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## EUFJE WARSAW CONFERENCE 2011

### **The environmental protection in the urbanistic planning and land development in European Union law**

#### **Part A**

#### ***I. How is the SEA-directive (Directive 2001/42/EC) implemented in your country? What is the scope of its implementation?***

The German Federal Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung - UVPG) as published in the announcement of 24 February 2010 (Federal Law Gazette I p. 95) is primarily implementing the SEA-Directive 2001/42/EC, especially section 3 and Annexes 3 and 4 of this Act. The implementation was completed by an amendment of this Act, which was enacted on the 29<sup>th</sup> of June, 2005. Furthermore the legislation of the German States (*Länder*) contains SEA-provisions for such plans and programmes that are regulated by the legislation of the *Länder*.

In accordance with Article 3 paragraph 2 of the SEA-Directive, Article 14b paragraph 1 UVPG differs between plans and programmes that always require a mandatory SEA and plans and programmes that require a SEA only if they set the framework for future development consents of EIA projects. The plans and programmes referred to in Article 14b paragraph 1 UVPG are listed in annex 3 of the UVPG. For other plans and programmes Article 14b paragraph 2 UVPG provides a screening mechanism, in accordance with Article 3 paragraph 3 to 5 of the SEA-Directive.

#### ***II. What types of public plans and programmes are subject to a strategic environmental assessment (SEA) in accordance with the SEA-directive?***

Annex 3 UVPG lists all types of plans and programmes for which a SEA is mandatory.

Annex 3:

*1. Compulsory Strategic Environmental Assessment pursuant to Article 14b para.1 no. 1*

1.1 Traffic route planning at national level including requirement plans according to national traffic route development legislation

1.2 Development plans pursuant to Article 12 para.1 of the Civil Aviation Act, if the preparation or modification of these plans goes significantly beyond the scope of decisions pursuant to Article 8 para. 1 and 2 of the Civil Aviation Act

1.3 Risk management plans pursuant to Article 75 of the Federal Water Act and updates of similar plans according to Article 75 paragraph 6 of the Federal Water Act

1.4 Programmes of measures pursuant to Article 82 of the Federal Water Act

1.5 Regional and subregional plans pursuant to Sections 8 of the Federal Regional Planning Act

1.6 Regional planning carried out by the national government pursuant to Section 17 paragraph 2 and 3 of the Federal Regional Planning Act

1.7 Designation of particularly suitable areas pursuant to Article 3a of the Offshore Installations Ordinance

1.8 Land use plans pursuant to Sections 6 and 10 of the Federal Building Code

*2. Strategic Environmental Assessment for plans and programmes when setting a framework pursuant to Article 14b para.1 no. 2*

2.1 Noise action plans pursuant to Article 47d of the Federal Immission Control Act

2.2 Clean air plans pursuant to Article 47 para. 1 of the Federal Immission Control Act

2.3 Waste management concepts pursuant to Article 19 of the Closed Substance Cycle and Waste Management Act

2.4 Updating of waste management concepts pursuant to Article 16 para. 3 4<sup>th</sup> sentence, 2<sup>nd</sup> alternative of the Closed Substance Cycle and Waste Management Act

2.5 Waste management plans pursuant to Article 29 of the Closed Substance Cycle and Waste Management Act, including special chapters or separate subplans for the disposal of hazardous waste, waste batteries and accumulators or packaging and packaging waste

Moreover, there is a general obligation to carry out an SEA for plans and programmes requiring an impact assessment under the Federal Nature Conservation Act (Bundesnaturschutzgesetz - BNatSchG) (Article 14c UVPG).

The UVPG further contains provisions for preliminary case-by-case examinations to be carried out for certain plans and programmes that are not already subject to a SEA according to Annex 3 (Article 14b para. 2 UVPG). A case-by-case examination must also be carried out for minor modifications or for plans and programmes which determine the use of small areas at local level.

Similar provisions apply at Länder level. Special provisions may apply to particular types of plans and programmes. For example, the Federal Building Code (Bundesbaugesetz) contains special provisions for land use plans, the Federal Regional Planning Act (Raumordnungsgesetz) contains special provisions for spatial plans.

### ***III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?***

In Germany SEA is an integral part of the procedure for the preparation of a draft plan or programme, Therefore the competent authority for this planning procedure is at the same time responsible for the carrying-out of the SEA. Depending on the kind of plan or programme this can be a local, regional or federal authority.

### ***IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?***

Pursuant to Article 14h UVPG and in line with the SEA Directive all “authorities whose environmental or health-related responsibilities are affected by the plan or programme” must be consulted. This can be authorities on all administrative levels. The decision which authorities are to be consulted in the respective procedure is made by the authorities preparing the plan or programme on a case-by-case basis.

Furthermore Article 14f paragraph 4 UVPG provides for an involvement of “authorities whose environmental or health-related responsibilities are affected by the plan or programme” in the scoping step of the procedure.

***V. What types of decision are resulting from a strategic environmental assessment proceedings?***

In Germany strategic environmental assessments are fully integrated in the procedure for preparation and adoption of plans and programmes. Decision-making in this context means that while deciding on the adoption or rejection of the draft plan or programme the results of the SEA must be considered. This means, that the content of the environmental report as well as the outcome of the consultation of the public, authorities and, if a transboundary SEA procedure has been carried out, other affected countries have to be taken into account. The type of decision-making depends on the respective mechanism for adopting the kind of plan or programme in question.

***VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?***

On the federal level, according to Article 14i UVPG, the draft plan or programme, the environmental report and further documents which the competent authority considers relevant have to be displayed for public inspection at an early stage and for an appropriate period of time of at least one month. With due regard to the nature and content of the plan or programme, the display location shall be determined by the competent authority in such a way as to ensure effective participation of the public affected. A public notice is to inform about the opportunity of inspection.

The public affected may comment on the draft plan or programme and the environmental report. For such comments, the competent authority sets an appropriate timeframe of at least one month. A hearing must take place for certain plans and programmes as provided by national law.

The Länder in their legislation mostly refer to these provisions. Some Länder also provide that documents can additionally be published on the Internet and that comments can also be communicated electronically.

In some specific provisions, as for example in the Federal Building Code, the opportunity to comment in the framework of public consultation is not restricted to the public affected.

***VII. Who is authorized to take part in a strategic environmental assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?***

The SEA procedure in Germany is open for participation of

- authorities whose environmental or health-related responsibilities are affected by the plan or programme (see question A. IV. above),
- the public, including NGOs (see for the procedure question A. VI. above),
- if transboundary impacts of the plan or programme are likely, the authorities and the public of any affected state (see Article 14j UVPG).

With regard to consultations of the public, the UVPG distinguishes between the public and the public affected. Article 2 para. 6 UVPG defines:

For the purposes of this act "the public" shall refer to individual or several natural or legal persons or groupings of such persons. For the purposes of this Act, with regard to participation in procedures pursuant to paragraph (1) sentence 1 and paragraph (4), the "affected public" shall refer to any individual whose interests are affected by a decision pursuant to paragraph (3) or a plan or a programme within the meaning of paragraph (5); this shall also include associations whose activities as described in their statutes are affected by a decision pursuant to paragraph (3) or a plan or a programme within the meaning of paragraph (5), including associations which promote environmental protection.

Authorities and the public affected participating in the consulting procedure have the right to comment on the draft plan or programme and on the environmental report.

The right to file an appeal against plans or programmes subject to an SEA depends on the kind of plan or programme. With regard to land-use-plans pursuant to Sections 6 and 10 of the Federal Building Code for example an appeal may be filed according to Article 47 of the Administrative Court Proceedings Code (*Verwaltungsgerichtsordnung – VwGO*). The right of NGOs to appeal is regulated by the Act Concerning Supplemental Provisions on Appeals in Environmental Matters pursuant to EC Directive 2003/35/EC (Environmental Appeals Act) of 7 December 2006 (Federal Law Gazette I p. 2816).

***VIII. To what extent are the SEA and EIA procedures integrated in your country? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give examples?***

In Germany SEA is integrated in the respective procedures for the preparation and adoption of plans and programmes, EIA is integrated in the procedures for development consents of projects. This approach has proved to work well in practice.

For land use plans the Federal Building Code provides for an environmental assessment that fulfils the requirements both of EIA and SEA. Therefore, in the given example the same documentation may be used for both assessments.

## **Part B**

***I. How is the EIA-directive implemented in your country? What is the scope of its implementation?***

The German Federal Environmental Impact Assessment Act (UVPG - Gesetz über die Umweltverträglichkeitsprüfung) as published in the announcement of 24 February 2010 (Federal Law Gazette I p. 95) is primarily implementing the EIA-Directive 85/337/EEC. This Act was first enacted on the 1st of August 1990 and has been amended regularly since then. Despite the provisions on SEA the UVPG contains provisions on the obligation to carry out an EIA and on the EIA-procedure.

According to the relevant provisions of the Federal EIA Act the EIA procedure in Germany consists of the following sequence of steps:

- Request for a development consent or permit by the developer
- Determination of EIA obligation by the competent authority (Article 3a):
  - EIA obligation due to type, scale and capacity of a project (Article 3b) or
  - EIA obligation in individual cases - Screening (Article 3c) - if the result of the

screening step is that no EIA has to be carried out, this negative result will be made public by public announcement

- Scoping (Article 5) - Independent experts and third parties may be consulted by the competent authority
- The competent authority receives the developer's documents, including the EIA documentation (Article 6)
- Consultation with other authorities (Article 7)
- Transboundary consultation with authorities of an affected state (Article 8)
- Consultation with the domestic public, including a hearing (Article 9)
- Transboundary consultation of the public in the affected state (Article 9a)
- Summary description of environmental impacts by the competent authority (Article 11)
- The competent authority shall take the results of the consultations into account in the final decision (Article 12)
- Possible access to justice against the decision by members of the public, including NGOs

Annex I of the Federal EIA Act defines the scope of EIA in Germany. It lists all projects

- for which it is mandatory to carry out an EIA or
- for which a case-by-case examination (screening) has to be carried out in order to investigate if the project has significant adverse effects on the environment and therefore requires an EIA.

This Annex 1 implements at the same time the EIA Directives 85/337/EEC, as amended by Directives 97/11/EC and 2003/35/EC, and the UN ECE – Espoo Convention.

## ***II. What types of public and private projects are subject to an environmental impact assessment in accordance with EIA-directive?***

Annex I of the Federal EIA Act implements inter alia the Annexes I and II of the EIA Directive.

## ***III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?***

If a project type, listed in Annex I of the Federal EIA Act, is marked in column 1 with the letter X an EIA is always mandatory.

If a project type, listed in Annex I of the Federal EIA Act, is marked in column 2 with the letter A or S a screening is required. The screening mechanism of the Federal EIA Act makes a distinction between a general screening (“A”) and a site-related screening (“S”). The need for the general or site-related screening depends on whether the respective thresholds laid down in the Annex have been reached or exceeded. The criteria pursuant to Annex II of the EIA Act, which is based on Annex III of the EIA Directive, shall be used for screening. The selection criteria cover the characteristics of projects, the location of projects and characteristics of the potential impacts. The general screening must examine these criteria fully, the site-related screening concentrates primarily on the criteria concerning the project site according to No. 2, Annex II of the EIA Act.

#### ***IV. What kind of authority (local, regional, central) is responsible for performing the duties arising from the EIA-directive?***

In Germany, EIA is an integral part of development consent procedures and of other forms of permit procedures (e.g. siting procedures). This means, that the authority responsible for the decision on the project (licensing authority) is responsible for the EIA too.

Apart from a few exceptions, the authorities of the Länder are responsible for these procedures. Usually the competence has been assigned to authorities on the local or regional level. In some rare cases authorities on the governmental level are responsible. For certain kinds of projects with national relevance (e.g. railways) a Federal authority is the competent authority. As the transboundary EIA procedure is integrated into the national EIA procedure, there are no special authorities for transboundary cases, i.e. transboundary EIAs will be carried out by the same authorities which are responsible for domestic EIA procedures.

#### ***V. When should an environmental impact assessment take place during the investment procedure?***

According to Article 1 UVPG the environmental impacts of a project shall be identified, described and assessed early and in a comprehensive manner. Consequently an EIA procedure should begin as early as possible in order to detect

any possible environmental impact of a project. Due to the fact that the EIA is integrated into the development consent or permit procedure, the EIA documents shall be prepared at the same time as the documents for the development consent or permit request. In this regard the scoping step as envisaged under Article 5 UVPG is most important for the efficiency and effectiveness of the procedure.

***VI. Does the decision resulting from an environmental impact assessment grant the final development consent?***

In accordance with Article 8 of the EIA Directive, Article 11 and 12 of the Federal EIA Act provide that the competent authority has to consider the results of the EIA while deciding on the development consent requested. This means that the content of the EIA documents as well as the outcome of the consultation of authorities, the public and other affected countries, if a transboundary EIA has been carried out, have to be taken into account. Of course the permit has to be rejected, if other legal requirements are not met by the project in question.

***VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?***

See the answer to question A.VI. above. The procedure envisaged by Article 9 of the Federal EIA Act for public participation in EIA was the model for the corresponding SEA provision provided by Article 14i UVPG.

***VIII. Who is authorized to take part in environmental impact assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?***

See the answer to question A.VII. above.

The EIA procedure in Germany is open for participation of

- authorities whose environmental or health-related responsibilities are affected by the project (Article 7 UVPG),
- the public, including NGOs (Article 9 UVPG),

- if transboundary impacts of the project are likely, the authorities and the public of any affected state (Article 8, 9a UVPG).

With regard to consultations of the public, the UVPG distinguishes between the public and the public affected. Authorities and the public affected participating in the consulting procedure have the right to comment on the project and on the EIA documents.

***IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceeding and the judgement.***

The right to file an action against development permissions subject to an EIA is regulated primarily by the Administrative Court Proceedings Code (*Verwaltungsgerichtsordnung – VwGO*). Additionally the right of NGOs to file an action is regulated by the Act Concerning Supplemental Provisions on Appeals in Environmental Matters pursuant to EC Directive 2003/35/EC (Environmental Appeals Act) of 7 December 2006 (Federal Law Gazette I p. 2816).

Example: A planning permission may be quashed by the administrative court, because the EIA is missing and it seems possible to the court that the responsible authority would have come to a different decision, if the EIA had been undergone. The plaintiff can be a neighbour or another local authority.

***X. What are the specific characteristics of the transboundary environmental impact assessment of certain public and private projects?***

See the answer to question B.I. above. If Germany is state of origin, the transboundary EIA procedure is part of the domestic EIA and therefore integrated into the development consent or permit procedure. Specific details are regulated in Article 8, 9a of the Federal EIA Act.

If Germany is the affected state the national procedure is prescribed by Article 9b of the Federal EIA Act. The German authority which would be competent for a project of the same kind in Germany shall ask the competent authority in the other state for documentation about the project and ensure that the domestic authorities and the domestic public can participate in the transboundary procedure.

In addition Germany and most of its neighbouring countries have established bilateral treaties, common declarations or other kinds of bilateral arrangements in order to safeguard details of the bilateral cooperation in transboundary EIA procedures, for example with regard to questions on translation of documents.

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### **Some recent decisions of the Federal Administrative Court**

On the Internet: [www.bverwg.de](http://www.bverwg.de) (in German)

Beschluss vom 23.11.2010 - 4 B 37.10 (planning permission, wind energy plant)

Urteil vom 14.4.2010 - 9 A 13.08 (motorway, transboundary impact)

Urteil vom 4.8.2009 - 4 CN 4.08 (local plan)

Urteile vom 16.10.2008 - 4 C 5.07, 3.07, (airport, transboundary impact)

Urteil vom 20.8.2008 - 4 C 11.07 (planning permission, turkey-farm)

Urteil vom 9. 4. 2008 - 4 CN 1.07 (local plan)

Urteil vom 13. 12. 2007 - 4 C 9.06 (airport)

Urteil vom 7. 12. 2006 - 4 C 16.04 (airport, maintenance hall)