

REPORT FROM THE CONFERENCE

TAKING THE NUCLEAR THIRD PARTY LIABILITY INTO THE FUTURE

by Andrej Klemenc, REC Slovenia

The conference “Taking the Nuclear Third Party Liability into the Future” took place in Brussels on January 20 & 21 2014. This high-level and well attended event was organised by the European Commission DG ENER, the European Economic and Social Council and Brussels Nuclear Law Association. More than 300 participants discussed cross border claims management with a focus on how to ensure equal treatment of potential victims of nuclear accidents, insurance market capacity, financial coverage and its impacts on electricity costs from NPP. They also discussed – and questioned – the capacities of international conventions to provide solid legal field for fair compensations to the victims and the issue on how to bridge the gaps between Paris and Vienna Convention on one side and the Convention on Supplementary Compensation for Nuclear Damage on the other.

Role of civil society lost in a global legal jungle of international conventions?

The conference provided clear evidence of the complexity of the legal situation regarding nuclear liability in the EU. Majority of MS are parties to either Paris or Vienna Convention but not all of them signed protocols that are updating one or the other convention and only few ratified most recent protocols, therefore also Joint Protocol that bridges the two conventions cannot play a significant role. In addition following the subsidiarity principle national law provisions on liability has priority if certain relevant legal matters are left to be covered by national legislation. Besides 5 Member States (Austria, Cyprus, Ireland, Luxemburg, Malta) are not parties to any convention and it is very probable that they would veto any EU attempt to force MS toward harmonisation of the legal framework. Last but not least the USA are not willing to recognise any of the two conventions as a basis for international legal frame but are pushing forward the Convention on Supplementary Compensation for Nuclear Damage. Contrary to Paris and Vienna Convention this is not based on legal but on economic liability and includes grandfathering principle that excuses one quarter of the operating NPP in the USA from liability.

Conventions channel liability to operators solely and, regardless to full or limited liability, successfully protects operators from full compensation of the damage by limiting their financial liability to some tens of some hundreds millions of euro. In case that damage to third party exceeds those limits the state should take the role of the “insurer of the last resort”. However the states are also limiting their financial liability from some hundreds to, in the best case, billion and a half euro. Comparing these sums with the hundreds of billions of the damage resulted from Chernobyl and Fukushima disaster each is enlightening.

Conventions define courts in the country of a nuclear accident as the principal legal institutions to deal with third party liability: access to justice for victims and decision making on their claims for compensation of the damage. In practice all those in theory elegant legal provision would result in a legal mess due to the absence of the legal practice and to the lack of judges experienced in nuclear (third party liability) cases, not even to mention the problems related to language barriers in case of

an accident in a small country with an “exotic” official language. For example if hundreds of thousands of citizens from Austria, Slovenia, Croatia etc. would have to appeal in Hungarian language on courts in Hungary with their claims to compensate the damage caused in an eventual case of major accident in Paks NPP. And if they succeed in their claims it would mean either very marginal compensation of the true damage caused or bankruptcy of Hungary.

The political and legal complexity of third party nuclear liability that hardly allows civil society to be engaged in discussion was discussed intensively, however the participants disagreed on the issue if the situation can be improved at all by more engagement of civil society or it should be simply transferred to EURATOM frame where adequate solutions for cross border victims compensation should be also found. Large evidence was brought that all current conventions are weak in providing basic principles like adequate compensation for losses, fair procedures, equality regardless nationality and place of living, proceeding claims fast and without large delays and processing to re-address in case that the system is nonresponsive. On that basis some participants argued in favour for a new nuclear third party liability regime “from scratch” but were denied by the others who claimed that there is no political institutional frame that would enable “starting over”.

European Commission: fighting several contemporary battles without heavy weapons

Nuclear third party liability is historically anchored in OECD and IAEA and is based on the hidden presumption that a major nuclear accident will never happen. Therefore it is highly unlikely that the EU - that has weak mandate over nuclear liability issues - will achieve harmonisation of the respective legal framework neither within the EU nor at global level. Nevertheless the European Commission has made some effort to have clear and workable rules on liability, insurances or other financial guarantees in order to ensure that in the event of an accident, adequate compensation for loss of life, harm suffered on health, damage of property or the environment are available.

Although European Commission has a weak mandate on nuclear matters it is pursuing several very ambitious goals in the field of nuclear energy: enabling nuclear energy to at least maintain its present share in electric power supply in the EU, making EU nuclear industry more competitive, enhancing nuclear safety both in terms of reactor safety and in terms of better emergency and preparedness, making the industry more liable for eventual damage caused to the third parties without discrimination between the MS and assuring better financial insurance of the third party liability by unlocking the EU market insurance industry potential. However the EC expects that this will not have an impact on the price of electricity from NPP in the EU as EC is also aiming to increase the competitiveness of the EU industries on the global markets by lowering energy prices through increased competition on a single EU electricity market.

Potentials and expectations of the insurance industry

The EU (re)insurance industry is expecting from the EU to assure mandatory legally binding commercial third party liability coverage for all operating NPP in the EU on common legal basis. In this manner the (re)insurance industry believes that another profitable “single market”- that would eliminate the present nuclear third party liability national insurance monopolies - will be created. In their calculation an increase of price of 0,1 € cent per kWh of electricity generated in NPP in EU

would be enough to assure financial compensation to the third parties up to 10 billion € in case of a major nuclear accident in the EU. This is from 10 to 100 times below the limits of the present compensations however taking into account the assessment of the third party damage in case of Chernobyl (1986) or Fukushima (2011) accidents, themselves still 20 to 40 times lower than the estimated damage to the third parties caused by each of the two disasters. In the scheme proposed by the (re)insurance industry the gap between the potential costs and the effective amounts for which nuclear operators are liable is significantly reduced however but still remains widely opened. Therefore scaling -up the nuclear third party liability to the level of full compensation of the damage to the third parties would bring up the average price of the electricity from NPP for about 1 € cent per kWh. This would then however represent a serious additional threat to the competitiveness of the electricity from NPP in the EU. Although the solution proposed by the (re)insurance industry significantly increases the present capacities for commercial compensation of the damage to the third parties, the state remains the “insurer of last resort” that can bring small states or weak economies to bankruptcy.

Third party liability solutions in Fukushima after disaster in Daiichi NPP

During the conference a special attention was given to the third party liability in case of Fukushima Daiichi level 7 accident as it is till nowadays the single case of nuclear third party liability in case of a major accident. Nevertheless it does not represent a case for cross-border third party liability since the disasters did not have a direct impact on the victims outside Japan.

Japan is not a party to any convention but its laws generally follow them. In Japan plant operator liability is exclusive and absolute, and power plant operators must provide a financial security amount of JPY 120 billion (approx. 1.1 billion €). However the government may relieve the operator of liability if it determines that damage results from “a grave natural disaster of an exceptional character”.

For the Fukushima accident in 2011 the government has set up a new state-backed institution to expedite payments to those affected. The body is to receive financial contributions from electric power companies with nuclear power plants in Japan and from the government through special bonds that can be cashed whenever necessary. The government bonds cover a total of JPY 5 trillion (approx. 50 billion €). The new institution will include representatives from other nuclear operators and will also act as an insurer for the industry, being responsible to have plans in place for any future nuclear accidents. The government estimates that Tepco will be able to complete its repayments in 10 to 13 years, after which it will revert to a fully private company with no government involvement. Meanwhile it will pay an annual fee for the government support, maintain adequate power supplies and ensure plant safety. In January 2012 Tepco deposited with the Tokyo Legal Affairs Bureau JPY 120 billion (about € 1.25 billion) as insurance coverage for the company’s nuclear energy facilities. The utility was formerly covered by the Japan Atomic Energy Insurance Pool, an industry organization established by 23 non-life insurers. However, the pool does not want to renew Tepco's contract after it expired in mid-January 2012. Tepco is seeking coverage from private-sector insurers.

In principle the victims have three options to claim the damage: direct negotiations with the operator, mediation (in case of Fukushima through Dispute Reconciliation Council) or the court case

(law suit). Since the Japan does not recognise “class law suits” most of the victims – being afraid that they will be not able to bring their case to the court within 3 year timeframe – decided for direct negotiation with the operator. Many of the victims also turned to Dispute Reconciliation Council that was faced - next to lack of personnel to deal with huge number of claims - with two main challenges: the extent of damage that should be compensated and the amount of money that should be paid to a victim. The council issued guidelines regarding compensation to a typical victim that were – although being only a “soft law” - recognised by TEPCO and used also as a reference for mainstreaming direct negotiations with the victims.