

REVISION OF THE EIA DIRECTIVE

1. The revision of the EIA: the Commission's proposal

- A 3-year process (from 2009 to 2012).
- A wide consultation of the public and the stakeholders covering a broad variety of issues took place.
- The proposal was based on a thorough impact assessment, which examined several policy options and assessed their economic, social and environmental impacts.
- The general objective was to adjust the EIA to the current environmental and socio-economic context.
- Two main specific objectives: effectiveness and efficiency of the EIA.

The 4th **implementation report** on the application and effectiveness of the EIA Directive (adopted in June 2009) stressed the **need to review** the Directive.

The Commission's **revision process** of the EIA Directive was launched in June 2010 with a wide public consultation covering a broad variety of issues. This consultation was concluded by a Conference for the 25th anniversary of the EIA Directive that took place on 18-19 November 2010 in Leuven.

As a result of the review process, on **26 October 2012 the Commission adopted a proposal** for a new Directive amending the current Directive. The proposal was accompanied by a thorough impact assessment, which examined several policy options and assessed their economic, social and environmental impacts.

The general objective of the proposal was to adjust the EIA Directive to developments in the policy, legal and technical context over the past 25 years. The proposal aimed to:

- correct shortcomings and improve the current level of environmental protection.
- reflect on-going **environmental challenges** in the legislation (in areas like resource efficiency, climate change, biodiversity and disaster prevention).

- align the Directive with the principle of **smart regulation**, mostly reducing unnecessary administrative burden and providing for a more harmonized/streamlined regulatory framework.
- take into consideration the relevant **case-law of the Court of Justice**.

Two specific objectives were considered as essential for the revision of the EIA Directive:

1. To strengthen the **quality** of the assessments with new and/or improved provisions (*effectiveness of the EIA*). In this regard: the content and the justification of the screening decision was clarified; the content and the justification of the EIA report and the final decision were specified; and the Directive was adjusted to new environmental challenges (e.g. climate change, biodiversity, disaster prevention, resource efficiency).
2. To improve **coherence** and synergies with other EU laws/multilateral environmental agreements (i.e. Aarhus and Espoo Conventions) and **simplify** procedures (*efficiency of the EIA*). To achieve this, the various environmental assessments were streamlined and three timeframes for specific stages of the EIA process are introduced.

2. The legislative process

→ In general, the European Parliament supported the objectives of the Commission's proposal and the means proposed to achieve them with light changes; the EP has also proposed some additional provisions, going beyond the Commission's proposal.

→ Member States have also supported the objectives of the Commission's proposal, but voiced serious concerns over lack of flexibility and respect for subsidiarity.

→ The Lithuanian Presidency has played a key role during the negotiations.

→ The Commission played a facilitator role with a view to reaching agreement.

3. Overall assessment of the final text

→ The efficiency objective was not fully met.

- Two important elements (mandatory scoping and specific time-frames for some steps of the decision-making) were not kept.
- The effectiveness objective was covered in a satisfactory manner.
- The main elements of the Commission's proposal aiming to improve the level of environmental protection were kept (e.g. quality of the EIA reports, assessment of reasonable alternatives, new environmental challenges assessed, monitoring of significant negative effects).

Compared to the proposal of the Commission, the final agreement did not finally retain some important elements. For "subsidiarity reasons" such proposals have not been accepted, although they would have made the EIA process more streamlined and efficient and would provide legal certainty asked by industry and business.

The **efficiency objective** was not fully met:

- Some important elements: **mandatory scoping** and **specific time-frames** for some steps of the decision-making were not kept.
 - ✓ The Commission proposed that scoping, which defines the scope and level of detail of the EIA report, should become mandatory and specified the content of the scoping decision to be taken (e.g. list of specific items, e.g. duration of the EIA process, alternatives, information available). However, this approach was rejected by the EP and the Council. Scoping remains voluntary upon request by the developer. Member States may also require that competent authorities foresee scoping regardless of whether it is requested by the developer.
 - ✓ The Commission proposed time-frames for specific stages of the EIA process in order to increase legal certainty and accelerate the process of adopting the screening and EIA decisions (3 months, with the possibility of extension by a further 3 months) and for consulting the public on the EIA report (30 to 60 days, with the possibility of extension by a further 30 days). However, these time-frames were not accepted by the Council. The revised Directive keeps the time-frame for taking the screening decision (up to 90 days, with the possibility of extension to be determined by the Member States upon some conditions) and provides for a minimum for public consultation (30 days). Member States shall ensure that the final decision is taken within a "*reasonable period of time*".

- Regrettably, the **one-stop shop has a much narrower scope (limited to EIA/Nature Directives)**, in addition to a margin for discretion for Member States ("where appropriate"). However, this may be used to provide the appropriate assessment procedure under the Habitats Directive with the necessary procedural framework (as the current provision under Article 6.3 of the Habitats Directive has no such framework).

The proposal of the Commission was that a mechanism to ease the EIA process is established when several environmental assessments are required and several authorities involved. Member States would be obliged to coordinate and/or integrate the assessments resulting from the EIA Directive and other pieces of EU environmental legislation mentioned indicatively in a recital (e.g. the Habitats and Birds Directives, the Industrial Emissions Directive, the Water Framework Directive, the SEA Directive).

On the other hand, the **effectiveness objective** was covered in a satisfactory manner

- **A quality control mechanism is introduced**

To tackle the issue of the poor quality of the environmental reports, the Commission has proposed that accredited and technically competent experts or committees of national experts should be used. In particular, the use of accredited experts by the developer (to prepare the EIA report) or by the competent authority (to verify the EIA report) would guarantee a sufficient level of quality and independence.

According to the final text, in order to ensure the completeness and quality of the EIA report, the developers will be required to ensure they have competent experts to prepare the report, **and** competent authorities need to ensure sufficient expertise to examine the environmental impact assessment.

- **Assessment of "reasonable" alternatives**

Based on the provisions of the Espoo Convention and the SEA Directive, the EIA report will have to describe the reasonable alternatives studies by the developer (currently only an outline of alternatives is provided).

The explicit reference to the least environmentally harmful alternative as proposed by the Commission was not maintained. However, the requirement for assessing the baseline is also

included ("*description of the relevant aspect of the current state of environment (baseline scenario) and outline of the likely evolution thereof without implementation of the project*").

- **Monitoring measures of significant adverse effects**

Member States should ensure that mitigation and compensation measures are implemented. Hence, the adverse effects identified during the EIA process will be tackled in practice.

In addition, Member States should ensure that appropriate procedures are determined regarding the monitoring of significant adverse effects on the environment resulting from the construction and operation of a project. Existing monitoring arrangements under other EU legislation (e.g. on industrial emissions or water quality) may be used to avoid duplication of monitoring.

- **New issues covered by the EIA**

The scope of the EIA is broadened and would cover new issues such as climate change, biodiversity and risks from natural or man-made disasters.

Regrettably, there are no references to "ecosystem services" and to "land use, land-use change and forestry" emissions as Commission proposed, while the wording on disasters is less detailed. However, the EIA is now more up-to-date.

4. New provisions based on the case-law of the Court of Justice

The above requirements refer to the main items discussed during the interinstitutional negotiations. However, as explained the Commission's proposal has incorporated the main findings of the Court rulings. The final text reflects and is directly inspired from the case-law:

- **Screening decisions and development consent decisions have to be motivated**

Both positive (EIA required) and negative (EIA not required) screening decisions need to be justified and state the main reasons for requiring or not of an assessment. This idea directly stems for the cases C-87/02 (Commission v. Italy) and C-75/08 (Mellor). In addition, the same requirement now applies to decisions to grant or refuse development.

- **Demolition works are covered**

The need to take into account of demolition works was stressed by the Court in case C-50/09 (Commission v. Ireland). The Commission's proposal was to include this in the project definition; finally, the concept of "demolition works" is an item to be included in the project description (Annex II.A.1(a) and Annex IV.1(b) and 5(a)).

- **Obligation for the competent authority to reach a “reasoned conclusion” on the impacts of a project**

The role of the competent authority in the context of the EIA was the subject of case C-50/09 (Commission v. Ireland). The revised EIA contains a new definition of EIA (Art. 1(2)g) and a specific obligation for competent authorities to reach a “reasoned conclusion” as regards the environmental effects of a project.

- **The use of exemptions is clarified and becomes stricter**

The case-law is rich with regard to exemption from EIA of national defence projects (case C-435/97, WWF) or projects approved in detail by law (case C-128/09, Boxus). The existing exemption with regard to national defence projects is further clarified (amended Article 1(3)) and refers only to projects solely serving defence; the existing exemption with regard to projects approved in detail by law is further clarified (new Article 2(5)).

- **General obligation on conflicts of interests**

Based on amendments of the EP, the new Directive introduces the obligation to avoid conflict of interests (new Article 9a). The wording is directly inspired by the case C-474/10 (Seaport).

5. Forthcoming implementation challenges

The principle of better law-making implies that legal texts should be clear and precise. However, co-legislators sometimes prefer to leave some grey areas in the texts. In addition, as the text is a Directive concerning 200 project categories, Member States have a margin of discretion on how to reach the objective of the text.

Having these in mind the following areas can lead to question and require clarification:

- **Determining when monitoring measures are appropriate**

The Commission proposed that for projects which would have significant and adverse environmental effects, monitoring measures should be taken. Such measures should assess the

implementation and the expected effectiveness of mitigation and compensation measures, and identify any unforeseeable adverse effects.

While the requirement for setting measures for assessing implementation and effectiveness is maintained in the final text (for projects with significant adverse effects monitoring measures to be taken and set by Member States), the requirement for identification of unforeseen adverse effects was moved to a recital (together with the need to take remedial action). Under the final text, developers will be obliged to implement measures to avoid, prevent or reduce and, if possible, offset significant adverse effects; monitoring, where appropriate, will be carried out following a procedure to be determined by the Member States.

- **Determining what are "reasonable" alternatives**

The term "*reasonable*" exists in other areas (e.g. Espoo Convention, SEA Directive).

However, given that this item is a constant grievance, national judges would probably be confronted. The current text (in Annex IV.2) provides for some elements of interpretation: "*A description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics...*".

- **Ensuring the objectivity of competent authority in cases where the competent authority is also the developer**

On a proposal from the EP, a new Article 9a is introduced. Conflicts of interest should be prevented by, inter alia, a functional separation of the competent authority from the developer. Member States should at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions of those authorities performing the duties arising from the EIA Directive.

6. What's next?

Commission's Guidance documents

In order to promote the application of EIA in the EU, the Commission initiates and contributes to a number of guidance documents. The most important for the promotion of the application of the revised EIA Directive are the following:

- **Compilation of the rulings of the Court of Justice**

The Court plays an important role in implementation and interpretation of the EIA Directive. Knowledge of its judgements is therefore necessary for a better understanding of substance and aims of the EIA Directive. The purpose of the guidance is to assemble the most important rulings of the ECJ related to the provisions of the EIA Directive. The guidance is regularly updated (last update 2013).

We would appreciate if you can provide us with a summary of the rulings delivered by national courts as a result of requests for preliminary rulings.

- Guidance on the interpretation of definitions of certain project categories of Annexes I and II

The EIA Directive applies to more than 200 project categories listed in Annexes I and II. However, with very few exceptions the Directive does not provide definitions or other descriptions of the project categories listed in the Annexes. Experience in applying the Directive shows that, in practice, it can prove problematic to decide if individual projects fall within its scope. Member States interpret certain project categories in different ways (especially those listed in Annex II); uncertainties in the interpretation of certain project types also frequently arise amongst competent authorities.

In 2008, the Commission prepared this Guidance with the aim to reduce the uncertainty surrounding the scope of the Directive and the meaning of certain project definitions so as to ensure that those projects likely to have significant effects on the environment do not fall outside the scope of the Directive due to issues of interpretation. The Guidance is currently undergoing revision and an updated version will be available in 2015.

- "One-stop shop" guidance

Under the revised Directive the Commission shall provide guidance regarding the setting up of any coordinated or joint procedures for projects that are simultaneously subject to assessments under the EIA, Habitats, Birds, Water Framework Directive, and Industrial Emissions Directives. This Guidance will be prepared in 2015 with the aim to support Member States in defining adequate legislative and non-legislative measures to streamline environmental assessment procedures and to ensure coherent application of these under Union law. It will be based on the implementation experience and the good practices identified in the Member States and will take inspiration from the Guidance for streamlining

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environmental assessment procedures for energy infrastructure Projects of Common Interest (PCIs) which was issued in 2013.