Denmark

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Danish report
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Impact Assessments – Preventive Measures against Significant Environmental Impacts in the 21st Century

Legal Framework

1. How is the EIA Directive (Directive 2011/92/EU) transposed in your country? Please provide a list of your national pieces of legislation transposing the EIA Directive.

The Danish implementation of the EIA-Directive was from the very beginning in the planning legislation covering only onshore projects and restricted to Annex I projects. After critic was raised from the Commission, the scope was after 1994 extended to Annex II projects and legislation regarding EIA on offshore projects was gradually adopted. Until 2013 the EIA-procedure was formally organized as an amendment to the Municipal Plan which implied that an EIA procedure always required a SEA procedure in accordance with the SEA Directive 2001/42. This system was cancelled in 2013 meaning that since 2013 the EIA procedure will not in itself require a planning procedure unless the project requires changes in the plans adopted for the area.

Regarding ***onshore projects*** EIA is today regulated by the Planning Act section 11 g – 11 i. More detailed regulation in the ministerial regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act. This legislation covers EIA on all onshore projects except livestock farming which is covered by the Act on Environmental Permits for Livestock Farmers and this Act does only indirectly and partly include the EIA procedures laid down in the EIA Directive. The main provision regarding EIA in the Planning Act is section 11 g (1)-(2) stating (private English translation):

> *1. Projects which are likely to have significant effects on the environment must not be started before an environmental impact assessment had been made.*
> *2. The Council of the municipality are regarding projects covered by section 1 obliged to publish a short description of the project explaining the most significant environmental impact of the project and call in ideas and proposals on what shall be included in the environmental impact assessment. When the environmental impact assessment has been made, the Council of the municipality is obliged to publish the environmental impact assessment and to organize a hearing of effected authorities and the public. The public announcement can be done only on the website. The Council of the municipality set a deadline for the public hearing.*

Regarding offshore projects the EIA Directive is implemented by a number of legislative Acts adopted by the parliament:

The Mining Act (2013/657) section 23 (regarding offshore extraction)
The Act on Promotion of Renewable Energy (2013/1330) section 26 (regarding offshore projects)
The Act on protection of the environment at Sea (2013/963) section 24 a (only regarding fish farms) – however no EIA provision on permits to dumping materials at Sea
The Undergrounds Act section (2011/960) section 28 a (regarding offshore extraction)
The Act on the Continental Shelf (2005/1101) section 4 a
The Harbor Act (2012/457) section 2

The Act on Coast Protection (2009/267) section 1
Ministerial Order 579 of 29 May 2013 on environmental assessments on certain projects on the Sea Territory (covering projects not covered by the other pieces of legislation)

There is no legislation answering what legislation applies for projects which are both offshore and onshore – and the question has until now not been dealt with by any Danish Court.

2. Are the EIA Directive and the IPPC Directive[1] transposed in your country through the same legislation?

The IPPC Directive as well as the IE-Directive (2010/75) is transposed through the Danish Environmental Protection Act, so it is not the same legislation – see answer to Q1 regarding the transposition of the EIA Directive.

3. What procedure is set up to determine whether a project (listed in Annex II) shall be made subject to an assessment, case by case examination, thresholds or criteria or a combination of these procedures?

The criteria governing the EIA-screening under the Planning Act is laid down in the ministerial regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act section 3(2) which requires that decision is made case by case based on the criteria laid down in Annex III of the EIA Directive which are copied in the ministerial order.

EIA Procedural Provisions

4. Is the environmental impact assessment procedure considered in a separate administrative procedure (e.g. - different from the development consent procedure) by the competent authority? If yes, please provide a short description of the applicable arrangements for the implementation of the Directive (including what administrative act is considered a development consent).

Under Danish legislation, the development consent is not subject to a particular procedure but is the final decision ending the environmental impact procedure if the project is not rejected, so the answer to the first question is NO. However, it is more complicated. According to the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act section 1(2) Annex I projects must not be started before an environmental impact an environmental impact assessment procedure has been completed and the development consent has been granted. Regarding Annex II projects, the Ministerial Regulation section 2(1) requires that the developer of all projects listed in Annex II makes a written application of the project to the Municipal Council (regarding mining, the application must be submitted to the Regional Council). According to section 2(2) of the ministerial order, the developer is prohibited to start the project before an environmental impact assessment procedure has been completed unless the competent authority has decided that an environmental impact assessment procedure is not needed which will be based on an EIA-screening based on the criteria laid down in Annex III of the EIA Directive.

1 The former Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control repealed by Art 81 of the DIRECTIVE 2010/75/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Text with EEA relevance) with effect from 7 January 2014, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in 2010/75/EU Annex IX, Part B.

If an EIA-procedure is required, an environmental impact assessment must be made in accordance with the scoping (section 4 and 5) and a public hearing and a hearing of competent authorities carried out (section 6). Based on the comments during the hearing, the competent authority decides whether the development consent can be granted (section 7). If the project requires an IPPC permit, the IPPC-permit replaces the development consent. The same system is applied regarding mining permits, permits under the watercourse act and for permits under the water supply act (section 8) – and for development consent for offshore projects under the relevant legislation. For other projects, the development consent is submitted separately in the end of the procedure parallel with the permit under the legislation relevant for the project in incidental order meaning that the legislation does not define at what stage of the decision process the development consent should be granted when other permits are required.

5. Is the EIA process part of a permitting procedure in your legal system? How are the results of the consultations with environmental authorities and the public and environmental information taken into consideration in the development consent procedure? To what extent does an EIA influence the final decision, i.e. its approval or refusal and attached conditions?

The EIA process is in Danish Law part of a permitting procedure linked to the relevant legislation (see answer to question 4). The results of the public hearing and consultations must be taken into consideration (see section 7 of Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act). The EIA is important for the final decision. If the environmental impact assessment is not sufficient, the permit or the development consent is invalid. This is illustrated by one case on a windmill farm from the Eastern High Court ruling of 15 February 2012 (MAD 2012.394). In this case the project development consent was given to a project which was change after the environmental impact assessment was made and the public hearing was held. The development consent was appealed by neighbors to the Nature and Environmental Appeal Board which upheld the decision, but this was appealed to the Eastern High Court finding that the modification of the original project required at least a new screening.

6. In case of a multi-stage development consent procedure (e.g. combination of several distinct decisions), at what stage does the environmental impact assessment procedure take place during the development consent procedure in your country?

Danish legislation does not have legislation for the development consent procedure but the development consent is in most cases part of a multi-stage decision procedure which can be illustrated by one example. One developer wants to establish a waste-recovery facility at the country side nearby a forest and a small water course. That will beside a development consent require: an IPPC-permit under the Environmental Protection Act section 33, a zoning permit under the Planning Act section 35, dispensation under the Nature Protection Act section 16 and 17, a building permit under the Building Act section 16 – and often a new local plan under the Planning Act section 13. The Danish legislation does not address at what stage the development consent can be issued, but if local plan is required, the development consent cannot be issued before the local plan has been adopted.

7. What kind of authority (local, regional, central) is responsible for making decisions on EIA and/or to grant/refuse development consent?

Regarding onshore projects the main rule is that the Municipal Council is the competent authority regarding EIA-procedure and to grant/refuse development consent – except for onshore mining where the Regional Council is the competent authority. However, the Environmental Protection Agency respectively the Nature Agency is the competent authority regarding EIA for certain big IPPC plants and windmill farms with mills more than 150 meter. Regarding offshore project, it is the relevant State agency for the permit of the project under the relevant Legislative Act which is the competent authority and grants the development consent as part of the permit of the project and therefore also responsible for the EIA procedure.

8. Is the decision resulting from the environmental impact assessment a pre-condition to grant development consent? In case of a multi-stage development consent procedure, at what stage are the results of the consultations with environmental authorities and the public and environmental information taken into consideration?

Since the development consent is the decision resulting from the environmental impact assessment, Danish Law does not include such a distinction. Danish law is not based on a multi stage development consent procedure – see answer to question 5 and 6.

9. In case of projects for which the obligation to carry out environmental impact assessment arises simultaneously from the EIA Directive and other Union legislation, does your country ensure a coordinated or joint (e.g. single) procedure ("one stop shop")? If yes, please provide a list of the Directives covered.

No, Danish legislation does not address how the different environmental impact assessments required under the EIA-Directive, the Habitat-Directive (92/32), the Bird Directive (2009/147), the SEA-Directive (2001/42), the Water Framework Directive (2000/60) are coordinated.

10. Is it possible to carry out joint or coordinated environmental assessments, fulfilling the requirements of the EIA Directive, and Directive 92/32/EEC and/or Directive 2009/147/EC? Is there a legal basis for carrying out such assessments?

Yes, it is possible to make a coordinated environmental impact assessment, meaning that the environmental impact assessment under the EIA-Directive often includes an assessment of the impact of the project on Natura 2000 sites, but formally the last is made under the Ministerial Regulation no. 408 og 1 May 2007 on the designation and administration of Natura 2000 sites and the protection of certain species, while the rest of the environmental impact assessment is made under the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act.

11. What arrangements are established with neighboring Member States for exchange of information and consultation?

Neither the Planning Act nor the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act includes a provision on notification of neighboring Member States in the EIA procedure. I do not know how the formal arrangement of such notification and exchange of information is organized by the Ministry of the Environment but the impression is that such consultations are done with the neighboring states.

EIA Content

12. Is the developer obliged by national legislation to consider specified alternatives to the proposed project?

Under section 5(3) and Annex 4 of the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act, the information provided by the developer must include a list a of the most important alternatives considered by the developer and an explanation of the chosen project include an explanation of the environmental of the alternatives including the 0-alternativ.

13. Is scoping (e.g. scope of information to be provided by the developer) a mandatory step in the EIA procedure?

Until 2013, the Danish legislation does not include any regulation of scoping. This was changed in 2013 and is now reflected in section 4 of the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act.

14. Are there any provisions to ensure the quality of the EIA report prepared by the developer?

Under section 5 of the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act, it is the competent authority – and not the developer – who is responsible for making the EIA report. The EIA report itself is not subject to administrative appeal and the Eastern High Court has in UfR 2003.496 rejected that the quality of the EIA in itself can be subject to a legal review by the court. However, if the development consent is under administrative appeal or brought before the court, the legal review can include the quality of the EIA report. The Danish courts are however reluctant in the intensity of the legal review of the quality of the EIA report and there has until now not been one case in which a Danish court found the quality of the EIA report insufficient.

15. How is the cumulation with other existing and/or approved/already proposed projects considered? Please illustrate your answer by referring to examples of national case law!

The cumulative impact of other projects must be considered and addressed in the environmental impact assessment and in the EIA-screening according annex 5 in the Ministerial Regulation no. 764 of 23 June 2014 on Environmental Impact Assessment of certain private and public projects under the Planning Act. However, this obligation does only include projects which are carried out or approved and does nøt include proposed projects.

16. How is it ensured that the purpose of the EIA Directive is not circumvented by splitting of projects – e.g. 'salami slicing' of projects (i.e. the assessment and permitting of large-scale, usually linear infrastructure projects by pieces)? Please illustrate your answer by referring to examples of national case law!

The Danish legislation does not address salami slicing, but the problem is recognized by Danish courts and the Nature and Environment Appeal Board as it can be illustrated by the Supreme Court ruling in UfR 2000.1103 H regarding the establishment of a new road which should connect two other roads. While the municipality council and the Easter High Court in this case assess the environmental impact of the new road without taking into account the synergetic effect, the Supreme Court find that the synergetic effect of the project should be taking into account and concluded that an environmental impact assessment should have been made before permit to the project was granted. Case law is however not always consistent regarding salami slicing. In the Biogen-case MAD 2002.313 regarding the establishment of a huge new biotechnology facility, the Nature and Environment Appeal Board accepted that the environmental impact assessment accepted that the environmental impact assessment did not cover the environmental consequences of a new sewage plant and a water supply installation was needed because of Biogen. This was strongly criticized by the Commission and in later ruling as MAD 2013.570 the Nature and Environment Appeal Board annulled the local plan for the extension of an industrial plant because the assessment of the impact on some nature protected sites was postponed to later in the environmental impact assessment. In conclusion, after the critic from the Commission in the Biogen-case, the Nature and Environment Appeal Board recognices in the legal review that the environmental impact assessment is not circumvented by splitting the project.

17. Can the screening decision be appealed? If yes, who can lodge an appeal?

Yes, screening decision can be appealed. If the screening concludes an EIA is required this decision can be appealed by the developer and if the screening concludes that EIA isn't needed this can be appealed by citizens and NGOs within the area effected by project.

18. Is there a time limit for the validity of the EIA-decision and the development consent? Is the permit holder obliged to apply for a new permit after a certain period of time?

There is no time limit for the validity of the EIA. However, the problem was addressed by the Danish Nature and Environment Appeal Board in a recent case regarding the construction of a new by-pass road (MAD 2013.1115). The appeal board originally in 2006 upheld the environmental impact assessment of the project as sufficient. However, the development consent was not given before 2011, at the consent was appealed by local NGOs claiming that the environmental impact assessment from 2005 was outdated and did not take into account the impact on certain species protected under the Habitat Directive Annex IV. The appeal board stated that there is no legislation on time limit for the environmental impact assessment, but since the impact on protected Annex IV species was not sufficiently addressed in the old environmental impact assessment, the EIA-consent was annulled.

Regarding the development consent, the Planning Act section 56(1) states, that the legal validity of development consents (and other permits) under the Planning Act expire three years after the development consent was granted.

Access to Information Provisions

19. How is the public informed about the project and the EIA? When is the public informed about a project requiring an EIA and about a pertaining administrative procedure? Where can the information be accessed? What does the information contain? Who gets access to this information?

Projects subject to the EIA-procedure are announced in the newspapers and on the web site of the competent authority. The announcement informs the public briefly about the project and how to get the application – and later on how to get the environmental impact assessment and eventually the proposed plan. Everyone can get this information.

20. How does the authority ensure public access to environmental information in the procedures based on the EIA Directive? To what extent is this provision of information user-friendly (easy to find, free of charge, searchable, online, downloadable, etc.)?

Public access to the environmental information is ensured since the environmental impact assessment and the application can be downloaded from the website without any charge. If further information is requested the competent authority is obliged to give this information in accordance with the Directive 2003/4 on environmental information.

Public Participation Provisions

21. What are the criteria for taking part in an environmental impact assessment procedure, besides the project developer and the competent authority? What rights can people living in the neighborhood, NGOs, authorities invoke in the procedure? What legal rights do participants of the proceeding have? What happens if the competent authority denies someone's legal standing? Please illustrate your answer by referring to examples of national case law!

There are no restrictions on who can take part in the environmental impact assessment procedure – so everybody can take part and the competent authority is under the obligations to take the comment of all parts of the public into account and this right cannot be taken away by the competent authority. The right to present opinion and have access to documents does however not in itself establish further

rights. But the public concerned as people living in the neighborhood, NGOs and effected municipalities have the right to appeal the development consent and the plans adopted for the project to the Nature and Environment Appeal Board.

Administrative and Judicial Review & Enforcement Provisions

22. Can the decisions of the authority (local, regional, central) responsible for making decisions on EIA be appealed? Who is the superior authority deciding over the appeal?

There are four categories of EIA-decisions which are subject to appeal from the effected part of the public including NGO: (1) The decision after the EIA screening to require an EIA procedure, (2) The decision that EIA procedure is not needed, (3) the development consent and (4) the local and municipal plans adopted needed for the project. Under the Planning Act, the appeal goes to the Nature and Environment Appeal Board and under the Energy Supply Act, the appeal goes to the Energy Appeal Board. Regarding projects adopted by legislator the development consent can only be appealed to the court – but in all cases, standing has been accepted as lastly the Supreme Court ruling in the Österild-case (UfR 2012.2572) regarding a new site for testing huge wind mills (up to 250 meter high). When offshore projects are permitted by the Minister of Transport, there is no appeal to the Nature and Environment Appeal Board but legal action can be taken before courts under in principle the same legal review. One case is actually pleading a Danish Court regarding the lack of EIA-screening before changes of environmental conditions in the Metro project was approved.

23. Is there a judicial review against decisions made in EIA procedures? If yes, what matters can be challenged and what decisions can the court take?

The decisions in the scoping process or regarding the quality of the environmental impact assessment cannot separately be subject to appeal, but if the development consent or the local plan is subject to appeal, the legal review also includes these matters.

24. What are the criteria of legal standing against decisions based on EIA? Who (individuals, NGOs, others) is entitled to challenge the EIA decision at the court? Do individuals need to be affected? If yes, in what way do individuals need to be affected by the decisions in order to have standing?

The criteria for legal standing against the development consent or the plan linked to the EIA is following the Aarhus Convention art. 9(2) meaning that all individuals direct or indirect effected by the projects and all environmental NGOs have standing. The last time this standing was questioned by the authorities (the Minister of Environment) was in the Österild-case (UfR 2012.2572) regarding a new site for testing huge wind mills. The standing for individuals which will be able to see the windmills from their house and local NGOs was upheld by the Western High Court and the Supreme Court except for some few individuals which not in any was physically effected by the project (could not even see the windmills) meaning that the ideal opinion of an individual not in itself is sufficient to establish standing.

25. Does an administrative appeal or an application for judicial review have suspensive effect on the decision? Under which conditions can the EIA decision be suspended by the court?

Administrative appeal or application for judicial review regarding development consent does not have suspensive effect unless the Nature and Environment Appeal Board or the court dicide such suspensive effect. Formally suspensive effect can be granted but it has until now not been done in any

case on environmental impact assessment before a Danish Court and to my knowledge neither by the Nature and Environment Appeal Board.

26. Does the court have the competence to change/amend an EIA decision? Can it decide on a new condition or change the conditions of the EIA decision?

Neither the Nature and Environment Appeal Board or the Court has the competence to change an adopted plan. So if the plan is annulled the case is returned to the competent authority to decide whether a revised plan should be adopted. The same principles are governing how courts and the Appeal Body address complains against screening or the development consent. Regarding development consent, the court and the Appeal Board have however the discretion to add new conditions providing such new conditions will not require a new EIA-procedure.

27. In general, is it required to include monitoring of environmental impacts in the EIA? How is compliance with the monitoring conditions being checked? Is the public informed about the results of monitoring and if yes, how?

The monitoring of calculated environmental impact of the project is not published in the environmental impact assessment but access to this documentation can be granted. However, regarding windmills there have been a number of cases in which the public was denied access to the monitoring calculations and this has been indirectly upheld by the Nature and Environment Board arguing that the monitoring information was not in the hand of the authorities but in the hand of the developer and therefore not subject to appeal (see for example MAD 2013.398).

28. Who controls compliance with EIA decisions in your country? Are there specialized inspectorates checking compliance? How often do inspections take place? What enforcement policy do the authorities have (warnings, injunctions, sanctions and so on) in case of detected non-compliance? Has information on the results of inspections and related enforcement actions been disseminated to the wider public, and if yes, how?

All EIA-decisions are taken by either government agencies or the Municipal Council and are as all other decisions from the authorities subject to the rule of law. Regarding government agencies, the Ombudsman has the discretion to make inspections or investigations but this has until now not been done regarding EIA. Regarding the Municipal Councils "statsforvaltningen" under the Minister of Interior has inspection and investigating role but this power has not been used until now regarding EIA.

29. If EIA decisions are infringed, what types of sanctions can be imposed by whom? Are these sanctions administrative, criminal or civil in nature? What is the level of sanctions? Are those sanctions often applied and are they considered to be effective? Can those sanctions be applied on legal persons? Please illustrate your answer by referring to examples of national case law!

If conditions in the development consent are infringed or the developer initiate an EIA project without an EIA such infringements are subject to a fine under the Planning Act section 64 and the sanction can be applied on physical as well as legal persons. However, despite the many published cases on projects not complying with the EIA-legislation not one single case on penal sanctions regarding EIA has been reported.

30. If a given activity falls under the provisions of the EIA legislation, but the developer started the activity without the required authorization, what kind of measures can be taken by the competent authority?

If the developer starts activities in conflict with the EIA legislation and the activity falls within the scope of the Environmental Protection Act or the Nature Protection, the competent authority has the

power to stop the project physically and require help from the police if that is needed. If the project only falls within the scope of the Planning Act, the competent authority does only have the power to issue an administrative order requiring the developer to stop the project but the competent authority does not have the power physically to stop the project before this is granted by a legal order from a civil or a criminal court.

31. Are there any penalties applicable to infringements of the national provisions adopted pursuant to the EIA Directive?

The penalties applicable in case of infringement of the national provisions adopted pursuant to the EIA Directive are fine. As mentioned above, no cases on this have been reported.