

23 March 2017

## HINKLEY POINT C AND THE ESPOO CONVENTION: THE CURRENT POSITION

We discussed in a [previous blog](#) the findings of the [Implementation Committee of the Convention of the Environmental Impact Assessment in a Transboundary Context \(Espoo Convention\)](#), who had investigated complaints from some countries alleging that an accident at Hinkley Point C would have the potential to cause serious pollution across Europe, and that the UK had failed to properly consider the possible impact of such an incident.

### Background

The committee informed the UK Government of their “profound suspicion” that the UK had fallen foul of the Convention, which has been in force since 1997. The UK has long argued that as the Hinkley Point C Project is unlikely to create a “significant transboundary environmental impact”, there was no need for discussions with European neighbours. However, the Implementation Committee last year recommended that the UK:

- Endorse the committee’s view that the UK is in ‘non-compliance’ with the convention in relation to the planning of the Hinkley Point C project.
- Engage in discussions with those parties likely to be affected by the Hinkley Point C NPP, including those “that cannot exclude a significant adverse transboundary impact from the activity at HPC”.
- Report back to the Committee on the progress of any such discussions.
- Send notifications to all parties that could potentially be affected by an incident at any other Nuclear Power Plant they may plan, bearing in mind the worst possible scenario.

### Updated Situation

On 17 February this year, the UK Government indicated its intention to address the Committee’s findings. It had written to all parties to the Convention last December asking whether they considered that a notification under the Convention was “useful” at the current stage of development of HPC.

The UK also indicated that it would in future notify the Parties for all future nuclear power plant development applications, which goes further than the recommendations of the Committee. It is understood that Norway, the Netherlands and Germany have indicated they would find this “useful”.

At the 20-22 February [meeting](#) of the Committee, they expressed concern that continuation of development at HPC might influence the views of the parties to the Convention contacted by the UK

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in December. They seemed to be worried that this might affect the outcome of any transboundary EIA procedure and render its results irrelevant.

The Committee has said it will ask the UK to consider refraining from carrying out works at the proposed activity until it established whether notification was “useful” and that if a potentially affected party requests it be notified, the UK should suspend HPC development until the EIA procedure is finalised.

In the meantime, the Friends of the Irish Environment has [written](#) to the Irish Minister of Communications, Climate Action and Environment complaining that its representations to the Irish Government on the above findings of the Implementation Committee had been ignored and that they should raise the matter with the UK at the upcoming UK-Ireland Contact Group on Radiological Matters. The [UK Supreme Court](#) had already rejected a challenge from An Taisce, the Irish National Trust.

#### Impact on Progress of Development of HPC

So is it foreseeable that the UK will consider asking EDF to suspend its construction activities?

From EDF’s point of view, project delay would be intolerable as the site would have to be suitably prepared, workers laid off and there would surely be breaches of contract with suppliers.

Also, would suspension serve any “useful” purpose in any case?

EDF has said that its EIA, prepared for the UK’s Planning Inspectorate, had addressed the transboundary impact issue and the Inspectorate, in granting permission, had concluded that there was no likelihood of significant transboundary effects. The Department of Business, Energy and Industrial Strategy has strengthened this point by saying that the Environment Agency and Office for Nuclear Regulation have also independently assessed the environmental impact of HPC.

With the current confusion about matters nuclear surrounding BREXIT and BREXATOM, further complications from the requirements of the Espoo Convention would appear to be far from “useful”.

The ability of overseas governments to bring two separate lines of attack against the EIA procedure in the HPC case arises from a dispute procedure in the Espoo Convention which is quite distinct from enforcement action in the national (and EU) courts to deal with alleged infringements of the EU EIA Directive which implements the Convention.

Under both the Convention and the Directive, proposals for nuclear power plants which are likely to have significant trans-frontier impacts must be notified by the project host country to other countries likely to be affected. The onus of deciding whether the notification duty applies rests initially on the project host country whose courts (with possible references to the CJEU) must adjudicate on whether any such decisions have been lawfully made.

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However, the Espoo Convention provides for a country which considers that it would be affected by significant trans-frontier boundary effects of a nuclear power plant in another country to trigger discussions with the project host country (in the absence of a notification) and ultimately to submit the question of whether there is likely to be a significant adverse transboundary impact to an inquiry commission.

The possibility (and in the case of HPC, reality) of conflicting decisions is unfortunate. As indicated above, the UK Government has sensibly decided to avoid such conflicts in the future by pre-notifying other countries of proposals for nuclear power plants irrespective of their likely impacts. However, it is strongly arguable that the Espoo Convention was not intended to encourage disputes to be carried on under its aegis after the matter has been conclusively settled in the national courts of the host party where overseas governments and their citizens have the right to be represented.

We will continue to monitor the situation and report our findings through this blog.

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Prospect Law provides legal and business consultancy services for clients involved in the infrastructure, energy and financial sectors.

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