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# elni

## REVIEW

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The Ruling of the Court of Justice in Sweetman:  
How to avoid a death by a thousand cuts?

*Hendrik Schoukens*

Transitional National Plan derogations for Large Combustion  
Plants under the IED: EEB legal challenge

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Selected problems of implementation of the Espoo Conventi-  
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## Editorial

This current issue of the elni Review is set in the light of the tragic loss of a friend of ELNI, Marc Pallemmaerts (see the obituary below).

The topical spectrum of elni Review 1/2014 encompasses EU nature protection and pollution control law as well as the implementation of international law on transboundary impacts on the environment in Ukraine.

*Hendrik Schoukens* analyses the ECJ *Sweetman*-Case and new developments in the judicial fixation of the scope of Art. 6(3) Habitats Directive about the permissibility of industrial or infrastructural interventions in Natura 2000 areas. The author argues that the Court's ruling should be welcomed since it provides an additional safeguard for the EU's most vulnerable habitats.

The article by *Christian Schaible* illuminates shortcomings of the Industrial Emissions Directive as regards transparency in the elaboration and evaluation of certain derogations for large combustion plants. The focus lies on an

EEB action concerning a Greek derogation approval decision of the European Commission, which the NGO has since contested before the General Court on 18 June 2014.

*Victoria Rachynska* examines the implementation of the "Espoo Convention" in the Ukraine. Based on a case study she identifies the country as one of the most persistent violators of the Convention and traces this in part back to the political and economic situation in Ukraine.

The next issue of the elni Review will concentrate on the current TTIP negotiations. Contributions concerning the clash of international trade and environmental protection, the role of arbitral jurisdiction and related topics are most welcome. Please inform us of your interest in a publication. Please send contributions to the editors by mid-September 2014.

*Julian Schenten/Gerhard Roller*  
July 2014

## Obituary Marc Pallemmaerts

Most elni-Members have already learnt about the very sad news. Marc Pallemmaerts, one of the co-founders of elni, has died at the age of only 53. Marc participated in the first elni conference in Frankfurt in 1990. In the final discussion of the conference he took the floor once again and argued for an international treaty providing for procedures to enforce environmental legislation (see the minutes kept by Gabriele Britz and Sven Deimann, in: Führ/Roller, *Participation and Litigation Rights of Environmental Associations in Europe*, p. 181): in nucleo the aim of the Aarhus-Convention. The "Aarhus" issue has been one important of the numerous subjects of Marc's work. His book on "The Aarhus Convention at Ten", to which also elni members contributed, was an outstanding example of Marc's research. This also holds true for his contributions to the debate on WTO rules and product regulation as well as in the field of chemicals legislation (his PhD was about Toxics and Transnational Law) where he served as a member of the Management Board of the European Chemicals Agency (ECHA) and – until his final weeks – as an alternate member of the Board of Appeal of ECHA. He was also UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes since November 2012 (see <http://www.ohchr.org/EN/Issues/Environment/ToxicWaste/Pages/MarcPallemmaerts.aspx>) and had planned two new missions for 2014 in that regard, in the Middle-East and in Europe.

Climate change was also one of the many fields in which Marc excelled and reached very important achievements. He played a truly decisive role in the international climate change negotiations, as a chief negotiator under the Belgian presidency of the EU in 2001, as an architect of the Marrakesh Accords, as a member of the Kyoto Protocol Committee and much more (see <http://www.climat.be/fr-be/news/2014/hommage-marc-pallemmaerts> - (<http://www.ieep.eu/about-us/in-memory-of-marc-pallemmaerts/>)).

In 2013, he was awarded the prestigious Elizabeth Haub Prize for environmental law by the University of Stockholm "in recognition of his extensive and outstanding contributions to the development of environmental law and his successful efforts to combine theory and practice in pursuit of concrete results in multilateral negotiations".

Not the least and most importantly for him, as a lawyer and a political scientist, Marc was an academic. He was a professor in various universities, in Belgium and abroad, much appreciated by its students and always ready to engage into new scientific research projects.

Marc was brilliant and had a very sharp mind. He always knew and explained where the real issues were. He rarely hesitated to speak his mind and frankly stated his opinions.

He will be greatly missed by us, as a colleague as well as personally. European Environmental Law has lost an important figure

## Transitional National Plan derogations for Large Combustion Plants under the Industrial Emissions Directive: EEB legal challenge\*

Christian Schaible

### 1 Introduction

The Industrial Emissions Directive (IPPC Recast) 2010/75/EU of 24 November 2010 has the objective to “lay down rules designed to prevent, or where this is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole.” (Article 1) setting out the so-called “integrated approach” to prevent negative impacts on all environmental media due to a certain industrial activity. The new framework strengthened the provisions from the previous IPPC Directive<sup>1</sup> for existing installations, with effect from 7<sup>th</sup> January 2014. These provisions are reflected within Chapter II of the IED.

The strengthened requirements relate in particular to the obligation on desk officers in regional environmental authorities granting IED-permits to set emissions limit values (ELVs) based on the best available techniques (BAT). The IED covers large scale industrial activities indicated under Annex I, including combustion plants having a thermal input above 50 MW irrespective of type of fuels used.

The BAT performance benchmarks are laid down in the “BAT reference documents” (BREFs), which are periodically reviewed, and which contain, amongst other, emission levels that may be achieved by the use of BAT (BAT Associated Emission Levels, BATAEL) for a limited number of pollutants (NO<sub>x</sub>, SO<sub>2</sub>, dust, heavy metals) to water or air, and set other requirements on resource consumption and waste prevention etc.<sup>2</sup>.

For Large Combustion Plants (LCPs), the environmental performance benchmarks – i.e. the 2006 LCP BREF – has been agreed and adopted after a 3 years exchange process in 2006<sup>3</sup>. This BREF is currently under review and operators will have to comply with

the updated requirements at the latest within 4 years following the publication of the BAT conclusions<sup>4</sup>.

However, only a few Member States have implemented the applicable 2006 LCP BREF BAT benchmarks in the respective permits, as was required for existing installations at the latest by 30 October 2007 in accordance with Article 5 of the IPPC Directive. Instead, the authorities of most Member States<sup>5</sup> have chosen to impose Emission Limit Values at the least strict level they were required to apply for 3 key pollutants (for NO<sub>x</sub>, SO<sub>2</sub> and dust) in accordance to the “minimum binding requirements” set under the Large Combustion Plants Directive (LCP-D) 2001/80/EC<sup>6</sup>.

Since the IED is a recast of several sector legislations on industrial activities with the IPPC Directive, the outdated minimum binding Emission Limit Values (for NO<sub>x</sub>, SO<sub>2</sub> and dust) of the LCP-D have been updated during the IED revision process. The minimum binding emission limits for existing plants are now set in Annex V part 1 of the IED. These minimum binding requirements are commonly referred to as the “EU safety net”. In essence these ELVs have been “aligned” to the less strict range of emissions that may be obtained according to BAT set already back in 2006 (the LCP BREF) with an additional 10% emissions allowance due to the compliance mechanism<sup>7</sup>.

Although the European Commission was aware that a large number of Member States were lagging behind with compliance in the IPPC-D framework, i.e. the 2006 LCP BREF (without initiating the necessary infringement proceedings), the IED proposal foresaw transition periods to have these updated IED ELVs to apply for existing LCPs only as from 1<sup>st</sup> January 2016.

However, due to intense lobbying by certain operators and the Member States lagging behind with BAT compliance for LCPs, certain optional derogations

\* The views expressed by the author do not necessarily reflect the approved views of the EEB.

1 Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC) of 24 September 1996, codified to Directive 2008/1/EC of 15 January 2008, OJEU L24/8 of 29.1.2008

2 All elements specified in Article 13 and Annex III of the IED have to be covered. The IED sets out a minimal list of polluting substances in Annex II to be addressed in permits. However the list of pollutants covered in most of the BREFs are very limited. For more information about the content and procedures linked to the BREF review, please consult the Commission implementing decision 2012/119/EU of 10 February 2012, OJEU L63/1 of 2.3.2012 and the website of the European IPPC Bureau <http://eippcb.jrc.ec.europa.eu/>

3 Available [http://eippcb.jrc.ec.europa.eu/reference/BREF/lcp\\_bref\\_0706.pdf](http://eippcb.jrc.ec.europa.eu/reference/BREF/lcp_bref_0706.pdf) here

4 According to Article 21(3). It is expected that the updated BAT conclusions of the new LCP BREF will be published in 2015.

5 Especially those that have lobbied against stricter Emission Limit Values for Large Combustion Plants during co-decision such as : UK, POL, BG, CZ, EL, EE, ES, RO, (IT), FIN, LT, LV, PT, SK, SI, CY.

6 Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJEU L 309/1 of 27.11.2001.

7 The emission levels associated with the use of BAT (BATAEL) as specified in the BAT conclusion of the 2006 LCP BREF are based on “daily based” averages, whereas the ELVs mentioned in the Annex V part 1 of the IED are “monthly averaged” values. The compliance regime of the IED in Annex V part 2 (point b) means a de facto +10% emissions allowance for the concerned pollutants. Therefore it is not an “effective alignment” to BAT based emission levels set in the old LCP BREF.

were negotiated into the final text of the IED for existing LCPs.

This article will only address the Transitional National Plan derogation (TNP) and not the other optional derogations such as the limited lifetime derogation, district heating derogation or desulphurization rates<sup>8</sup>. The EEB has opposed the derogations for LCPs, in particular the TNP system, during the negotiations of the IED because it will result in additional emissions at significant negative impacts to environmental and human health protection, ultimately leading to additional external costs<sup>9</sup>. Further, the TNP mechanism allows for a differentiated approach – emission trading between several installations – opposed to the traditional permitting approach to require BAT performance for each combustion installation.

The EEB has been active in ensuring transparency in the elaboration and evaluation of the TNP applications by the European Commission and has raised legal objections for the approval of the European Commission. The following case concerns the Greek TNP approval decision of the European Commission<sup>10</sup>, for which the EEB requested an internal review (RIR) to re-consider the decision. That is the first RIR of the EEB submitted, followed by RIR submitted against the Polish and Bulgarian TNP approvals. Other requests will follow on other major TNPs if they get approved e.g. applications made by Spain, UK and the Czech Republic.

The Commission has recently dismissed the EEB request for internal review of the Greek TNP on the basis that the TNP would not constitute a “*measure of individual scope*”. The EEB considers taking further legal steps, for these reasons only general considerations on legal matters are developed in this article which may be of interest to the readers, without pre-judging decisions taken by the EEB on the above case and without addressing on an exhaustive manner other problematic issues arising from the IED provisions.

## 2 What is a TNP? Overview on procedural aspects

In short, the TNP derogation allows existing LCPs<sup>11</sup> to delay the application of the stricter minimum binding ELVs / desulphurization rates of Annex V part 1 of the IED by about 4 years and half (Instead of 1<sup>st</sup> Janu-

ary 2016 to 1<sup>st</sup> July 2020). This will allow operators of existing LCPs to evade the requirement to invest in expensive pollution abatement equipment, which could either mean anticipated closure for some by 1<sup>st</sup> January 2016 (technical and economic reasons) or significant increase in operation costs from 2016.

Certain Member States<sup>12</sup> have desperately argued during co-decision that not having those derogations would cause “*undue economic impact and, in certain cases, endanger the security of energy supply*”.

In this system, emission ceilings are calculated for specific reference years: In 2016 the ceiling would be calculated on the basis of the maximum allowable ELV under the current framework and averaged fuel consumption of previous 10 years, i.e. the LCP-Directive. For 2020 the emission ceiling will be calculated on the basis of the maximum allowable “updated” ELVs of Annex V part 1 of the IED. ELVs will be tighter for a certain categories of plants for NO<sub>x</sub>, SO<sub>2</sub> and dust (PM10 and PM2.5). A linear emission reduction will have to be achieved between the 2016 and 2020 ceilings. From 1<sup>st</sup> July 2020 the standard permitting approach would have to apply for each combustion plant and the updated IED ELVs “EU safety net” should not be exceeded.

The details of the calculation methods are elaborated in the Commission Implementing Decision 2012/115/EU of 10 February 2012<sup>13</sup>.

The external impacts due to the TNP derogation in terms of undue emissions are considerable: According to an EEA report of 2013, total EU 27 air emissions of NO<sub>x</sub>, SO<sub>2</sub> and dust could be significantly reduced compared to 2009 levels if the IED ELVs would be consistently applied. The theoretical emission reduction potential (for 1.595 LCPs concerned) would be at least -36% for NO<sub>x</sub>, -66% for SO<sub>2</sub> and -64% for dust<sup>14</sup>.

If we consider only the Greek TNP as an example, which is a “small” TNP in relation to capacity concerned because it just covers 4 LCPs with a total of 8.1GWth (Megapolis 3+4, Meliti 1, Agios Dimitrios 1-5 and Kardias 3+4), allowing the Greek TNP derogation will result in the following additional pollution load:

- **SO<sub>2</sub>: 85.828 tonnes** (a factor 4 annual emission reduction would be achieved by applying the IED Annex V ELVs as from 2016, compared to the TNP)

8 For a more general overview of major changes brought with the IED, please consult the 2011 policy briefing <http://www.eeb.org/?LinkServID=290B7936-ADF0-4AD8-D16350AB49EE7DFC&showMeta=0&aa>

9 See policy briefing in advance of 2nd reading, 22nd March 2010 <http://www.eeb.org/?LinkServID=AFC3981A-9338-E03D-B66C105386BD294E&showMeta=0>

10 See Commission Decision 2013/687/EU of 26 November 2013 on the notification by the Hellenic Republic of a transitional national plan referred to in Article 32 of the IED; OJEU L317/35 of 28.11.2013.

11 Meaning certain LCPs with an aggregated thermal input exceeding 50MW that have been permitted before 27 November 2002 or that submitted a full permit application before that date but put in operation before 27 November 2003.

12 In particular BG, UK, PL, RO, EE, EL, PT, SI, FI.

13 Commission implementing decision 2012/115/EU of 10 February 2012 laying down rules concerning the transitional national plans referred to in Directive 2010/75/EU: OJEU L 52/12 of 24.2.2012.

14 See EEA technical report no 7/2013 “Reducing air pollution from electricity generating LCPs in the EU”. The real emission reduction potential by simply applying existing BAT benchmarks is much higher: -69% for NO<sub>x</sub>, -94% for SO<sub>2</sub> and -79% for dust.

- **NOx: 42.916 tonnes** (a factor 2 annual emission reduction would be achieved by applying the IED Annex V ELVs as from 2016, compared to the TNP)
- **Dust: 16.984 tonnes** (a factor 8 annual emission reduction would be achieved by applying the IED Annex V ELVs as from 2016, compared to the TNP).

This does not even consider co-benefit removal of heavy metals such as mercury. With this parameter it is worth remembering that Agios Dimitrios is the EU's top worst mercury emitter to air<sup>15</sup>.

These high extra pollution allowances should also be put in the light of other TNPs approved so far or which are pending. The following Member States have submitted an application for TNPs: BG, CZ, ES, EL, FI, HR, HU, IE, LT, PL, PT, RO, SI, SK, UK. For certain Member States, the TNP concerns a very high share of existing energy generation capacities (excluding refineries). Below an overview of the major TNPs:

- **TNP of Greece:** Approved by the European Commission on 26/11/2013. Concerns 8.1 GWth capacity, which corresponds to **36%** of total combustion plant energy generation capacity<sup>16</sup> in Greece. All LCPs included are major lignite Electricity Supply Installations (ESI). EEB filed a request for internal review.
- **TNP of Poland:** Approved by the European Commission on 17/02/2014. Concerns 60.3 GWth capacity, corresponds to **54%** of total combustion plant capacity<sup>17</sup> in Poland and includes the majority of major ESI. EEB and HEAL filed a request for internal review.
- **TNP of Bulgaria:** by the European Commission on 31/03/2014. Concerns 9.2 GWth capacity, which corresponds to **40%** of total combustion plant energy generation capacity<sup>18</sup> in Bulgaria. It includes 7 ESI. EEB, HEAL, Frank and Bold and a national NGO filed a request for internal review.
- **TNP of UK:** First application rejected by the European Commission but TNP resubmitted. Approval pending. Concerns 91.3GWth capacity, which corresponds to **51%** of total combustion plant capacity<sup>19</sup> in UK. It includes at least 38 major ESI.
- **TNP of Czech Republic:** Approval by the European Commission pending. Concerns 39GWth capacity, which corresponds to **93%** of total

combustion plant energy generation capacity<sup>20</sup> in Czech Republic. It includes at least 11 major ESI.

- **TNP of Spain:** First application rejected by the European Commission but TNP resubmitted. Approval pending. Concerns 31.8GWth capacity, which corresponds to **37%** of total combustion plant energy generation capacity<sup>21</sup> in Spain. It includes at least 20 major ESI.

### 3 EEB Request for Internal Review (legal issues) against the Commission approval of the Greek TNP derogation

The EEB has made sure that all legal avenues are kept open to challenge the practical implementation of the TNP system up to 1<sup>st</sup> January 2016 and is willing to pursue this in regards to strategically important TNP submissions. Certain TNPs have already been approved by the European Commission but are to be implemented in subsequent stages by the Member States.

In its request for internal review (RIR) against the Greek TNP approval submitted on 7 January 2014, the EEB has based its arguments on the following procedural / legal elements<sup>22</sup>. On 8<sup>th</sup> April 2014 the European Commission has rejected the request for internal review on the basis that it would not constitute a “measure of individual scope”.

There is quite some resemblance with the cases T-338/08 Stichting Natuur en Milieu and PAN Europe v. Commission, judgment of 14 June 2012 and Case T-396/09 Vereining Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission, judgment of 14 June 2012 (cf. section 2.1.2).

However, the present case may further be interesting since it relates to a derogation system that may be considered as a “plan or programme relating to the environment” pursuant to Article 7 of the Aarhus Convention and relating to a decision on specific activities where reinforced public participation rights are foreseen pursuant to Article 6 of the Aarhus Convention. The TNP related provisions of the IED also raise more general compatibility issues with provisions of the Aarhus Convention in relation to public participation / access to justice rights during the permitting procedures (in particular, review of existing permits).

#### 3.1 Greek TNP is a “measure of individual scope” with legally binding external effects

##### 3.1.1 Article 10(1) and 2(1)(g) of the Aarhus Regulation

The EEB anticipated that the European Commission would base the admissibility of the RIR on Article

15 See 2011 E-PRTR reported data (>1 tonne emitted into the air).

16 Official 2009 figures, in relation to all Large Combustion Plants (>=50MWth) including process industry but excluding refineries.

17 Ibid, including refineries.

18 Ibid, excluding refineries.

19 Ibid, including refineries.

20 Ibid, excluding refineries.

21 Ibid, excluding refineries.

22 For the full application please check the online version available here: <http://ec.europa.eu/environment/aarhus/pdf/requests/22/request.pdf>.

10(1) of the Aarhus Regulation (EC) No 1367/2006 of 6 September 2006<sup>23</sup> (hereafter “EU Aarhus Regulation”), which enables NGOs to make a RIR to the relevant community institution that has adopted an administrative act under environmental law. However, an “administrative act” is defined in Article 2(g) as “any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effect”. The European Commission did notify to the EEB on 8<sup>th</sup> April 2014 that it would dismiss the RIR on the basis that the Greek TNP would not constitute a measure of individual scope having legally binding effect in their understanding of the Aarhus Regulation<sup>24</sup>.

The EEB has however indicated that the Greek TNP approval is to be regarded as a “measure of individual scope under environmental law” insofar as the decision in question applies to the benefit of one individual operator of clearly identified (4) Large Combustion Plants located in Greece. In fact, the European Commission’s decision on the Greek TNP approval is to the benefit of one (exclusive) individual commercial entity which is PPC S.A. (Public Power Corporation S.A. Hellas). Further, it is clear that the act is taken pursuant to the application of EU environmental law, which is not disputed by the European Commission.

Finally the act in question does have a binding and external effect insofar as it constitutes an approval to derogate from stricter ELVs and to provide for a linear decrease of emissions for certain LCPs pursuant to the conditions and ceilings set in accordance to a binding implementing decision of the European Commission. As stated above, the TNP enables certain operators to derogate from the standard IPPC-D/ IED permitting approach (now Chapter II of the IED) or regular maximum ELVs to be applied to each combustion plant (Annex V part 1 ELV of the IED) but instead defer the applicable ELVs to July 2020 which may mutually benefit other operators in the system opting for the same (laxist) compliance system. The TNP has to contain provisions on monitoring and reporting “as well as the measures foreseen for each of the plants in order to ensure timely compliance with the emission limit values that will apply as from 1<sup>st</sup> July 2020” (Art 32(4) for the IED). These elements need to be evaluated by the Commission prior to possible validation (tacit approval).

23 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ L264/13 of 25.09.2006.

24 On this see section 2.1.2 the EEB did explicitly raise that, based on the case T-338/08 Stichting Natuur en Milieu and PAN Europe v. Commission and Case T-396/09 Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission, we do not consider that constituting a measure of individual scope can legitimately be invoked as a pre-condition for the admissibility of the request for internal review.

Despite that, the Commission responded that these measures would only provide “contextual information enabling the Commission to consider whether it is appropriate to approve the overall emission ceilings, without however implying any element of formal approval regarding their content or appropriate character”. Further, the Commission argues that although the Greek TNP would allow temporary exemption to comply with stricter ELVs, it would “however not set any specific emission limit values for each installation, only overall ceilings for the various emissions concerned”. The Commission concludes on that basis that the Greek TNP would “not establish nor approve specific obligations for the operators concerned”. The Greek authorities would implement the plan and take decisions affecting the installations individually. According to the Commission, operators would only be concerned by the Commission decision “by reason of their objective capacity to contribute to the overall ceilings laid down in the transitional national plan”.

It is questionable whether the Court would follow this line of argumentation. It should be quite evident that the TNP is de facto providing for a more laxist and more favourable compliance regime for 3 major pollutants that would enable only certain individual operators to evade the regular ELVs applicable from 2016 for a clearly defined list of existing combustion plants. The derogation is in particular aimed at evading / delaying significant investment requirements for abatement techniques for most operators<sup>25</sup> and therefore for effective environmental performance to be achieved by those combustion plants. Finally a proactive approval decision by the relevant Member State to allow for this derogation system is required, which could be regarded as a privilege to the benefit of a limited group of individual entities, in blatant breach of the basic Treaty principles in relation to environmental protection, e.g. pollution prevention at source and polluter pays principles.

In the case of the Greek TNP it is of the exclusive benefit of one operator: PPC S.A. Surprisingly (or maybe not) the Greek State is also majority shareholder of this operator.

### 3.1.2 Admissibility of request for internal review in the light of the Aarhus Convention

Irrespective of the above considerations, Article 9(3) of the Aarhus Convention<sup>26</sup> provides access to administrative or judicial procedures to be available “[...] to challenge acts or missions by [...] public authorities [...]”. The Court has annulled two decisions of the Commission that considered requests for internal review inadmissible claiming that the concerned acts

25 Except for gas turbines which concerns only NOx emissions.

26 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 (the Aarhus Convention).

were not ‘administrative acts’ as defined in Art. 2(1)(g) of the Aarhus Regulation.

According to the case T-338/08 *Stichting Natuur en Milieu and PAN Europe v. Commission*, judgment of 14 June 2012<sup>27</sup> and Case T-396/09 *Vereining Milieudéfensie, Stichting Stop Luchtverontreiniging Utrecht v Commission*, judgment of 14 June 2012, the Court has maintained that the definition in the Aarhus Regulation of an act which may be the subject of an internal review request is too narrow and that an administrative act should not be limited to a measure of “individual scope”.

The Court has therefore found that “*It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified.*” (see paragraph 76 of Judgment T-338/08).

“*It follows from the above that Article 9(3) of the Aarhus Convention cannot be construed as referring exclusively to measures of individual scope. Consequently, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of ‘acts’, as used in Article 9(3) of the Aarhus Convention, to ‘administrative act[s]’ defined in Article 2(1)(g) of Regulation No 1367/2006 as ‘measure[s] of individual scope’, it is not compatible with Article 9(3) of the Aarhus Convention*” (see paragraph 83 of Judgment T-338/08).

The Commission has appealed to that landmark ruling which provided more effective rights to EU citizens on matters relating to the environment, with the Council and the European Parliament supporting the European Commission in the appeal<sup>28</sup>.

The Greek TNP issue and stance of the Commission is similar to case T-396/09 *Vereining Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht v Commission*. Firstly, the Greek TNP approval is also about an attempt by a Member State, with the complicity of the European Commission, to obtain a derogation to stricter air quality requirements. Secondly, the same legal basis has been used by the European Commission to dismiss the request for internal review by NGOs promoting environmental protection.

According to Article 216(2) of the TFEU, “*international agreements concluded by the Union are binding*

*upon the institutions of the Union and on its Member States*”. That is the case for the Aarhus Convention.

“*Where an interpretation compatible with the Aarhus Convention is not possible, either because a provision of EU law on access to information or public participation contradicts or is incompatible with a provision of the Aarhus Convention, the provision of the Aarhus Convention should prevail. In accordance with the Court’s case law, those agreements prevail over secondary Community law.*” [see Court of Justice, case C-366-10 *Air Transport Association of America and Others* [2011] ECR I-0000, paragraph 50. On that basis the Aarhus Convention forms an integral part of the legal order of the EU see C-240/09 *Lesoochranarske zoskupenie* [2011] ECR I-1255, paragraph 30). It can be said that the Aarhus Convention is unconditional and sufficiently precise in its wording, unlike the condition stated in Article 2(f) of the Aarhus Regulation referring to “act of individual scope”.

It is clear that in the present case the Commission acted in the exercise of its implementing powers.

Based on the above, the request for internal review should have been declared admissible.

### 3.2 Lack of appropriate dissemination of environmental information for the purpose of early and effective participation in decision making

The Greek TNP decision explicitly relates to activities listed in Annex I of the Aarhus Convention i.e. point 1 “Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more”, for which strengthened public participation rights are foreseen pursuant to Article 6. The Greek TNP decision relates to 8 Large Combustion Plants which are all above 50MWth.

Article 6(10) of the Aarhus Convention explicitly foresees that “[...] when a public authority reconsiders or updates the operating conditions for an activity referred to in [Annex I], the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis* [...]”.

The Greek TNP decision taken by the European Commission shall be considered *inter alia* as a decision on those activities, either as an update of the operating conditions pursuant to Article 6(10) or as other “*decisions on proposed activities*” in the sense of article 6(1) (b) of the Aarhus Convention which will a) significantly impact their operating conditions and b) will have significant effect on the environment.

As stated above, the Greek TNP decision taken by the European Commission is to be regarded as a specific approval decision of a derogatory permitting regime to be applied from 1st January 2016, which is fundamentally different to the traditional IPPC/IED permitting regime where the permitting authority would be bound

<sup>27</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0338:EN:HTML>

<sup>28</sup> An incomprehensible attitude, which is not only in blatant contradiction of how decision makers should behave in democracies (i.e. enable effective public participation in decision making which serves the public interest) but also in breach of the very first article of the Treaty of the European Union which requires that “decisions are taken as openly as possible and as closely to the citizen”.



to apply instead. According to a (correct) application of the provisions of Chapter II and Article 30 (2) of the Industrial Emissions Directive, each existing combustion plant (i.e. the 8 LCPs subject to the Greek TNP application) shall comply with Emission Limit Values based on Best Available Techniques, and which each may not exceed the binding Emission Limit Values for dust, nitrogen oxides and sulphur dioxide set out in Annex V part 1, at the latest by 1st January 2016 for existing LCPs. Contrary to the standard permitting approach, the optional TNP derogation system allows for compliance with aggregated emission ceilings through a trading mechanism between the 8 LCPs part of that system. This means that the operators benefiting from this system would be able to evade expensive abatement techniques which would affect their operating conditions.

Allowing a TNP to go ahead will result in significant negative effects to the environment: it will result in a delay of compliance with stricter ELVs for 3 key pollutants by another 4 ½ years. In the case of the Greek TNP it means significant additional pollutants load to air. The main negative impact of the respective decisions taken on the TNP implementation are therefore due to the “principle approval” of the European Commission of this derogatory compliance regime, whilst the practical implementation of the framework is left to the national permitting authorities.

More importantly, according to Article 6(4) of the Aarhus Convention, “*Each Party shall provide for early public participation, when all options are open and effective public participation can take place*” (emphasis added). In the present case<sup>29</sup> the Commission has withheld the essential elements of information about that TNP, its preparation, modification or review from the public. However, Article 6(2) (a) requires timely and effective information of the public concerned of the application on which a decision will be taken. That information was only made available following requests for access to documents by EEB and other NGOs. The Greek TNP approval was adopted by the Commission two weeks prior to the release of certain documents relating to its elaboration. Hence the public, including the EEB, did not have any early and effective opportunity to participate during the preparation, modification or review by the Commission of the Greek TNP when options, i.e. to modify / reject where still open. We are not aware that a public participation took place prior to the adoption of the TNP at the national level.

In this regard, it is interesting to highlight that the Aarhus Compliance Committee has made the following observations in case ACCC/C/2006/16 (Lithuania), para 71: “[the] requirement for ‘early public participation when all options are open’ *should be*

*seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place”* (emphasis added).

In the case of the Greek TNP approval, some key strategic decisions have already been taken at the Commission level, i.e. the nature of the permitting system that may be used to regulate those LCPs. These will inevitably have an effect on the technical design as well as environmental standards applied at each of the 8 Greek LCPs concerned, significantly affecting the operating conditions of the very same operator (P.P.C. S.A).

### 3.3 Breach of public participation rights concerning plans and programmes relating to the environment

Furthermore, the TNP referred to in Article 32 of the IED is to be considered as falling within the definitions of “plans and programmes” pursuant to Article 2(5) of the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context and Article 2(a) of the Strategic Environmental Assessment (SEA) Directive 2001/42/EC<sup>30</sup>. And is to be considered as a plan / programme relating to the environment pursuant to Article 7 of the Aarhus Convention.

Therefore, the validity of the approval procedure should also be assessed against the relevant provisions of the EU Aarhus Regulation and the Aarhus Convention that apply on public participation.

In the same line of argument as raised in point 2.2, the Commission has acted against the provisions on public participation of the EU Aarhus Regulation, in particular Article 9 stating that the “Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective

<sup>29</sup> This also relates to other TNP applications, in particular from Bulgaria.

<sup>30</sup> Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment; L 197/30 of 21.7.2001.

*opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open.*" (emphasis added).

### 3.4 General considerations linked to compatibility of provisions on permitting procedure with the Aarhus Convention

Based on the above points, in particular section 2.3, it may be questioned whether certain provisions of the IED relating to public participation in the permit procedure (Article 24) and Access to justice (Article 25) are fully compatible with the relevant provisions of the Aarhus Convention.

First, the TNP elaboration and approval procedure should be regarded as a "plan relating to the environment" in the sense of Article 7 of the Aarhus Convention, and therefore should have been explicitly mentioned in the list of procedures of paragraph 1 of Article 24 IED, for which Member States shall ensure early and effective opportunities for public participation (at least for the "public concerned"<sup>31</sup>). The TNP elaboration procedure of the TNP should be explicitly listed under its Article 24.

Secondly, and potentially more importantly, there is a serious issue with regard to the public participation rights when this concerns the updating of an (existing) permit or permit conditions:

Whilst the public participation is explicitly foreseen in the case of "substantial change" or "application of a derogation" from BAT-based ELVs, the final wording of Article 24(1) (d) is significantly restricting the explicit public participation obligation in case of updating of (existing) permits. Public participation is only foreseen for cases "*in accordance with Article 21(5) (a)*" (emphasis added).<sup>32</sup>

Article 21 sets out the provisions relating to the "*re-consideration and updating of permit conditions by the competent authority*". Paragraph 5 of this Article lists specific cases on when the permit conditions shall be reconsidered / updated (so-called permit review triggers). The case listed in paragraph (5) (a) is limited and only concerns a permit review trigger where "*the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit*".

A strict / restrictive interpretation by Member States would exclude cases of permit reviews due to operational safety requirements (Article 21(5) (b)) or if need for compliance with Environmental Quality Standards (Article 21(5) (c)).

These restrictions of cases of public participation are not in line with the provisions of Article 6(10) of the

Aarhus Convention, which explicitly foresees that "*when a public authority reconsiders or updates the operating conditions for an [IPPC/IED activity], the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis [...]*". The provisions cross-referenced to, in particular paragraph 4 of Article 6, provide that each Member State "*shall provide for early public participation, when all options are open and effective public participation can take place*". This is notably the case when the competent authority envisages reviewing / updating an existing IED permit.

Since Article 25 on Access to Justice provides only for a review procedure on acts or omissions "*subject to Article 24*", it is paramount that Article 24 is urgently reviewed in order to bring it in compliance with the Aarhus Convention. This means in essence deleting the cross reference to paragraph 5 (a). Instead, only a cross reference to Article 21 may be envisaged<sup>33</sup>.

The EEB is considering bringing this case before the Aarhus Compliance Committee as it is also linked to upcoming permit reviews in the light of the TNP derogations.

It is important to the EEB that operators that have successfully evaded BAT compliance in the past will not go away with further derogations in reward of their lack of action that would have benefited environmental and human health protection. The EEB has been clear in the IED negotiations that the operators of these old LCPs shall either comply with BAT standards or have to retire by 1<sup>st</sup> January 2016. In the Greek TNP all combustion plants are lignite-fired Large Combustion Plants dating back to the 1970s. Considering that the average lifetime operation is 40 years for these plants, they have all recovered their investment costs and are run as cash-cows for the operators under laxist and outdated pollution standards. Of course it is up to the competent authority and in particular the Hellenic Government – in this case also majority stakeholder of the operator PPC SA – to decide whether it would make more sense instead to invest the required costs for abatement techniques to comply with the IED in energy efficiency and renewable energy sources. In any case, it would be counter to the pollution prevention at source and the pollution pays principle laid down in Art. 191(2) TFEU to go ahead with these derogations, allowing these outdated combustion installations to operate even longer at least cost for operators with huge negative costs "outsourced" to EU citizens and the environment.

The EEB will make sure the operators will not get away with this unchallenged and will aim to keep the legal uncertainty for operators upheld.

<sup>31</sup> In the present case, however, also "the public" (at large) shall be able to participate in the procedure.

<sup>32</sup> This restriction has actually been proposed in the original Commission Proposal (see initial Article 26(1) (c)).

<sup>33</sup> I.e. the new provision of Article 24 (d) would have to read "the updating or reconsideration of a permit or permit conditions for an installation in accordance with Article 21 (5)(a)."

## Imprint

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

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Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

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elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

### elni Website: elni.org

The elni website [www.elni.org](http://www.elni.org) contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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