, the following section discusses, bearing in mind the mandate of the Aarhus and Espoo Conventions, whether it is lawful to limit or restrict public participation procedures within a transboundary EIA. In addition to that, the next section analyses the consequences under EU Environmental Law to provide adequate remedies to the acts of MS regarding public participation within transboundary EIA.

2. LAWFULNESS OF LIMITATIONS OR RESTRICTIONS TO PUBLIC PARTICIPATION

2.1. Lawfulness under International Environmental Law

The analysis shall consider the scope and effects of Article 2(8) of the Espoo Convention regarding public participation. According to the aforesaid article:

“The provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security”

Certainly, the overview of the previous article entails a significant impact on the application of public participation under the transboundary EIA regime. Indeed, the provision in question does not impair the State Party's ability to invoke national law that may restrict or limit the information to be supplied to the public concerned within the public participation procedure. On that light, the provision restricts the lawful invocation of national law limiting certain parts of the information to be supplied to demonstrate—considering therein the information pertaining to the EIA procedure— it “would be prejudicial” to either “industrial and commercial secrecy” or “national security”. The provision would apparently constitute a lawful ground for a State Party to limit public participation by withholding information prejudicial to certain values.

In that regard, the ILC acknowledges the scope of such restriction. In its opinion, Article 2(8) entails a “similar protection of industrial and commercial secrecy” in relation to Article 14 of the Draft articles on prevention of transboundary harm from hazardous activities.⁷⁹ However, the latter article includes a safeguard to such restriction that obliges the State to provide “as much information as possible under the circumstances”. To justify such approach, the ILC understands the “good-faith cooperation” allows for such equitable balance between the “legitimate interests of the State or origin and the States that are likely to be affected”.⁸⁰ Whereas Article 2(8) of the Espoo Convention does not include expressly such safeguard, the next paragraph will analyse whether the application of such provision is restricted or limited to such safeguard.

To the extent that a broad interpretation of Article 2(8) may oppose to the letter and intent of the Convention, a lawful interpretation cannot dismiss the good faith. As noted by the Implementation Committee, “the Convention was to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms and in the light of its object and purpose”.⁸¹ In that regard, following the preamble of the Convention, to interpret Article 2(8) as an absolute restriction would considerably reverse the aim of international cooperation within the transboundary EIA, thus, rendering void an effective participation of the public likely to be affected.⁸² To that end, the Party of origin cannot indiscriminately or arbitrarily invoke such provision to withhold all potential information that would impede the public likely to be affected to effectively participate in the procedure.

The aforementioned argument relies, likewise, in the consideration of public participation under the Aarhus Convention. Under Article 6, the Party of origin is legally bound to ensure the public participation procedure within a transboundary EIA.⁸³ Yet, even under Article 4(4), the invocation of any grounds to withhold certain information is restrictive and must “take into account the public interest in disclosure”.⁸⁴ Consequently, even if

⁷⁹ ILC (2001: Article 14, para. 2).

⁸⁰ Ibid. (2001: Article 14, para. 3).

⁸¹ UNECE (2020b): *Report of the Implementation Committee on its forty-eight session*, ECE/MP.EIA/IC/2020/4, annex, para. 8.

⁸² Ibid., para. 19(c).

⁸³ UNECE (2016): *Findings and recommendations with regard to...*, *op. cit.*, ECE/MP.PP/C.1/2017/3, paras. 69, 72.

⁸⁴ Ibid. (2021): *Findings and recommendations with regard to communication ACCC/C/2014/105 concerning compliance by Hungary*, ECE/MP.PP/C.1/2021/16, para. 110.

such protection is afforded under national law to certain information,⁸⁵ the disclosure of such information would be applicable if the public interest outweighs the harm to the interests at stake.⁸⁶ Hence, grounds for the Party of origin to withhold certain information are subject to an objective assessment—protection afforded by law and significant public interest—that cannot simply be satisfied by merely claiming the information is protected.

Following the treaty *in pari materia* criteria, the interpretation of the applicability of restrictions or limitations to certain information under the Espoo Convention may rely on the views of the Aarhus Convention. The wording of Article 4(1) of the Aarhus Convention providing that “Each Party shall ensure that... public authorities, in response to a request for environmental information, make such information available to the public...” follows the purpose of Article 2(6) of the Espoo Convention. Bearing in mind that the wording “the opportunity provided” in such provision includes “access to at least relevant parts of the documentation”⁸⁷ and concerns to “complete [information], provided in time and, for the relevant parts of the EIA documentation”,⁸⁸ therefore, to interpret *in abstracto* Article 2(8) of the Espoo Convention would impair the effective public participation within a transboundary EIA as no complete or relevant information will be made available to provide all the possible views to the public to afterwards submit their comments or objections.

Additionally, as no provision is incorporated into Article 4 of the Aarhus Convention—in similar terms to the Espoo Convention—materialising the criteria laid down in the interpretation of the Compliance Committee—except for the public interest criterion—, it is not unreasonable to understand the criteria—as both provisions intend to protect access to environmental information within public participation—can be applicable *mutatis mutandis* to Article 2(8) of the Espoo Convention. Consequently, the lawful restriction or limitation under Article 2(8) of the Espoo Convention is limited to the effective public participation within the transboundary EIA procedure that requires the

⁸⁵ UNECE (2020a): *Findings and recommendations with regard to communication ACCC/C/2013/96 concerning compliance by the European Union*, ECE/MP.PP/C.1/2021/3, para. 98.

⁸⁶ *Ibid.* (2011d): *Report of the Compliance Committee on its Twenty-third meeting*, ECE/MP.PP/C.1/2009/2/Add.1, para. 30(c).

⁸⁷ *Ibid.* (2010b): *Report of the Implementation Committee on its nineteenth session*, ECE/MP.EIA/IC/2010/4, para. 20.

⁸⁸ *Ibid.* (2013): *Report of the Implementation Committee on its twenty-seventh session*, ECE/MP.EIA/IC/2013/2, annex, para. 48.

protection afforded to be provided by law and to not exist a significant public interest for disclosure.

Nonetheless, in contrast to the Espoo Convention, the Aarhus Convention does include a specific exception to disapply the public participation requirements. In the wording of Article 6(1)(c):

Each Party... May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

The analysis of such provision introduces two main criterions to observe before the public participation requirements can be exempted: (1) a provision under national law; and (2) to have an adverse effect on national defence purposes. In that sense, the exception provided opposes to the mandatory requirement to observe public participation requirement when the EIA —or transboundary EIA— regimes provide for public participation.⁸⁹

Nonetheless, it is not sufficient to only include a national defence provision or criteria under national law for the exception to operate. In case such exception introduced under national law is broader in its scope than the one of the Convention, it is likely that would constitute a non-compliance,⁹⁰ rendering the action as unlawful. Moreover, the State seeking to invoke such exception should likewise consider implementing an inquiry into whether an adverse effect may or may not result.⁹¹ Therefore, a lawful limitation or restriction of Article 6 requirements would require, on one hand, a clear legal provision, and, on the other, an objective procedure to demonstrate the exercise of such participation would adversely affect national defence.

⁸⁹ UNECE (2011a): *Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain*, ECE/MP.PP/C.1/2009/8/Add.1, para. 82.

⁹⁰ Ibid. (2011b): *Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus*, ECE/MP.PP/2011/11/Add.2, para. 82.

⁹¹ Ibid. (2014): *The Aarhus Convention: An Implementation Guide, 2nd edition*, https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf [last accessed 26/06/2022], p. 134.

2.2. Lawfulness under EU Environmental Law

For the purposes of clarifying the discussion based on the cases cited in the present study, the main provision concerning to restrictions is outlined below. In the wording of Article 4(4) of the EIA Directive:

Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

The aforementioned provision enlightens as to the reduced or no margin ascribed to a lawful restriction or limitation to undertake a transboundary EIA —under Article 7—. Whereas the wording “without prejudice” excludes the application of such “exceptional cases” restrictions to undertake an EIA,⁹² the scope of the examination concerns to the effects to public participation in case such discretion is invoked by the MS where the project is to take place.

In that regard, Article 10 of the EIA Directive will be discussed. The wording of the aforesaid article is like that of Article 2(8) of the Espoo Convention except for the following: (a) the exclusion of the “which would be prejudicial to” condition and the “national security” ground; and (b) the inclusion of the wording “without prejudice to Directive 2003/4/EC” and the applicable law regime to the protection of information—that of the MS where the project is to take place—. Certainly, a clearer difference arises regarding the wording of the Convention, nonetheless, in contrast to the Espoo Convention, the reference to Directive 2003/4/EC⁹³ introduces into EU law the considerations of the Aarhus Convention.⁹⁴ The aforesaid reference is relevant to adequately interpret the scope of the lawful restrictions or limitations allowed to MS to the information made available during the public participation within a transboundary EIA.

To the extent that Directive 2003/4/EC is included as a safeguard to Article 10 of the EIA Directive, the following paragraph interprets the scope and content of such protection afforded to information during a transboundary EIA. To that end, the purpose and wording of the Aarhus Convention shall be considered to unfold the adequate

⁹² Opinion of AG Kokott, C-411/17, para. 154.

⁹³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26–32.

⁹⁴ C-279/12, *Fish Legal and Shirley*, EU:C:2013:853, para. 37.

interpretative criteria of the Directive.⁹⁵ On that line, the wording of Article 4(2) of the Directive 2003/4/EC is similar except for the inclusion of the following wording after indicating all the grounds allowing for refusal to supply certain information:

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

Indeed, and in consistency with the views of the Implementation Committee, the restrictive interpretation still applies to the grounds indicated in Article 4 of the Directive.⁹⁶ In that sense, MS, when deciding to invoke any of the grounds of Article 10 of the Directive limiting or restricting the information available for public participation, must bear in mind the general rule of disclosure of information during the transboundary EIA procedure.⁹⁷ Moreover, the EIA Directive, as understood by the CJEU, “is intended to take account of the provisions of the Aarhus Convention”,⁹⁸ thereby enabling the interpretation of such provision following the purpose and object of such international instrument in what related to public participation. As a result, the MS needs to take into account whether the public interest outweighs the interests at stake and if the information is protected under its national law before invoking such protection.

Notwithstanding the reference made before, the following part addresses in the cases cited in the present study the analysis on the lawfulness of limitations or restrictions to public participation within a transboundary EIA.

In the *Inter-Environnement Wallonie* case, the Court adopts a consistency view regarding the application of the Aarhus Convention within transboundary EIA. In doing so, the Court satisfies itself when contending that, in case the EIA Directive is applicable to the case, and the EIA Directive “takes into account... the provisions of the Aarhus Convention”, the public participation regime therein is likewise to be considered in a transboundary EIA.⁹⁹ Certainly, that analysis connects the provisions of the Aarhus

⁹⁵ C-442/14, *Bayer CropScience SA-NV*, EU:C:2016:890, para. 54.

⁹⁶ C-266/09, *Stichting Natuur en Milieu and Others*, EU:C:2010:779, para. 52.

⁹⁷ C-279/12, *Fish Legal and Shirley*, para. 66.

⁹⁸ *Inter-Environnement Wallonie*, para. 164.

⁹⁹ *Ibid.*, paras. 164-165.

Convention to the transboundary EIA procedure within Article 7 of the EIA Directive. In that sense, *a priori*, under such interpretation, the grounds to limit or restrict the information to be supplied under Article 4(4) of the Aarhus Convention could be applicable.

But, in the view of the AG Kokott, that interpretation would be contrary to the purpose and object of the Aarhus Convention.¹⁰⁰ Nonetheless, considering the grounds invoked in this case did not include that of “national defence” under Article 6(1)(c) of the Convention, the effects of such analysis only limits to such cases where the “security of energy supply and legal uncertainty” ground is invoked. Yet, as noted by the AG Kokott, that ground does not satisfy the requirements to invoke the state of necessity, thus rendering unlawful for a MS to dispense from the public participation procedure within a transboundary EIA by invoking that restriction. For that reason, and following the reasoning in the section *supra*, if the obligation to carry out an EIA is not dispensable—noting Article 7 of the EIA Directive—the MS where the project is to take place must produce evidence that: (1) under national law it is contemplated a national defence exception; and (2) that, under an objective procedure, the adverse effects to national defence are elucidated.

In the *Namur-Est Environnement ASBL* case, the limitations or restrictions applicable to public information within a transboundary EIA pertain to the scope of Article 8 of the EIA Directive. The aforesaid provision reads as follows: “The results of consultations and the information gathered pursuant to Articles 5 to 7 shall be duly taken into account in the development consent procedure.” Although, in view of the Court, the content of Article 8 entails the obligation of the competent authority to take into account in its decision the public participation outcome,¹⁰¹ the effects of Article 10 are not examined.

Insofar Article 10 allows the competent authorities to rely on their national legislation protecting certain types of information, the non-observance of the requirements under the Aarhus Convention and the Directive 2003/4/EC to limit or restrict certain type of information, as developed *supra* in the present section, would render ineffective the public participation under Article 8 in relation to Article 7 of the EIA Directive.¹⁰² Hence, the information to be taken into account as a result of the public participation within a

¹⁰⁰ Opinion of AG Kokott, C-411/17, para. 156.

¹⁰¹ *Namur-Est Environnement ASBL*, para. 69.

¹⁰² Opinion of AG Kokott, C-463/20, para. 66; *Namur-Est Environnement ASBL*, para. 72.

transboundary EIA is adequately safeguarded under Article 8 if MS observe the criteria required under Directive 2003/4/EC and the Aarhus Convention.

Following the view of AG Pikimäe in the *Czech Republic v. Poland case*, a lawful limitation or restriction may consist of the non-obligation to implement a public participation procedure within a transboundary EIA if such procedure took place beforehand.¹⁰³ Under Article 2(2) of the EIA Directive, the AG Pikimäe understands the content of public participation cannot preclude the Directive's provision allowing MS to include a project authorisation into an existing one, thus, not requiring to organise new public participation procedure before a decision is adopted.¹⁰⁴ If accepted such interpretation, following the reasoning *supra* in the first section, if the transboundary EIA is not mandatory —given that a MS can incorporate a prorogation of an existing authorisation—, then, according to the Aarhus Convention, the public participation requirements would no longer be compulsory. Indeed, only such limitation or restriction would be founded if, at the time of the stage of implementation or prorogation of the initial authorised project, the effects on the environment are seen and assessed in the principal stage as to preclude the requirements under Article 7.¹⁰⁵ But, in a manner consistent to reinforce the guarantees under the EIA Directive, it is noteworthy to address such limitation or restriction still requires to ensure the public concerned and/or MS affected participated effectively in the principal stage.¹⁰⁶

Furthermore, the aforesaid limitation or restriction, in view of AG Pikimäe, extends to Article 11(1) of the EIA Directive. Considering the aforesaid article includes an obligation pertaining to public participation,¹⁰⁷ such limitation or restriction extends to the right to access judicial or administrative means against the authorisation or decision. However, the lawfulness of such limitation or restriction depends on whether the MS ensures the public concerned and/or MS affected effectively participated in the decision on the incidence to the environment beforehand.¹⁰⁸

¹⁰³ Opinion of AG Pikimäe, C-121/21, para. 101.

¹⁰⁴ *Ibid.*, C-121/21, para. 102.

¹⁰⁵ *Vid.* C-290/03, *Baker*, EU:C:2006:286, para. 47; C-508/03, *Commission v. United Kingdom*, EU:C:2006:287, para. 104.

¹⁰⁶ Opinion of AG Pikimäe, C-121/21, para. 102.

¹⁰⁷ *Ibid.*, para. 95.

¹⁰⁸ *Ibid.*, para. 149.

On the other hand, such limitation or restriction does not extend to the invocation by a MS of its administrative practices or domestic legislation. In relation to Article 9(1)—also considered as an obligation on public participation—,¹⁰⁹ a limitation or restriction to public participation is unlawful when the information made available—after a decision is made on the authorisation—to the public concerned and the authorities of the MS affected is; incomplete or incomprehensible pertaining to the content of the Member MS of origin administrative law,¹¹⁰ or not adapted to the public it will be supplied to.¹¹¹ Consequently, the competent authority of the MS of origin is bound to—in the course of a transboundary EIA— disclose the relevant information pertaining to the procedure of authorisation. However, the provision does not allow for a mere disclosure; the competent authority is bound to provide the information in an adequate, appropriate and complete according to the public concerned and the authorities of the MS affected.

3. REMEDIES UNDER EU ENVIRONMENTAL LAW AGAINST SUCH LIMITATIONS OR RESTRICTIONS

The present section identifies and discusses the scope of the infringement under EU Environmental Law of any act contrary to public participation within a transboundary EIA.

Bearing in mind the lack of provisions in the EIA Directive concerning unlawful limitations or restrictions, reliance on the jurisprudence of the CJEU will enlighten the application of such necessary means. In view of the Court, any act by a MS contrary to the obligations contained in the EIA Directive entail a breach of the principle of cooperation in good faith (Article 4(3) of the Treaty on the European Union - TEU).¹¹² Nonetheless, from the breach of Article 4(3) TEU arises the duty to “nullify the unlawful consequences”.¹¹³ In that regard, the measures to address such infringement will be analysed.

For instance, if the act in question refers to the failure of the MS to undertake the transboundary EIA regime regarding a certain plan or project, the adequate remedy will consist in the Member State’s obligation to adopt the necessary “general or particular

¹⁰⁹ Ibid., para. 95.

¹¹⁰ Opinion of AG Pikimäe, C-121/21, paras. 170-171.

¹¹¹ Ibid., para. 172.

¹¹² C-201/02, *Wells*, EU:C:2004:12, para. 64.

¹¹³ Joined Cases C-196/16 and C-197/16, *Commune di Corridonia*, EU:C:2017:589, para. 35.

measures”.¹¹⁴ When discussing about the potential measures to be adopted by the MS, these include namely, the “revocation or suspension of a consent already granted, in order to carry out an assessment”.¹¹⁵ Certainly, the measures may likewise include the duty or obligation to “suspend or annul the plan or programme in breach of the obligation to carry out an environmental assessment”.¹¹⁶ Indeed, any of the previous measures are subject to the principle of procedural autonomy of the MS governing the procedural rules that allow individuals or interested parties to request the national court to nullify the consequences of the unlawful act under the jurisdiction of the MS in question.¹¹⁷

The aforesaid measures are relevant to the extent that demonstrate the case-law is inclined to reverse or stall the effects of acts or regulations under national law that are contrary to EU law, especially the EIA Directive. Although the procedural means under national law vary in each MS, under EU law, the general rule requires that the national legal order provides effective —do not render impossible or excessively difficult the exercise of rights conferred by EU law— and equivalent —rules are not less favourable than those governing similar domestic situations— remedies that ensure the unlawful act does not continue producing effects.¹¹⁸ Consequently, the measures provided under EU Environmental Law, albeit subject to actions to be carried out by MS to produce final effects, are likely to provide a significant remedy to any unlawful limitation or restriction to public participation within a transboundary EIA. In that sense, an adequate compliance is ensured to the obligations that arise from the Aarhus and Espoo Conventions inasmuch the EU legal order bounds MS to ensure its acts under national law do not contravene the Directives that implement such international instruments.

However, in cases concerning the protection of waters against nitrate pollution,¹¹⁹ the Court has declared that a retroactive annulment of the national act or regulation contrary to EU law would not be appropriate —at least temporarily— to protect the environment —and not for economic reasons—. ¹²⁰ On that line, the Court’s interpretation has been restrictive as to allow such extemporary measure requiring four conditions: (1) correct

¹¹⁴ C-41/11, *Inter-Environnement Wallonie ASBL*, EU:C:2012:103, para. 42.

¹¹⁵ *Wells*, para. 65.

¹¹⁶ *Inter-Environnement Wallonie ASBL*, para. 46.

¹¹⁷ *Wells*, para. 67.

¹¹⁸ *Inter-Environnement Wallonie ASBL*, para. 45.

¹¹⁹ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375, 31.12.1991, p. 1–8.

¹²⁰ *Inter-Environnement Wallonie ASBL*, paras. 56-57.

transposition of the Directive of protection of waters against nitrate pollution; (2) the referring court must demonstrate the new order or act to be adopted does not entail adverse effects than the order to be avoided; (3) the annulment of the order must result in a legal vacuum more harmful to the environment than maintaining the order; and (4) the maintenance of such order must be for the time strictly necessary.¹²¹

Having had explained the case-law of the CJEU in the infringement of the EIA Directive, the following paragraph will address the adequate means to respond to unlawful limitations or restrictions to public participation within a transboundary EIA. In case of any act contrary to Article 4(1) in relation to Article 7 —on the obligation to undertake an EIA for activities listed in Annexes I and II of the EIA Directive—, the most adequate measure would be to, either suspend or annul the plan or programme; or to revoke or suspend the consent —under Article 9—, so the transboundary EIA procedure can be implemented. Moreover, if the act consists of the unlawful application of Article 10 that allowed the competent authority to withhold information relevant to the effective public participation either under Articles 7 or 8 it is likely the most adequate measure would consist of revoking or suspending the plan or the consent given as to allow the public concerned and MS affected to effectively participate. But, in case the act affects Article 9, it is probable the suspension of the plan or consent will be more adequate as to allow the public concerned and MS affected to exercise the necessary actions in the administrative or judicial venues.

¹²¹ *Inter-Environnement Wallonie ASBL*, paras. 59-62.

IV. DE LEGE FERENDA PROPOSAL: ADEQUATE CONTROL OF LIMITATIONS OR RESTRICTIONS TO PUBLIC PARTICIPATION WITHIN A TRANSBOUNDARY EIA

Having had analysed and discussed in the previous chapters about the effects and limitations of the measures under national law concerning public participation within a transboundary EIA, the present chapter addresses the possible means under EU law to control the invocation of such limitations or restrictions.

As noted in the previous chapter, the EIA Directive does not include any provision referring to the consequences of unlawful limitations or restrictions imposed on public participation within a transboundary EIA. In what pertains to the present study, the relevant provision concerns to the reinforced protection under Article 2(4) of the EIA Directive that impedes MS to dispense from a transboundary EIA. Nonetheless, as the EC acknowledged, the EIA Directive does not contemplate a single, harmonised procedure to implement the transboundary EIA procedure that may affect public participation.¹²² Although the EIA Directive in force intends to seek an “effective public participation in the decision-making process”,¹²³ the goal cannot be achieved if no consequences are provided for such national legal provisions that do not provide adequate remedies in case the objectives of the Directive are not adequately met.

Following the *ratio* of the case-law CJEU, it is possible for the Directive to provide measures in case of infringement of the procedure laid down in the transboundary EIA.¹²⁴ Albeit the Directive may indicate such measures, the MS would only be obliged to ensure the transposition abides and observes the goal of the Directive that is to ensure the effective participation of the public concerned in the EIA procedure.¹²⁵ To that end, an

¹²² EUROPEAN COMMISSION (2009): *Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC)*, COM(2009) 378 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0378&from=EN> [last accessed: 26/06/2022], para. 3.4.

¹²³ UNECE (2015): *Report of the European Union for 2012-2015 on the implementation of the Convention on Environmental Impact Assessment in a Transboundary Context (1991 Espoo Convention)*, https://unece.org/fileadmin/DAM/env/eia/documents/Review_2013-2015/Completed_EIA/EU_EIA_2012-2015_07.12.2015.pdf [last accessed 29/06/2022], p. 2.

¹²⁴ *Inter-Environnement Wallonie ASBL*, para. 45; *Commune di Corridonia*, para. 34.

¹²⁵ *Wells*, para. 65.

effective proposal to empower public participation within a transboundary EIA would consist of an amendment to the text of the Directive that incorporates the measures from which MS may choose, within the limitations of its national legal order, which one is applicable should any unlawful act against EU law arises. Whereas it is true the current EIA Directive went through a 5-year process before its entry into force (2009-2014),¹²⁶ it is likely for a new amendment to be applicable the timeframe would not be any lesser than that of the review. However, for the proposal to produce legally binding effects on public participation within a transboundary EIA an amendment to a Directive responds adequately to such goal.

Having observed the main measures proposed in the settled case-law of the CJEU, the amendment shall adequately incorporate them as to ensure consistency with the interpretation of EU Environmental Law, thus reinforcing the likeliness of its adoption. In that regard, the following amendment shall incorporate the “general or particular measures” referred to in the case-law.

In cases concerning the failure of a MS to carry out a transboundary EIA (interpreting Article 4(1) in relation to Article 7 of the EIA Directive) that implies an unlawful limitation or restriction in the public participation regime contained therein, a potential amendment may include the following provision: “Where a Member State fails to submit a project listed in Annex I to an assessment in accordance with Articles 5 to 10, the Member State shall, following the procedures laid down in its national rules, adopt the general or particular measures provided in its national rules to achieve the goal of assessing the incidence into the environment of such project”. Bearing in mind the previous text, the provision observes Member States’ procedural autonomy while constraining the implementation of national rules to a goal that pertains to carry out an assessment, allowing for public participation, subject to the national rules of that MS.

Moreover, in cases concerning the failure to ensure effective public participation before the development consent is granted (Article 9 in relation to Articles 7 and 8 of the EIA Directive), a potential amendment may include the following provision: “When a decision to grant or refuse development consent has been taken without an effective public participation following the requirements under Article 7(1), the competent authority,

¹²⁶ EUROPEAN COMMISSION (2022): *Review of the Environmental Impact Assessment (EIA) Directive*, <https://ec.europa.eu/environment/eia/review.htm#:~:text=The%20newly%20amended%20Environmental%20Impact,it%20reduces%20the%20administrative%20burden> [last accessed 29/06/2022].

subject to the conditions laid down in its national rules, shall adopt the general or particular measures, including the suspension or revocation of such consent, to ensure such requirements are observed”. The text of the previous amendment takes into account that, in accordance with the procedural autonomy of MS to implement EU law deriving from a Directive, the provision cannot be restrictive as to the measures provided in national law to ensure the goal pursued by the Directive. In that sense, respecting such autonomy, the text of the amendment bears in mind the case-law of the Court in cases concerning the development consent phase, a moment connected to public participation insofar the decision is adopted “taking into account” the effective public participation exercised beforehand.

The two previous amendments, having had explained its connection to public participation within a transboundary EIA, would require following the ordinary procedure (Article 294 TFEU) in relation to the environmental policy of the Union (Article 192(1) TFEU) to be adopted to produce legally binding effects. Under such procedure, the EC would require producing a proposal including the text of the aforementioned amendments (Article 294(2) TFEU). Afterwards, the European Parliament would be required to adopt a position on the EC’s proposal and transmit the proposal to the Council of the European Union (Article 294(3) TFEU). Assuming the Council agrees with the wording proposed by the Parliament, the act would be adopted following the wording adopted by the Parliament (Article 294(4) TFEU). However, following Article 192(1) TFEU, before an action is adopted on the text of the amendments, the Parliament and the Council must consult beforehand both the Economic and Social Committee, and the Committee of the Regions. As a result, in the form of an amendment to the EIA Directive, MS would count with a clear, and legally binding, guidance on the consequences for not adopting the measures intended to ensure public participation within a transboundary EIA.

CONCLUSIONS

The present study outlined the currently in force regime pertaining to public participation within a transboundary EIA in reference to both IEL and EU Environmental Law. In doing so, the study provided the grounds to discuss the scope and content of the obligations arising from public participation in relation to a transboundary EIA under EU Environmental Law through the lens of three cases brought before the CJEU.

Having had clearly determined the nature of those obligations, the present study examined, in reference to both IEL and EU Environmental law, the existence of limitations or restrictions to public participation within EU Environmental Law and the remedies available under EU law to prevent their negative or harmful effects. As a result, seeking to prevent legal uncertainty in the treatment of such unlawful limitations or restrictions, the present study elaborated two amendments to the EIA Directive in light of the settled case-law of the CJEU.

The main findings derived from the present study underscore the stringent regulation and structure of public participation within a transboundary EIA in EU Environmental Law when compared to IEL. Although under IEL public participation is acknowledged, albeit not universally, as a principle, under EU Environmental Law, it receives the protection and status as a procedural obligation within the transboundary EIA procedure. Whereas the regime under EU Environmental Law is clearer in the scope of public participation within a transboundary EIA, the consistent interpretation of the EIA Directive with IEL ensures that, when analysing any potential limitation or restriction, the nucleus of such principle is duly observed when implementing it in the EU. Both the IEL and EU Environmental Law regimes have been consistent in refusing to accept exceptions to the observance of the obligations arising from public participation within the transboundary EIA regime, albeit in EU Environmental Law, in light of the procedural autonomy of MS, it is possible if the main procedure has already taken into account such effective public participation.

Furthermore, in contrast to IEL, EU Environmental Law case-law contemplates, in the EIA framework, to reverse or correct situations that infringe or violate the duties related to an EIA, including public participation. Whereas EU Environmental Law interprets the EIA Directive as to provide for remedies in case of infringement, the measures provided, when interpreted in relation to the obligations arising from public participation, allow to

construe a consistent interpretation on how to implement such measures within a transboundary EIA. Finally, in a manner consistent to prevent legal uncertainty when faced with limitations or restrictions to public participation within a transboundary EIA, through direct amendments to the EIA Directive, following the settled case-law of the CJEU, allows the Union to ensure, on one hand, the protection of the environment, and on the other, the protection of public protection within the special transboundary regime.

In the present analysis, the main limitations witnessed are in relation to the scope of the cases cited in the present study. To the extent that the case-law of the CJEU is limited regarding the public participation within a transboundary EIA, the analysis only covered such aspects interpreted or addressed—even briefly—by the Court or the AG connected to the research question. For instance, the study focused mostly on the access to environmental information and the effective participation in the decision-making procedure; however, the access to justice and administrative means was considerably reduced given that the Court did not pronounce on such issue in the *Czech Republic v. Poland* case. To that end, the present study, should further discussion or judicial disputes arise in relation to such areas, in a more holistic approach, would require to be adequately adapted and complemented to new findings in relation to how the elements of public participation interact in relation to transboundary requirements.

Having had reviewed thoroughly the findings of the present study, it is possible to answer in the negative form the research question as posed in the introduction. As unfolded in the present examination, MS cannot freely limit or restrict public participation within a transboundary EIA insofar the grounds only concern to certain aspects of public participation that have been interpreted restrictively by both IEL and EU Environmental Law. To that end, the limitation or restriction, being subject to great scrutiny, is of little extent possible for a MS, especially if provided no dispensation can be claimed in relation to the public participation requirements within a transboundary EIA. In case the MS decides to rely on invoking the unique ground to limit or restrict public participation *in abstracto* the MS must undertake a heavy burden of proof to ascertain if there exists a national defence purpose. Yet *in concreto*, the available grounds to limit or restrict certain parts of public participation still require the MS to demonstrate not disclosing does not significantly harm the public interest; hence reinforcing the protection of the environment and the public participation in the context of a transboundary EIA.

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