

Conformity of the EIA Directive with the Aarhus Convention

Position Paper

EIA

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Introduction

The EU is a party to the Aarhus Convention and thus has to adhere to the standards set out by the Aarhus Convention, which are specified by the case-law of the Aarhus Convention Compliance Committee. Whilst the previous amendments of the EIA Directive were steps in the right direction, there are still some deficits concerning the complete and precise transposition of the public participation and access to justice guarantees provided for in the Aarhus Convention.

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These deficits are identified in detail in the related study on the conformity of the EIA Directive with the Aarhus Convention and can be summed up as follows:

The guarantees of the Aarhus Convention apply to decisions on projects listed in Annex 1 of the Convention. These decisions include so called “screening decisions”, by which Member States decide on whether or not a certain project must undergo an EIA procedure. The present provisions of the EIA Directive do not (explicitly) provide for public participation and access to justice for these screening decisions. In order to establish a clear and transparent framework transposing the Aarhus Convention, we propose to explicitly include screening decisions in the provisions of the EIA Directive providing for public participation and access to justice. The same standards should be applied when Member States set certain thresholds or criteria to determine whether or not EIA is necessary (Art 4 (2) b EIA Directive).

Next to determining when public participation procedures are necessary, the Aarhus Convention also prescribes how public participation should be conducted. According to the Convention and the case-law of the ACCC, i.a., public participation must take place at an early stage, when all options are open. This prohibits provisions allowing public participation to take place after construction of a project has already started. Further, the outcome of the public participation must be taken into due account. These obligations are not transposed by the current provisions of the EIA Directive, we thus propose amendments of Art 1 and Art 6 EIA Directive as stated below.

Another crucial issue is access to justice. The scope of application of Art 11 must be widened to include screening decisions. Furthermore, the EIA Directive should set stricter requirements concerning the review procedure itself: It must be ensured by EU law that review procedures are effective, which, according to ACCC case-law, includes injunctive relief and/or suspension of the development consent until the final review decision has been taken. Effective access to justice demands that the project may not be executed before the review procedure has been closed. In order to further the effectiveness of the EIA Directive, clear (minimum) time-frames for review procedures should be set.

We welcome the process to revise the EIA Directive initiated by the European Commission and hope that the study we provided will be used as guidance for drafting a new EIA Directive. In order to ensure compliance with the Aarhus Convention and thus avoid international responsibility for non-compliance with an international treaty, it is mandatory to adhere to the case-law of the ACCC. By taking the case-law of the ACCC seriously when revising the EIA Directive, the EU has a chance to – next to fulfilling an international obligation – once again function as a role-model for non-EU-countries within in the UN-ECE region when it comes to public participation and access to justice standards.

On the long run, given the need for clear and precise provisions governing EIA procedure on a European level, the European Commission should also consider the possibility of transforming the EIA Directive into a Regulation.

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