The EIA in
Selected Member States

Report and Case Studies

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1. Introduction

J&E aimed to gather case studies regarding implementation of EIA Directive in MS and accession countries and to identify good practices and also gaps of implementation. The countries participating in this activity are: Czech Republic, Hungary, Romania, Croatia and Macedonia.

According to J&E analysis many of the failures were before mentioned in other documents as weaknesses of the EIA Directive itself. However, they can be regarded as failures of implementation of EIA Directive considering the scope and the principles that the directive aims to achieve. The Directives created the evaluation procedure to prevent harmful projects to be developed in order to protect the environment. Since 1985 the principles regarding the protection of the environment developed and became fundamental principles stated by the EU treaty and the Charter of Fundamental Rights of European Union. The EIA Directive may achieve a proper implementation only if the transposition measures are respecting these principles and are really preventing the development of harmful projects. In the present report we will try to assess the implementation of the Directive and show cases where the EIA Directive achieved its purpose and also cases where it did not.

I. Good practices

No case was identified as being entirely a good practice. However, in some cases one issue can be highlighted as proper implementation of the EIA Directive:

Injunctive relief in Hungary

In Hungary in case of Holcim Cement Factory the court suspended the enforcement of the environmental permit. The court stated that the construction of the cement factory will produce irreversible effects upon the environmental factors and that the nature protection is more important than the economic interests that were invoked by the investor. The construction is suspended since 2008 and in 2012 the case in court is still not finished. If the court wouldn’t have suspended the effects of the environmental permit then the factory would have been built already and the damage to the environment already done. However, in Hungary and as well in Romania (as you can see in the second section of this report), there are several other cases were the courts refused to suspend the environmental permits. In such cases by the time the EIA case finished in court, the investment is already build, leaving the decision of the court with no effect, even if the ruling of the court was that the environmental permit was illegal.

2\text{Charter of Fundamental Rights of European union Art 37 and art. 3 3, 21 from the Consolidated version of the Treaty of European Union, art. 11, 114.3, 191 – 193 from the Consolidated version of the Treaty on the Functioning of the European Union;}
II. Failures of implementation of EIA Directive

Use of the “Salami slicing” procedure

Salami slicing procedure was in two cases presented along with this report. In Czech Republic and Romania projects were split so that the effects over the environment would be diminished.

In Czech Republic R55 Expressway total length is 101 km and it was split in several sections, three of them already finished. Each of them had about 18 km. No assessment of the entire road of 101 km was done.

In Romania the DN 66 Road was split in 4 sections. One section and a half were built without any EIA assessment. For half of the second section an EIA permit was granted. The third section received the EIA permit in 2011. Total length of the road is about 100 km. There is no mention in the documentation for the third section regarding the total length of the entire road. The length of the third section is of about 18 km.

National legislation is not preventing such practices. In Romania the national legislation is not describing or preventing in any way such practices, so that they are used in many projects by the developers. In Czech Republic, short sections of the projects (especially roads) are assessed and permitted without taking into account the impacts of the project as a whole. The environmentally less questionable parts are mostly authorised and built first, which in fact predetermines the following route of the project even across an environmentally valuable territory.

Issue of the cumulative effects

In all MS participating to this procedure, Czech Republic, Hungary and Romania, cumulative effects are not analyzed for all relevant projects: in Czech Republic the case of R55 expressway project and in Romania the case of DN 66 Road is an example of fake cumulative effects analysis. In both cases there was no analysis the different sections of the roads. The road was split in several sections and EIA procedure done for each section without any analysis of the cumulative effect of the entire road. In Romania the EIA report mentions that the cumulative effects will be assessed in SEA procedure. In Hungary in case of Holcim cement factory there was no analysis of the cumulated impact caused by the old factory that is located near the new location of the factory intended by the developer, by the closing project of the old factory, nor of the cumulated impact of the conveyor belt planned for the new factory, or of the extension of limestone and marl pits that are planned to become 4 times bigger, to supply the new factory.

Issue of associated works

In Hungary the legislation is providing a definition of the associated works that is not in line with the scope of EIA Directive as it is described into the Note regarding the interpretation
suggested by the Commission\(^3\). The Hungarian legislation provides that only those facilities can be regarded as connecting facilities which are all realized on the installation site and only those works can be regarded as associated works, which (inter alia) are all realized on the same or neighboring properties. Therefore in this case the conveyor belt was not regarded as a part of the project. The legislation requires EIA only for the cement factories above a certain production limit. Therefore the investor and environmental authorities decided that the 11 km long conveyor belt doesn’t need an EIA. The conveyor belt is going from the mines to the factory through Natura 2000 areas, special areas of conservation and protected forests that have to be cut down.

In Romania there is no definition of the associated works. Therefore during the EIA procedure there was no assessment of such works, for example of the impact produced by the transport of the materials needed for the building of the road.

**Nature protection**

All three cases are describing projects located in and near Natura 2000 sites. In all cases the effects over the protected species were not fairly assessed. In Hungary, during the second phase of EIA procedure, an assessment of the conveyor belt 11km long was done. In the assessment it was described that the conveyor belt would actually enhance the quality of the environment, and it would not have any negative impact. The conveyor belt passes through Natura 2000 sites, special areas of conservation, protected forests, etc.

In Czech Republic and in Romania the roads would fragment the habitats and have a severe impact on the protected species. The EIA reports minimized such effects stating that only a few protected species was seen along the road. As measures to minimize the effects, for ex in Romania, the EIA reports suggests that nests for bats will be built in the trees, although no bats were seen during the EIA assessment. They are one of the protected species in the Natura 2000 Site where the road will be build. Actually in Romania no adequate evaluation study was done, only one biodiversity report was delivered. The legislation regarding the adequate evaluation procedure was enforced in early 2010. According to the EIA methodology such legislative changes must be taken into consideration into the procedures on going, and the documentation must be modified accordingly.

In Hungary the 11 km conveyor belt was passing through Natura 2000 site and other protected areas. The assessment was done only in the second phase of the EIA procedure in 2 month. In such short period of time it is not possible to analyze fairly the impact of the project over all species and for the whole vegetation period.

**The EIA reports**

All three case studies are showing that the reports are not objective. The aim of the experts is not to show real impact of the project and make a fair conclusion on whether the project

\(^3\)http://ec.europa.eu/environment/eia/pdf/Note%20-%20Interpretation%20of%20Directive%2085-337-EEC.pdf
can be safely developed or not, but to realize an assessment convenient for the developer. After all, the developer is the one choosing and paying for the assessment. Both in Hungary and in Romania there are detailed provisions of law regarding the experts qualified to realize such assessments. However this proved not be enough to ensure the objectiveness of the assessments. In all cases the experts reached conclusions heavily contested both by the general public and by specialists who claimed that the project would be harmful for the protected species and the mitigation or compensation measure if any suggested, are not enough. In Romania the experts refused to analyze the impact of the project on three Natura 2000 Sites, because they considered that they are too far – 10 to 14 km. However the entire area of the project is inhabited by many protected species included large carnivores, mammals and birds that are easily traveling outside the neighboring Natura 2000 sites and inside the one crossed by DN 66 road. Fragmentation of habitats was also not considered in this case.

**Access to justice against EIA Statement**

Access to justice against the EIA Statement is not possible. In Czech Republic NGOs tried to attack in court the positive EIA statement but the court rejected the request because the EIA statement is considered only a preliminary basis for a permit of the expressway. The court also stated that art 9 from the Aarhus Convention and 10a from the EIA Directive do not require a separate judicial review of any decision, act or omission.

**Alternatives**

No real alternatives were analyzed in any of the three case studies analyzed.

In Czech Republic and in Romania due to the use of the salami slicing procedure the alternatives were done only for the different sections of the road. No alternatives for the entire route of the roads were assessed.

The alternatives analyzed for the Czech case didn’t considered an alternative where R55 expressway is not build through the Natura 2000 Site. Assessment of such alternative was requested by the interested public but the environmental authority rejected this proposal. The assessed alternatives were all passing through the protected area. The difference were that compared to the first version where the expressway was at the surface, the second suggested the rod build into a 12 km long tube and the third and the one endorsed, the road passes through a shorter tube, only 2 km and a 6,6 km tunnel.

In the Romanian case, the main alternatives were: the existing situation – a forest road that is upgraded in the legislation (1999 Governmental Decision) to a national road. The project aims to upgrade also physically the road from forest to national. Therefore this alternative was considered illegal. The Alternative 1 was the one endorsed – it is specifying technical works needed to upgrade the road. The route is more or less the same as the forest road. The third alternative was following a different route but also inside the Natura 2000 area. No alternative analyzed included a route outside the protected areas.
In Hungary no alternatives were studied for the 11 km long conveyor belt going through Natura 2000 site from the mines to the cement factory, as the analysis was done in the second phase of the EIA process in only 2 month.

**Public participation in EIA procedure**

The most important conclusion arising from the three case studies analyzed is that the public’s suggestions and opinions are not taken into consideration even if the public expressing opinions is made of experts and the conclusion are technically formulated. In Czech Republic, the public asked for a much more reasonable alternative to the project to be analyzed, to build the expressway outside the protected area, but the authorities refused to take such proposal into consideration. In Romania the public made a shadow EIA report emphasizing the dangers represented by this project to the protected species and for the forests along the road (untouched forest sites). In Hungary even the municipalities brought many arguments against the project and they were still not considered. In these conditions, the only resort left for the public is access to justice.

**Romania**

The EIA Procedure is regulated by Governmental Decision no 445/2009 and Order no 1284/2010. The time frame for public participation in Romania is not sufficient and it is not *early public participation*. According to the provisions of the Romanian legislation the public has 5 days to comment the screening decision, 20 days to study the EIA Report and if it is the case the security report and the adequate evaluation report and 5 days to comment the already made decision to issue the environmental permit.

There is no public participation in scoping decision. The public is not invited to the technical committee meetings and it is sometimes not even allowed as observer. Into the last phase first the decision to grant the permit is done, then the public can comment and only after maybe the authority will change its mind and reconsider the decision. We consider this practice not in line with either the scope of EIA Directive nor with the Aarhus Convention.

Regarding the public announcements, the developer is left to choose in what newspapers will publish the announcement. Obviously, as it happens in practice, he will publish in the smallest ones possible to avoid the public’s opinion that might be against the project. Even if the announcements are published properly, it is not likely that relevant NGOs will read the newspapers in the same day. There is no practice of informing directly the interested NGOs or inviting the NGOs already known that are interested in the subject, depending on the object and location of the project. The webpages of the environmental authorities are not helping since they are disorganized and it is almost impossible to follow the course of one project. 

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In Hungary the public participation seems to be better regulated.

The EIA directive has been implemented with the following legal acts in Hungary:

- Act LIII of 1995 on the General Rules of Environmental Protection
- Government Decree No. 314/2005. (XII. 25.) on environmental impact assessment and the uniform environmental use permits

The EIA procedure in Hungary is a two-phase process. Phase 1. is a screening or scoping phase that is a preliminary impact assessment for estimating the possible effects of the project? Based on the results of this phase, the authorities determine the exact requirements for Phase 2., that is a detailed impact assessment procedure. If the result of the EIA based environmental permitting process is negative, it practically means a veto for the construction itself.

Both, the procedure of screening and of the actual impact assessment have components of public participation, where the public has sufficient time to comment on documentation submitted by the project developer. The public have 21 days to comment the screening documentation since the day it was released and 30 days to comment the EIA Report. The public debate can be organized at any hour of the day. The public might not be able to participate in the working days during the working hours.

However in a complex case involving many pages of documentation the timeframe set for public participation is not enough. For such complex cases the time frame should be wider so that the public would have a real opportunity to express well founded comments in EIA procedure.

In the Czech Republic, the 100/2001 Coll. EIA Act provides for a good level of public participation in the EIA process itself. The public can participate at all stages of the EIA procedure, including screening and scoping. In this phase the public has 20 days to comment the project proposal.

The public has 30 days to comment the EIA report submitted by the developer and another 30 days to comment the EIA expert opinion done by the expert hired by the EIA authority to check the quality of the EIA report.

Public participation is organized only if there are critical comments to the EIA report/expert opinion and must be organized in 35 days since the expert opinion was published.

The EIA statement, issued at the end of the EIA procedure, is not a permit approving the project in the Czech Republic. It is an obligatory, but not binding, basis for the subsequent administrative decision(s) necessary for realization of the project (e.g. for land use and construction permits, mining concessions, exceptions and preliminary consents of agencies responsible for air, water, nature, forest, agriculture land, public health protection, etc.).
The NGOs can participate in these decision-making procedures if they submit written comments during the EIA procedure. According to the relevant sectorial laws, e.g. the Building Act, the participation of individuals in the environmental decision-making procedures is possible only for owners of the real property. Such regulation fails to guarantee participation to persons having an interest in the decision-making process.

**Access to justice in EIA cases**

**Injunctive relief**

In Romania the injunctive relief was denied in the case of DN 66 Road. The courts are often denying suspending the enforcement of the environmental permits because such administrative acts can never fulfill the requirements set by the law: to prove an imminent damage. In the presented case and also in the general practice from Romania the courts are considering that the environmental permits can’t cause any immediate damage to the environments because the investor will not start the construction based on these acts, but on the development of consent. The development of consent is interpreted in Romania as the last administrative act being issued for an investment. In general, this is the building permit (with certain exceptions) an entirely different administrative act issued by different authorities with no environmental competences, therefore unable to correct technical errors done in the EIA Report or decide that the project will be harmful for the environment and deny the building permit. According to the national legislation, Construction Law no 50/1991 with further amendments, the environmental permit must be respected when the building permit is issued. Challenging the building permit due to the illegalities of the EIA procedure is not possible. This makes it impossible to prevent the development of the projects before the cases in courts regarding the annulment of the EIA permits are finished. Therefore, the aims of the EIA Directive and the principle to prevent damages to environment and access to justice right are impossible to be fulfilled.

**Judicial experts**

In most EIA cases there is a need of judicial experts to prove that the projects are damaging for the environment. Both in Hungary and Romania the costs of expertise are very high. If in Hungary the costs were supported by the municipalities that are against the project, in Romania the NGOs opposing this project will not be able to pay for such an expertise.

In the Czech Republic, the EIA statements and the screening decisions are not considered “directly reviewable” by courts, due to their non-binding character. The number of subjects considered to have standing against the development consent is restricted, in comparison to the definition of “public concerned”. The NGOs can only successfully challenge violation of their procedural rights at court; objections concerning material aspects of the development consent are mostly not taken into consideration by courts.
Case studies

Czech Republic - R55 Expressway

1. Title:
Construction of R55 Expressway Olomouc – Břeclav trough Bzenecká Doubrava - Strážnické Pomoraví SPA (Bird Area)

2. Description of the developer
The developer of the R55 expressway project is Ředitelství silnic a dálnic ČR (The Road and Motorway Directorate of the Czech Republic), which is the government-owned company set up by Ministry of Transport and Communications to provide administration, maintenance and repair of the national roads and secure construction and modernization of motorways and roads. Ředitelství silnic a dálnic ČR is funded from state budged and the State fund for transport infrastructure.

In the past, Ředitelství silnic a dálnic has been repeatedly criticized for promoting structurally and technically complicated, non-economic solutions, which were not friendly to environment and as such, were subject to disputes.

3. Subject of the case
R55 is an expressway under construction that will after completion connect cities Olomouc and Břeclav. Its total length shall be 101 kilometers. At the moment, only three sections of a total length of 18 kilometers are finished. R55 as a project is a reaction to overburdened roads in relatively densely populated areas of the south-eastern part of The Czech Republic and in future it is supposed to ease and faster the transportation across Moravia.

The fundamental problem of the planned R55 expressway is the section from Rohatec to Moravský Písek, as the expressway is planned over Special Protection Area (SPA) Bzenecká Doubrava – Strážnické Pomoraví, which is a part of the NATURA 2000 network.

4. Location of the project (the problematic section)
The R55 section from Rohatec to Moravský Písek shall be an expressway with four lanes in the length of almost 18 km. Within the scope of the plan falls to build interchanges Bzenec, Bzenec – Přívoz and Rohatec, as well as building lower class road relocations, rural roads and utilities.

In 2004, large part of the area, in which the expressway is supposed to be built, has been declared Special Protection Area Bzenecká Doubrava - Strážnické Pomoraví by the Czech Government regulation No. 21/2005 Coll., subject to protection under the EU Birds Directive. In June 2005, the assessment of the environmental impacts of the R55 expressway Moravský Písek - Rohatec has started. The subject of evaluation was the “surface” (uncovered) version of the R55 (variant A) and the same route, but "sealed" in a tube of length of about 12 km (variant B). Both these variants calculated upon intersecting SPA Bzenecká Doubrava - Strážnické Pomoraví. Length of the two variants differed only slightly, the same situation is in occupation of the land.
The surface variant was later found unacceptable in terms of bird protection requirements. It would be in accordance with relevant European directives and Czech law to consider other variants of the R55 outside this bird area.

*Problematic part of the R55 trough the SPA (black line). Alternative corridors proposed by NGOs (blue, red and green lines).*
5. Interested public involved
The mayors of the affected municipalities, as well as the authorities concerned, supported the construction of the R55 expressway as proposed, as it would reduce communication traffic load inside the municipalities. On the contrary, other members of the public were against the implementation of both variants significantly affecting the SPA constituting part of the NATURA 2000 network.

6. Estimated negative environmental impact of the project:
The proposed variants of the expressway differ significantly in their impacts on the SPA.

a) The surface variant would have a significant negative impact on the subjects of the protection. Its implementation would cause a decline in the populations of the protected species (birds) caused by high mortality due to collisions with passing vehicles, noise and light disturbance, etc. The project would occupy suitable sites for nesting and foraging, not only in the width of the road itself, but also due to the noise and movement of motor vehicles in the range of about 500 meters from the road. Other risks are also emissions from transport and release of hazardous substances from accidents. The expressway would also constitute a barrier to migration of the species. Like any other similar construction, it would also negatively affect the landscape character.

b) The variant “B”, with 12 km long tube, would have the same negative effects on the subject matter during construction as the surface variant. After the construction, the traffic would cause less damage and disturbance with respect to the protected species (birds). However, neither this variant solves the impacts of the fragmentation of the SPA (reduction of the habitat integrity, namely the suitable nesting area).

c) The variant with 2 km long tube and 6.6 km long tunnel would particularly solve problems of the bird mortality and noise interference in critical sections, but only for certain parts of the expressway and after completion of the tunnel. Therefore, also this variant would have serious impacts in terms of long-term protection of the SPA. These deficiencies may also have a significant negative impact on the population of the species concerned since they do not solve the problem of mortality, noise and partially light loads throughout the whole stretch of R55 expressway. Neither would it solve the negative effects of the construction.

7. Analysis of the relevant national/European legislation
The EIA was transposed into Czech law mainly by Act No. 100/2001 Coll., environmental impact assessment (“EIA Act”). However, due to the fact that the Czech EIA Act regulates only the assessment procedure as such, finished by a non-binding statement of the public authority (Ministry of Environment or Regional Office), and not the subsequent development-consent (permitting) procedures, also other acts regulating the subsequent administrative processes must be considered as transposing the requirements of the EIA Directive. Currently, these are namely the Land Use Planning and Building Act, Nature and Landscape Protection Act, Air Protection Act, Water Protection Act, Mining Act and also

The main stages of EIA procedure under Czech law can be shortly summarized as follows:

Screening and scoping
A developer submits an “announcement” of the project, which describes its main characteristics, to the responsible authority (Ministry of Environment or regional office – hereinafter “the EIA authority). The EIA authority publishes the announcement on the
internet and sends it to the affected municipalities, who are responsible for informing the local public on the official notice board and by at least one more “locally typical” way. The public can send written comments to the EIA authority within 20 days.

The initial part of the EIA combines both “screening” (for Annex II projects) and “scoping”. It also combines “categorical” and “case-by-case” approach method. There are threshold criteria for both “Annex I” and “Annex II” projects in the Czech EIA Act. Annex II projects not meeting the threshold (size, etc.) criteria are subject to case – by case screening, concerning their significant impact on the environment. A simplified screening procedure (without the possibility of public participation) is applied with respect to the project not meeting the thresholds.

The first part of the EIA procedure is finished by a “conclusion” (screening decision) issued by the “EIA authority”. For “Annex II projects, the EIA procedure can end at this stage, if the authority decides so. In other cases (always for the Annex I projects), the conclusion includes requirements for preparation of the more detailed EIA report.

The conclusion does not have the form of a decision in the sense of the Czech Administrative Code. It must be accompanied by a justification, but the EIA Act does not provide any details concerning its content. In practice, the conclusions (especially when stating, for Annex II projects, that the EIA procedure will not continue) are often poorly justified, without making clear the reasons why the project cannot have a significant effect on the environment.

**EIA report and its evaluation**

In case of Annex I projects, or if the EIA authority decides so for the Annex II projects, - the developer has to hire an authorised person to prepare detailed EIA report and to send it to EIA authority. The EIA authority and affected municipalities inform the public about the report (by the same way(s) as in the announcement (screening and scoping) stage. The public can send written comments to the report within 30 days.

The EIA authority can ask the developer to amend the EIA report. If not deciding so, it hires another authorised person, who evaluates the quality of the EIA report and provides an expert opinion about it. The EIA authority and affected municipalities inform the public about an expert opinion (the same way as in previous stages. Again, the public can send written comments to it within 30 days.

**Public hearing**

If there are any critical comments to the EIA report and/or the expert opinion, a public hearing must take place no later than 35 days from the date when the expert opinion was published. The public can make further comments at the hearing.

**EIA statement**

After the public hearing, the EIA authority issues the “EIA statement” (negative or positive with conditions for realization of the project. The EIA statement is not a permit approving the project. It is an obligatory, but not binding, basis for the subsequent administrative decision(s) necessary for realization of the project (e.g. for land use and construction permits, mining concessions, exceptions and preliminary consents of agencies responsible for air, water, nature, forest, agriculture land, public health protection, etc.).
It is therefore clear that the “EIA statement” cannot be considered a “principal decision” in the sense of the ECJ case law (e.g. case C-201/02, Delena Wells). Due to the fact that any project often requires a number of administrative permits according to the Czech law, it is not always clear which of them should be considered “preliminary”, which “principal” and which “implementing”. However the EIA statement must always be issued prior to each of them.

This concept of an “EIA statement” issued at the end of the (relatively separate) EIA procedure does not, in itself, contradict the requirements of the EIA Directive. However, some requirements of the Directive have to be met in the subsequent procedures, regulated by other laws (see above). This is not fulfilled in many aspects, especially concerning requirements of public participation and access to justice (see below).

**Public participation and access to justice – main shortcomings**

In principle, the Czech legislation EIA Act provides for a good level of public participation in the EIA process itself. However, it causes substantial problems in the development consent and judicial review phases.

As described above, EIA authority publishes the outcomes of the EIA procedure (announcement, EIA report and expert opinion) in the internet and sends it to the affected municipalities, who are responsible for informing the local public on the official notice board and by at least one more “locally typical” way. However, the Czech law does not express the requirement to inform the public in an adequate, timely and effective manner as required by article 6(2) of the Aarhus Convention.

The arrangements for informing the public of decision-making procedures, following on to the EIA process, is not sufficiently clear (a combination of arrangements in several acts.), nor sufficient from the aspect of the requirements of the EIA Directive and particularly in practice.

Pursuant to Article 6(4) of the EIA Directive, the public concerned shall be given early and effective opportunities to participate in decision-making procedures. The NGOs can participate in decision-making procedures subsequent to EIA if they submit written comments during the EIA procedure. According to the relevant sectorial laws, e.g. the Building Act, the participation of individuals in the environmental decision-making procedures is possible only for owners of the real property. Such regulation fails to guarantee participation to persons having an interest in the decision-making process.

This is also connected with the insufficient transposition and incorrect implementation of Article 11 of the EIA Directive (according to which the public concerned must have access to a review procedure before a court of law to challenge the substantive or procedural legality of decisions, acts or omissions concerning public participation provisions of EIA directive. Czech laws or, more precisely, the accustomed interpretation thereof induces a number of problems:
the EIA statements and the screening decisions are not considered “directly reviewable” by Czech courts, due to their non-binding character
- the number of subjects considered to have standing against the development consent is restricted, in comparison to the definition of “public concerned
- non-governmental organisations, in cases when they have the position of a party to the administrative procedure, can only successfully challenge violation of their procedural rights at court; objections concerning material aspects of the development consent are mostly not taken into consideration by courts

Other problems
The EIA Act requires assessment of the cumulative impacts of the projects (also taking into account impacts of other projects – both existing and under preparation). Pursuant to Section 5 para 2, the individual stages of long-time projects shall be assessed separately and within the context of the environmental impacts of the plan as a whole. This is, however, often not fulfilled in practice. One of specific problems at this point is “salami slicing” of transport infrastructure projects (namely new highways). Only short sections of the projects (especially roads) are than assessed and permitted. The environmentally less questionable parts of projects are mostly “logically” authorised and built first, which in fact predetermines the following route of the project even across an environmentally valuable territory.

The EIA Act entitles the competent authority to ask the developer to supply information on the main alternatives to the project. There is a problem with interpretation of the term “main alternatives studied by the developer” both on the national level and in the EIA Directive itself. No real (territorial) alternatives are often assessed in the EIA process. The authorities accept this approach and do not ask for further alternatives. This raises an important conceptual question whether Article 5(3) of the EIA Directive requires that the developer has to study all realistic alternatives of the project. The wording of the EIA Directive (and subsequently the EIA Act) makes the interpretation that alternatives must be presented only when the developer himself decides to “study” them, literally possible.

8. Description of the EIA procedure for R55 expressway
During the EIA procedure for R55 expressway, the following shortcomings have occurred:

a) failure to assess all impacts of the project, mainly indirect and cumulative (Articles 1, 2 and 3 of the EIA Directive)

According to the EU and also Czech legislation, it is necessary to consider the impacts of individual parts of the project as well as the effects of the project as a whole. In the EIA procedure for the R55 expressway, as well as in the cases of many other transport projects, so-called salami method has been used. Only short sections of the expressway were assessed independently.

b) not considering the real alternatives to the project (Article 5 of the EIA Directive, Article 6, paragraph 4 of the Council Directive 92/43/)

In the EIA process, the alternatives of the R55 expressway bypassing the SPA were not assessed. This is contrary to Article 5 in conjunction with point 2 of Annex IV of the Directive,
which requires the investor to ensure, among other things, assessment of alternative solutions, giving reasons for the choice and taking into account the environment. It is also contrary to Article 6, paragraph 4 of the Habitat Directive, according to which the alternative with smallest or no impact on the protected (NATURA 2000) are must always be taken into account.

c) Ignoring the requests and comments of the public (Article 8 of the EIA Directive)

In the positive EIA statement for the R55 expressway segment crossing the SPA, significant amount of the objections raised by the public during the public hearing has not been included. The Ministry of Environment completely ignored all objections regarding variant bypassing the SPA and requirements of additional evaluation of the noise effect on birds.

d) no effective judicial review of the outcome of the EIA (Article 10a (now 11) of the EIA Directive, 9 of the Aarhus Convention).

The lawsuits of the NGO against the positive EIA statement for the R55 expressway section crossing the SPA have been refused by courts with the argument that in order to satisfy the requirements of Article 10a (now article 11) of the EIA Directive and Article 9 of the Aarhus Convention, it is sufficient to review the consequent administrative decisions (see details below).

9. Actions of the public during and after the EIA procedure

In the EIA process, the environmental NGOs claimed to assess variations of the expressway bypassing the SPA, with reference to Article 6, paragraph 4 and paragraph 2 and paragraph 3 of Council Directive 92/43/EEC. Nevertheless, this claim was rejected and Ministry of Environment issued a positive EIA statement for the variant B of the expressway (tube variant) in June 2006. The NGOs have consequently commissioned a comparative study regarding possible alternative bypassing the SPA, proving that this alternative is feasible from the transport (engineering) point of view. It would also decrease the overall costs of the project of about 1-2 billion CZK (40 – 80 million EUR) as it would not require construction of bypasses around local towns.

Lawsuit against the positive EIA statement
The NGO Děti Země (Children of the Earth) filled a lawsuit against the positive EIA statement for the R55 expressway section crossing the SPA. The Municipal Court in Prague dismissed the action on 23rd of January 2007. Municipal Court justified its decision by argument that the contested EIA statement forms only a preliminary basis for a permit (development consent) of the expressway section. According to the court, only the development consent establishes the rights and obligations of the parties, which can be subject to judicial review. The Supreme Administrative Court endorsed the opinion of the Municipal Court and dismissed the appeal. The Court stated that the provisions of Article 9 of the Aarhus Convention and Article 10a of the EIA Directive are intended to protect the rights and legitimate interests of the public however these provisions do not require a separate judicial review of any decision, act or omission.
Lawsuit against the exception from the habitat protection
The NGO Děti Země (Children of the Earth) filed a lawsuit against the decision which granted an exemption to interfere with the habitat of nine critically endangered species of animals for the R55 expressway section crossing the SPA. The Municipal Court in Prague dismissed this action by its judgment of 29th of December 2011. The Municipal Court stated that in the present case the proceeding related to a specific request of the investor and the administrative authorities could not therefore be required to take into consideration alternative variants of the expressway. The Municipal Court also stated that the administrative bodies did not have to connect the procedures for exemptions for the different sections of the expressway, because, in accordance with the Code of Administrative Procedure, it depends on the evaluation of an administrative authority, whether the specific circumstances make connecting the related procedures possible. The Supreme Administrative Court has, however, consequently overruled the decision of the Municipal Court. Although it has not upheld the NGO objection that R55 expressway should have been considered as a whole for the purpose of granting the exception from the habitat protection, it agreed that the facts gathered by the public authorities had not been sufficient for granting the exception with respect to the section crossing the SPA.

Complaint with the European Commission
In May 2007, the NGOs Czech Society for Ornithology and Children of the Earth filed a complaint to the European Commission with the suspicion that the Czech Republic has failed to fulfill its obligations to protect the European network Natura 2000, by not properly assessing the R55 variants bypassing the SPA. The complainants claimed that the construction and subsequent use of the expressway crossing the SPA would have serious negative impacts on the protected area and would threaten the largest population of the Nightjars in the Czech Republic. As the alternative with no impact on the SPA (bird area) has not been assessed, although the NGOs have proposed it, Article 6 (3) and (4) of the Habitats Directive (92/43/EEC) and the Article 5 (3) of the EIA Directive have been infringed (as well as the Czech laws implementing the Habitats Directive and the EIA Directive).

The Commission, has started an infringement procedure with the Czech Republic (it has send both a letter of formal notice and a reasoned opinion, indicating possible breach of the Habitats Directive). However, after the new alternative (with the 6.6 km long tunnel) had been introduced, the Commission concluded that this alternative will not have significant negative impacts on the SPA, and therefore this alternative is not contrary to the EU law. For the reasons mentioned above (negative impacts of this alternative and existence of the variant bypassing the SPA), the NGOs disagree with this conclusion.

Changing of the project by the developer
In the reaction to these steps of the NGOs, the investor has suggested in 2008 another variant of the expressway. This variant is again crossing the SPA, but next to the tube (significantly shorter than in variant “B”), it includes also a tunnel of cca. 6.6 km length. Subsequently, in August 2010 the Ministry of Environment issued another positive EIA statement for this variant.

10. Decision of the environmental authority
In the reaction to the steps of the NGOs described above, the investor has suggested another variant of the expressway in 2008. This variant is again crossing the SPA, but next to
the tube (significantly shorter than in variant “B”), it includes also a tunnel of cca. 6.6 km length. Subsequently, in August 2010 the Ministry of Environment issued another positive EIA statement for this variant.

The Ministry of Environment also approved an exemption allowing the developer to interfere with the habitat of nine critically endangered species of animals for the R55 expressway section crossing the SPA, granted by the Environmental Office. This exemption is, however, still subject to a judicial review (see above).

11. Current status of the case
The R55 expressway variant crossing the SPA with tunnel, authorized by the positive EIA statement of the Ministry of Environment, is now under the permitting procedures. Objections of the NGOs, which enforce the alternative bypassing the SPA, are ignored.

The Ministry of Transport has announced that there are no sufficient funds to commence building of the R55 expressway in the near future.

The case represents a number of shortcomings concerning the implementation of the EIA Directive in the Czech Republic, which are typical namely for large infrastructure (traffic) projects. These are in particular:

- Failure to assess all impacts of the project, including indirect and cumulative;
- The alternatives proposed by the public concerned, with lower negative impacts on the environment, are not subject to EIA;
- Public comments are ignored;
- No possibility of effective judicial review of the outcome of the EIA process.

The remedy of this situation would require both legislative changes (specifications of the EIA Act) and (mainly) changing the attitude of both the administrative bodies and courts to the application of the EU law requirements.
Hungary – Holcim cement factory

1. **Title**
Implementation of the European EIA regulation in Hungary - the case of a new cement factory

2. **Description of the developer**
Holcim Hungária Ltd. is a multinational company with great experience in similar types of projects and with significant financial capabilities. Holcim in Hungary is part of the Eastern-European section of Holcim Group. In Hungary the company has already two cement plants and 16 concrete plants.

3. **Subject of the case**
This is a case of an environmental Impact assessment procedure (EIA) started at 2004, finished in 2008 and still under decision at court.

Holcim Hungary wants to build a new cement plant in a place called “Nyergesújfalu”, in the Danube delta in Hungary. They already have a cement factory not far from there in a place called “Lábatlan”. Based on their explanation after having the new factory (which actually would have a capacity four times larger than the already existing one) they will close the old and outdated one. There are no facts about that issue, no time limits for the closure procedure and it is just mentioned even in the EIA.

The EIA process is already finished. They get the IPPC permit on the second instance from the National Inspectorate for Environment, Nature and Water⁵ (inspectorate), which is the licensing authority on the second instance (we have appealed against the first instance decision).

Our clients are several neighboring municipalities and NGOs working at the local and national level. We appealed at the court against the decision of the inspectorate, and based on the rules of our court proceedings we are the claimant, the inspectorate is the respondent and Holcim is interferer on the inspectorate’s side. The aim of the court procedure is to decide, if the decision (and the proceeding) of the inspectorate regarding the environmental authorization procedure (EIA and IPPC) was in line with the legal provisions or not.

4. **Location of the project**
North-East of Budapest, close to the curve of the Danube. The conveyor belt would go through Natura 2000 sites⁶ and special areas of conservation (SACs). The plant would be a greenfield investment, close to residential areas. On the following pictures the settlement (Nyergesújfalu) is indicated where the cement factory is planned to be realized.

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⁶Effected Natura 2000 sites (the conveyor belt goes through these sites)
HUDI10003Special Protection Area
HUDI20018Special Area of Conservation
Effected Natura 2000 sites (by the effects of the cement factory and the conveyor belt)
HUDI20034Special Area of Conservation
HUDI20030 Special Area of Conservation
On the second picture the settlement and the Natura 2000 sites are visible, and on the third picture the line with the red dots indicates the track of the conveyor belt.
5. **Interested public involved**

There are relatively detailed regulations in Hungary relating to public participation in the EIA and IPPC procedures.

Both, the procedure of screening and of the actual impact assessment have components of public participation, where the public has sufficient time to comment on documentation submitted by the project developer.

In the screening phase the most important provisions relating to public participation are:

- Following the receipt of the request from the project developer the communication of the competent environmental authority published in the office and on the website of the authority must contain a warning that within 21 days the public may make comments on the screening documentation.
- The clerks at the project location and of the potentially affected municipalities, must publish the screening documentation received from the competent environmental authority within five days by posting in it public places and in ways according to local custom.
- Access to the entire screening documentation is ensured by the competent environmental authority within 8 days of its availability.
- The clerks at the project location and of the potentially affected municipalities must publish the screening decision within five days by posting in public places and in ways according to local custom.
- The clerks at the project location and of the neighboring municipalities who receive the EIA documentation must publish it by posting in public places and in ways according to local custom.
- Comments of the public have to be taken into account in merits by the decision making authority.
- The decision is published by the decision making authority and by the clerks of the effected municipalities as well.
In the environmental impact analysis phase the most important provisions relating to public participation are:

- The clerks at the project location and of the neighboring municipalities who receive the EIA documentation must publish it by posting in public places and in ways according to local custom.
- The public has at least 30 days for access to information and commenting.
- Publication of the data of the public hearing in a local or national daily newspaper and by posting in public places by the clerks of the participating municipalities must precede the hearing at least with 30 days.
- Access to the entire EIA documentation is ensured by the competent environmental authority within 8 days of its availability (e.g. the consulted special authority statements are available within five days of their submission).
- The clerks of the location of the project and of the potentially affected municipalities must publish the EIA decision within five days by posting in public places and in ways according to local custom.

During the authorization procedure there have been public hearings organized at the affected municipalities. However these were held during the week, in the morning (in this time most of the people are working and much less people can participate than in the afternoon for example) and the NGOs participating in the procedure are on the opinion that this form of involvement cannot be regarded as effective way of public participation.

In the court procedure we referred on the infringement of the provisions of the Aarhus Convention and the relevant national law transposing the regulations of the Convention into the national law. The investor and the Inspectorate claims however, that there have been more than one public hearing held, at all of the likely effected municipalities, and people could participate, there is no evidence that more would have been participated, if the public hearing would have been held in the afternoon.

6. Estimated environmental impact of the project

We have several arguments in the case, but the two most important which need scientific considerations as well are the air pollution and the nature protection issues.

As regards the air pollution: the debate is about how far the polluting components from the factory will spread, and if this pollution can be allowed in the given area? There were prepared different calculations on the spreading of the polluting components, especially on PM10 and based on these calculations we have now 5 different calculated affected areas which range from 1600 meters to 4700 meters. This is a very important question actually, because based on the national law, in the affected area there are several restrictions, for example it is not allowed to have residential houses and the EIA documentation should have analyze all of these issues. It shouldn’t be mentioned, but the EIA study calculated with the smallest range of affected area.

The largest one is based on the calculations of the National Weather Service, which is the main institute of pollution control and meteorology in Hungary, however not an authority in the procedure. The opinion of the National Weather Service has been prepared on our client’s request in the EIA procedure.
The main problem regarding the air pollution and the calculations of the area affected by the pollution is that the Hungarian regulation does not require one special standard on those calculations; there are several standards which can be used and it is up to the investor to choose from those approved standards.

The court have ordered a court expert in the proceeding who finally told that some of the relevant regulations have been not fulfilled (the way Holcim measured the basic and already existent pollution of the affected area; the court expert prepared a different calculation on the affected area than the calculation in the EIA; he mentioned that there are some data and calculations which are missing from the EIA study, so it is a question, how the inspectorate could properly control the EIA study etc.), but at the end he made a finding, that the EIA study can be accepted regarding air pollution issues.

Following this first expert opinion, the court decided, to order a second court expert on the air pollution issues. The task of the second expert was to decide on the relevant calculations of the extent of affected areas and if the calculation of the EIA study, the calculation of the first expert, or the calculation of the National Weather Service is correct? Finally, this second expert prepared very detailed calculations and determined that the calculation of the National Weather Service shall be accepted.

**As regards nature protection issues:** an 11 km long covered conveyor belt was planned from the mines to the factory. In some places, it goes on the ground and in some places they are planning to build it like a bridge, on pillars. In part it crosses Natura 2000 areas, special areas of conservation (SACs), more hectares of protected forests are designated to cut down, not to mention, that such a huge conveyor belt would be a definitive element of the landscape in the future.

In the EIA process, on the second instance, the inspectorate required an amendment to the EIA study from Holcim regarding those nature protection issues. In 2 months they prepared that more than hundreds of pages of amendment, based on site visits and already existing scientific data. The conclusion of that amendment is that the preparation and the existence of the conveyor belt will not have adverse effects on the effected environment, even; in some extent it will enhance the state of the environment. However even this documentation mention that it was not possible in the two months to make investigations on the whole vegetation period, to estimate which exact animals and plants are living on the affected area and the population of those.

In the court procedure the court ordered a court expert on the nature protection issues as well. This expert made the definite statement that the conveyor belt will have no negative effect nor on the environment, neither on the protected Natura sites. Compared to the whole territory of the given protected site, even if they destroy those where the conveyor belt will be built, it is such a small area, that it is not possible to talk about adverse effects on the site.

Our clients argue against that opinion, claiming, that there are very valuable natural resources on the effected site and the court experts opinion is not grounded from scientific point of view.
7. **Analysis of the relevant national/European legislation**

This case started in 2004 with the environmental authorization phase, continued with the court phase in 2008 and is still ongoing; the court procedure has not been ended yet. Even in this single case there are numerous examples on the wrong implementation and interpretation of the relevant European and national EIA/IPPC legislation and there are also a few examples on the good practice as well.

**EIA legislation in Hungary:**

The EIA directive has been implemented with the following legal acts in Hungary:

- Act LIII of 1995 on the General Rules of Environmental Protection
- Government Decree No. 314/2005. (XII. 25.) on environmental impact assessment and the uniform environmental use permits

The EIA procedure in Hungary is a two-phase process. Phase 1 is a screening or scoping phase that is a preliminary impact assessment for estimating the possible effects of the project. Based on the results of this phase, the authorities determine the exact requirements for Phase 2 that is a detailed impact assessment procedure. If the result of the EIA based environmental permitting process is negative, it practically means a veto for the construction itself.

Designated competent authorities are in the EIA procedure at the first instance the regional inspectorates for environmental protection, nature conservation and water affairs and at the second instance the National Inspectorate For Environment, Nature and Water. It shall be also noted, that these authorities are the main decision-making bodies. However the authorization procedures are rather complex in Hungary with a main decision-making authority and special authorities having a co-decisional role on their special field. The final decision in each phases of the decision making process is a complex decision, which involves the decision of the main and the specialized authorities as well in one decision.

Against the final (second instance) decision there is a right for appeal to the competent county court. The petition shall have no suspensory effect on the enforcement of the second instance decision, however, the court may - based on the request of the effected party - suspend the enforcement of the administrative decision insofar as the petition is decided.

**Example on good practice in the given EIA procedure:**

As mentioned above, legally there is a possibility to request the court to suspend the enforcement of the administrative decision until the final decision of the court in the merit of the case. Based on the Code of Civil Procedure,\(^7\) if the statement of claim contains a request for suspension of the enforcement of the administrative decision to which it pertains, the court shall adopt a decision thereof within eight days of receipt of the relevant documents. Henceforward, the court may order the suspension of the enforcement of the administrative decision - before setting the date of the hearing - at any time upon request.

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\(^7\)Act III of 1952 on the Code of Civil Procedure, §332 (3)-(4).
In the event of adopting a ruling for the suspension of the enforcement the court shall forthwith notify the body of enforcement thereof. In adopting a ruling for the suspension of enforcement the court shall take into consideration as to whether the original state can be restored following enforcement, or whether the damage caused by the lack of enforcement outweighs the loss the suspension of enforcement is likely to entail.

The ruling ordering the suspension of enforcement may be contested separately. If a party, whose request for the suspension of enforcement has been refused, submits another request for suspension of enforcement under the same cause of action and legal basis, the ruling on refusal of the request for suspension of enforcement may not be appealed separately. The court’s ruling ordering the suspension of enforcement may be executed irrespective of any appeal.

So it is up to the court to decide if the argumentation of the given party can be accepted or not, if the original state can be restored following enforcement, or whether the damage caused by lack of enforcement outweighs the loss the suspension of enforcement is likely to entail.

In the past we have had numerous cases, where we requested the suspension of enforcement of the administrative decision, but the court rejected our request. In these cases at the end of the court procedure, independently from the final decision of the court, the investment has been usually realized, so the decision of the court does not have any effect in the merit of the case.

This means, when the court finally stated, that the rules of the EIA procedure has been breached, e.g. the public has not been involved, the transboundary effects has not been taken into account, the procedural rules of the relevant legislation has been violated or the investigation of the possible adverse effects of the project has not been measured properly, this judgment have had only theoretical significance, because the contested investment has already been realized.

In this given case we also requested the court to suspend the enforcement of the administrative decision, granting environmental permit at the end of the EIA/IPPC procedure to the cement factory. With its decision the court finally suspended the enforcement of the environmental permit. Based on the reasoning of the decision, the realization of the construction works of the cement factory would cause irreversible effects in the wildlife and nature of the effected territory. In our request for suspension of the enforcement of the administrative decision we referred to the interests of nature and wildlife protection, while the investor referred to its own economic interests. The court finally stated that nature conservation interests take precedence over economic interests.

Thanks to this decision, the construction of the cement factory (42 hectares of green field investment) and the 11 km long conveyor belt has not started yet; the case is at the court from 2008 until now (2012). In the last years the court carried out a very detailed taking of evidence process relating to nature protection and air protection issues and the final judgment can be expected this or next year.
Failures of the national EIA legislation and implementation

Based on this given practical case we can list number of failures of the national EIA legislation and failures of the implementation. These are:

- question of independence of the EIA documentation and the supervision of the documentation by the relevant environmental authority
- the involvement of court experts and the cost of this expertise
- interpretation of associated works and estimation of cumulative effects

a) Question of independence of the EIA documentation and the supervision of the documentation by the relevant environmental authority

It is a fact that in those cases, where a preliminary impact assessment study or environmental impact assessment study has to be prepared and is required by law it is prepared by the relevant investor. Developers can prepare this documentation by themselves, or - this happens in most of the cases - they commission an environmental expert or company to prepare this documentation.

Based on the Hungarian EIA legislation there are detailed requirements relating to those, who are qualified to prepare such EIA documentations, however based on our experiences we never met any EIA documentation which finally stated, that the given planned activity will have such significant effects on the environment which cannot be authorized.

With other words: with the commissioning of a relevant expert developers usually expect a result, namely, that the given activity they are willing to fulfill, will be authorized and can be realized following the required authorization procedures.

It is the task of the relevant environmental authorities to check the validity of the documentation, however the workload on the administrative authorities is very high and the financial resources of the authorities are very limited (e.g. to get external expertise to supervise the content of the EIA documentation). This results in some cases the impairment of the credibility and validity of the final decision.

b) Involvement of court experts and the cost of this expertise

Based on Act III of 1952 on the Code of Civil Procedure (section §177) in the court procedure if any special expertise is required in the proceedings for the establishment or judgment of any relevant fact or other circumstance which the court is lacking, the court shall appoint an expert. Normally one expert shall be employed; more than one expert may be appointed only in connection with different subjects for which special expertise is required.

The court may appoint the expert from the register of forensic experts, or a business association or institution registered in the register of forensic experts, or a government body, institution or organization so authorized in specific other legislation. Other experts may be appointed only in the absence of the above, under exceptional circumstances.
Failing an agreement of the parties, the expert shall be selected by the court. In the latter case, the parties shall be heard as regards the appointment of the expert, if deemed necessary.

Where so justified in view of the complexity of the case, or by the estimated volume of work the expert is likely to face, the court - at the party’s request, after hearing the expert if deemed necessary - shall instruct the expert to draw up a preliminary action plan outlining his functions and the estimated costs and expenses involved. After studying the action plan, the party adducing evidence shall announce if he requests the expert to proceed. The costs of drawing up the action plan shall be advanced by the party adducing evidence.

In most of the EIA cases it is unavoidable to involve a court expert. In the given case of the cement factory an expert on the nature protection issues and two experts on the air protection issues have been involved. The task of these experts was to decide if the statements in the EIA documentation and in the final decision of the environmental authority granting permit to the activity are scientifically grounded or not, can be accepted or not.

The cost of this taking of evidence process is now above 2,5 million HUF (about 8500 EUR), which would be a basic obstacle in those cases, where the plaintiff is a private individual or an NGO (and not several municipalities and NGOs like in the given case).

Because on general principle the facts based on which the case can be decided shall be adduced by the party bearing a vested interest in persuading the court to recognize them as true, when the relevant party does not have financial resources to pay for court experts, it will finally lead to the loss of the lawsuit.

**c) Interpretation of associated works and estimation of cumulative effects**

One of the most important questions in the given case is to decide which works of the investment can be regarded as associated works.

There is a cement factory planned, there is an 11 km long conveyor belt planned (which connects the factory to the limestone mines), and there is a need to extend the capacity of limestone and marl-pits to four times bigger than before the investment. Based on the opinion of the investor this is a totally separate investment from the construction of the cement factory and cannot regarded as associated works, and the environmental effects of the extension of the mines shall be considered separately from the effects of the planned factory and the conveyor belt.

Based on the Note of the European Commission in this regard, we argued in the court procedure, that those parts of the investment (cement factory, conveyor belt, extension of the exploitation capacity of the mines) should have been regarded as associated works and all of their possible effects should have been considered collectively.

Based on the opinion of the developer only the cement factory and its potential effects on the environment shall be considered, and based on the opinion of the investor the conveyor belt shall not regarded as part of the investment, because due to the EIA law only cement factories above a certain production limit require EIA, conveyor belts doesn’t need an EIA.

In our opinion the national legislation is not appropriate in this regard and is not in line with the provisions of the EIA directive. Based on the Government Decree No. 314/2005. (XII. 25.) on environmental impact assessment and the uniform environmental use permits only those facilities can be regarded as connecting facilities which are all realized on the installation site and only those works can be regarded as associated works, which (inter alia) are all realized on the same or neighboring properties.

Based on the practice, this definition excludes all of those activities and facilities which are planned to realize in the framework of the same investment, but are not planned on the same property or on the neighboring properties. In our point of view, facilities which are optionally kilometers from each other can be regarded as associated activities as well(certainly based on the given circumstances) where, based on a center of gravity test, the associated works are inextricably linked to the main works. Certainly this question needs in the practice a case-by-case evaluation.

8. Actions of the public during the procedure

During the procedure the interested public of the effected municipalities have participated very actively. There have been public hearings (see at point V.) and also demonstrations and protestations organized against the investment and we can say that the project intensively divided the local community.

Finally two local and one national NGO and four local municipalities decided to challenge the final decision of the environmental authority (authorizing the investment) at the court, referring on procedural and substantive failures of the administrative procedure.

9. Decision of the environmental authority

As presented above, the environmental authority finally authorized the investment and granted permit to the new cement factory.

10. Current status of the case

The case is under judicial revision since 2008.

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10 Article §2. Para 2, point d), e).
Romania – DN 66 National Road

1. Title

Construction of DN 66A Câmpul lui Neag Valea Cernei – National Road

2. Description of the developer - who is the developer, relevant experience in the same type of projects, financial capabilities, known attitude towards environmental protection, etc.

The developer is The National Company for Highways and National Roads (NCHNR). It is functioning under the authority of Minister of Transport and Infrastructure but if has a financial and economic autonomy. NCHNR has extensive history regarding such projects as it is its main object of activity.

3. Subject of the case: description of the project, if it is national, local, transborder, etc.

DN 66 is a National Road. The project is of national scale. The road is passing through several Natura 2000 areas. The project was split in 4 sections by the developer. The first two sections were already built. The third one obtained the EIA permit in 2011 and the SEA permit in 2012.

In 1999 the Romanian Government decided to change the nature of the road passing through the same area from “forest road” to „national road”. When the permitting procedure started, the authorities claimed they are not building a new road but they are rehabilitating the old one. Therefore no permitting procedure was done for the first section of the road.

The building of the second section of the road was started also without any permitting procedure and no environmental assessment. We don’t know in what year the building started. In 2008 for the remaining part of the second section, an EIA permit was granted.

In fact, considering that the old road is a forest road, this is a false affirmation. A national road is considerably larger (about 10 m large) and asphaltic structure instead of earth or rocks. The area occupied by the national road, DN 66 is of 29.43 ha compared to the surface occupied by the forest road of 11,20 ha.

NGOs participating in the EIA procedure claimed that the DN 66 is not following exactly the old forest road, going through a path that will produce even more damage as it will destroy the untouched forest sites.

The goal of this road is to shorten the distance with 100 km between the village Râul Morii and Băile Herculane, a small village of 9000 inhabitants, also known as holiday and therapeutical resort due to the old thermal bath and mineral waters.
4. **Location of the project – geographical area: if it is urban, if it is a natural protected area / what kind (Nature 2000, national park, natural reservation, etc.)**

The third section, which is object of the 2011 EIA permit, threatens to destroy the habitat of several species of fauna and flora and also “untouched forests”. It is actually dividing in two a wide natural area where several Natura 2000 sites were set up. The road goes from the village called Râu de Mori to the City Bâile Herculane. The Natura 2000 Sites that DN 66 is passing through, are Nordul Gorjului de Vest and Domogled Valea Cernei. The neighboring sites are: RetezatMountains, Mehedinți Plateau, ȚarcuMountains and Rusca Montana – Țarcu – Retezat Coridor. The Natura 2000 Sites can be better observed at this link: http://natura2000.eea.europa.eu/#
5. **Interested public involved**

Several NGOs participated into the EIA procedure for the third section of the road. As most of the road is passing through the forest there are very few inhabitants in the entire area. We doubt that any other interested public was involved. However, until today, although the case had several hearings in court already, the documents from EIA procedure were not entirely released to the public as for example: comments of the public, list of participants to the public debate, etc. Therefore, besides the NGOs, we are not aware of other interested public participating in this procedure.

6. **Estimated environmental impact of the project**

NGOs participating to the procedure showed that the habitats in all Natura 2000 will be severely affected as the habitats will be actually split in two parts. There were identified by the NGOs 9 protected habitats likely to be affected by this project (the most important is Habitat no 9180* **Tilio – Acerion Forests**), one amphibian, 4 reptile species, 4 birds species from Annex 1 of the Birds Directive, 13 mammals species, 25 species of plants protected at national level. The untouched forests will be destroyed both by the construction of the road and by the tourism that will dramatically increase in the area. According to the environmental permit, over 17 ha of forest that is protected according to the Habitats Directive, will be cut.

7. **Description of the EIA procedure emphasizing the illegalities/shortcomings/gaps in transposition**

Several illegalities were done during the EIA procedure:

1. **The “Salami Slicing” practice**
   
   The most obvious violation of the law is that the project was split in 4 sections. The discussed “salami slicing” procedure is denied by the authorities that are claiming that it is legal to carry out EIA procedure for different sections of the road. For the first section of the road and for a part of the second one (we don’t know how much it was built until the EIA permit was granted in 2008) there was no EIA procedure. EIA procedure finalized in 2008 with an environmental permit was done only for that remaining part of the second section of the road. The EIA procedure was enforced in Romania for the first time in 2002 through Order no 860/2002 issued by Minister of Environment.

2. **Violation of Birds and Habitat Directive – no adequate evaluation**
   
   a. The second very serious violation of the law was that no adequate evaluation was done for the protected habitats and species. Although the legislation reading the adequate evaluation was enforced in Romania in 2010 and the EIA permit for the third section was issued in 2011, the authorities claimed that the adequate evaluation study is not mandatory because the project started before these provisions of law were enforced. However, art 49 paragraph 3 from Order no 1284/2010 regarding the EIA methodology, requests that all ongoing EIA procedures must be updated according to the latest changes in the legislation. These changes are the enforcement of the EIA directives transposition measures in 2010 and 2011 and also the adequate evaluation procedure. For the protected species only a brief biodiversity study was done.
3. **Failing to analyze all direct and indirect effects of the project**

Another problem of the EIA procedure was that the impact over the neighboring Natura 2000 Sites (Mehedinți Plateau, Țarcu Mountains and Rusca Montana – Țarcu – Retezat Coridor) was not analyzed. The authorities claimed that they are two far from the road, 10 to 14 km. At least for Retezat Mountains Natura 2000 Site this is not true. The road is passing very close to the limit of this Natura 2000 site. Some NGOs claimed that a short sector of the road is in fact inside The Retezat Mountains site. However the authorities are denying such claims. They also failed to explain why the animals belonging to protected species would not travel 10 – 14th km, especially the bears, the wolfs and other large animals, to cross over in Domogles Valea Cernei Site and DN 66 Road. Viaducts and crossing for animals were included into the project. However, they are too small to be used by large mammals and too few for smaller species.

Tourism and climate changes are two chapters missing in the EIA Study. If the experts are mentioning that tourism is regulated in the SEA permit (not existing when the EIA Study was done. It was granted in January 2012), climate change is not mentioned at all.

4. **No study regarding the cumulative effects**

During the EIA procedure the experts didn’t considered necessary to analyze the impact of building this section of the road and the impacts of the other three sections. No other project planned for the same region was analyzed. The experts stated that such analysis has to be done under the SEA review.

5. **No real study of the alternatives**

The alternatives of the project were not legally analyzed. First of all there were no alternatives for the entire road since there was no EIA done for the entire project. Secondly the alternatives were set up in such way that the only viable choice was to build the road. Alternative 0 was dismissed because the road is only a “forest road” and is not in accordance with the Governmental Decision 856/1999 that is classifying the road as a national road. The first alternative was the one chosen, to construct the national road more on less on the same route like the forest road. The third alternative was a different route but also inside the Natura 2000 Sites. No alternative analyzed considered a route outside the protected areas.

6. **Regarding the participation of the public to the procedure:**
   - Not all relevant documents were posted on the website. Some documents were not released not even during the judicial procedure in front of the court
   - The public was not invited to the procedure. The developer and the authorities only informed the public posting some announcements on the website
   - The comments of the public and their observations and suggestions were not taken into consideration

8. **Analysis of the relevant national/European legislation**

EIA Directive is transposed through the Governmental Decision 445/2009 and Order of the Minister no 1284/2010.

*Communication of the relevant documents and the public announcements*. The methods used by the authorities to inform the public are not aimed to encourage public participation.
The documentation produced in the EIA process is not always posted on the authority's website. Even if it is posted it is very difficult to find out in time because notifications are not sent even to the public that asked to be considered interested public. In big controversial projects sometimes this is happening but not entirely. The authorities might inform you on certain aspects and might “forget” other important issues. This is possible because in Romania there is no provision of law regulating the public participation procedure in accordance to the Aarhus principles. The website are also very disorganized all documents for EIA procedures going on or finished are all posted on the same page in such a way that it is confusing and nearly impossible to find out in time that an EIA procedure for a certain project started. The public is never invited to participate into the procedure for a specific project. If it happens that someone is seeing the announcements on the website or in the newspapers there might be some public involved but most of the time there isn't any.

The time frame for public participation in Romania is not sufficient and it is not early public participation:

First phase is the notification and initial evaluation
A notification is made by the developer regarding the intention to realize the projects. In this phase there is no public participation. The authorities will decide if the project is or it is not subject to EIA or adequate evaluation procedure. The authorities can reject in this phase the request of environmental permit for the locations where the development of the project is illegal.

Screening phase
Regarding the screening decision, the public can make comments in 5 days since the announcement regarding the release of the draft decision was published in newspapers, webpage of the competent environmental authority and local authority's offices from the location of the project. The public authorities have 10 days to convocate the technical committee who will analyze the comments and suggestions of the public and will make a final decision. This will be published only if the committee will reconsider the decision according to the comments of the public.

The next phase in the EIA process is scoping and EIA assessment.
There is no public participation in scoping. The authorities are reaching the decision related to what information should be included into the EIA report in a technical committee meeting where the public is not invited to participate. A letter is sent to the investor informing him about the committee’s decision. Based on this letter the developer will realize the EIA Report.

The third phase of the EIA process is the analysis of the EIA Report.
In 5 days since the developer submitted the EIA report, it must be released to the public and the members of the technical committee. In the same 5 days the authority has to send the developer the announcement of releasing the EIA report and the date of the public debate. The developer must also publish the announcement in local or national newspapers (the developer is left to decide where) on its own webpage and local authorities offices from the location of the project in 3 days since he received it from the competent authority.
The announcement regarding the opportunities of the public to participate in the decision making procedure is to be made with 20 days before the day when the public debate will take place. The competent authority will publish the announcement on the webpage and it will be made available in the authority’s office.

The public can make comments until the day when the public debate takes place.

The public debate will be considered closed if in 60 minutes no members of the public will appear. If members of the public are present, the developer will answer to all questions of the public. In 20 days since the public debate the authority must sent the developer all questions and comments of the public and the developer will have to answer. In 10 days since the competent authority is receiving the answers, will convoke the technical committee who will reach a decision regarding the project in the same time frame. The decision is communicated to the developer in 15 days since the decision was made. In three days the developer will publish in local or national newspapers (the developer is left to decide where), on website and to local authority’s offices the announcement regarding the decision of the public authority. The public can comment the decision in 5 days since the announcement was done. The public authority may decide to recast the EIA procedure from a specific point according to the public’s comments.

If during the analysis of the EIA report the committee decides that modifications are needed, then the modified report will be posted on website for 15 days for the public to be informed.

The environmental permit will be issued or the decision to refuse the request for EIA permit in 5 days since the deadline for the public to comment the decision was done.

9. Actions of the public during the procedure
The NGOs that participated into the procedure made a shadow EIA report. They were also involved in the public debate. Demonstrations against the construction of the road and media campaigns were also done.

10. Decision of the environmental authority
The National Environmental Protection Authority granted the EIA permit rejecting all arguments of the public. The arguments of the public who completely opposed to this project was that the surface occupied by DN 66 is very small compared to the size of the protected areas, therefore there will be no negative impact over the environment.

11. Current status of the case
The environmental permit was attacked in court by all NGOs that participated in the EIA procedure and also by Greenpeace CEE Romania. The injunctive relief was denied by The Court of Appeal on October 19th 2012, case no 1751/2/2012. The same case regards the annulment of the environmental permit and is still on trial. During the procedure an expertise might be necessary but we still don’t know if it will be possible because it will involve several judicial experts. Some specialties are not covered in this list so that we might have to ask professors or well-known specialists to participate if the court would allow their participation. In other previous cases the courts allowed, in the absence of judicial experts, specialists authorized to do environmental reports. The very same experts that are hired by the developers to make the favorable assessments that would grant then the EIA permit.
The conclusions of the experts in such situations are favorable to the investor. The cost of one judicial expert might be between 300 and 1000 euro per expert. The cost of a different expert might be extensively higher starting with at least 1500 euro.In EIA cases there is usually more than one expertise to be done, so the costs will go a lot over NGOs financial resources.

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