

# Commission Proposal for a New EIA Directive

Position Paper

EIA

*Justice and Environment 2012*

# COM(2012) 628 final, Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EIA Directive)

## Position Paper

### 1. Introduction

Justice & Environment (J&E) has welcomed the European Commission proposal for a revision of the EU Directive on Environmental Impact Assessment (EIA) released on 26.10.2012. We consider that the proposal in many respects represents an improvement on the existing EIA Directive, attempting to address many of the shortcomings we have criticised over the years. However, we are concerned that a number of shortcomings remain, especially relating to public involvement in the process as well as access to justice against screening and permit decisions.

### 2. Improvements

As far as we are concerned, the following improvements can be identified in the Commission's proposal:

- The **scope of application** of the Directive is widened in some aspects: Firstly, the definition of a "project" that may need to undergo EIA is amended to include "demolition works". Secondly, the exemptions from the application of the EIA Directive are narrowed by the proposal: Projects serving national defence and projects that are the response to civil emergencies can be excluded from the Directive only if they **solely** serve the mentioned purpose. Projects adopted by an act of national legislation can only be exempted from the Directive **if** the legislative process achieves the objectives of the EIA Directive – prior to the amendment such projects were deemed to achieve those objectives ex lege.
- **Screening procedures:** Member States have to determine whether projects listed in Annex II should undergo an EIA. The **criteria** for whether or not a project should undergo an EIA procedure are listed in Annex III EIA Directive and **are now more specific**. The proposed text includes new aspects to be taken into account, such as hydromorphological changes, disaster risks, climate change aspects, and cumulative impacts of the project. According to the proposal, **developers are obliged to provide detailed information** on their project for screening procedures in order to enable the authority to make an informed decision. The relevant information is listed in Annex II.A and includes, i.a., characteristics, location, and likely environmental effects of the project as well as measures envisaged to avoid or reduce those environmental effects. The proposal also introduces provisions governing the screening decisions itself: Such **decisions must include** specific information on the project and the **reasons why EIA was deemed necessary or not**. Further, the screening decisions must be taken **within 3 months** after all necessary information has been provided by the developer, in exceptional cases that deadline can be extended by a further 3 months and the **decision must be made available to the public**. If the result of the screening procedure is that no EIA is necessary, the decision must include "a description of the measures envisaged to avoid, prevent and reduce any significant effects on the environment".

This can be read as a new obligation of the Member States to responsibly consider environmental effects even outside the scope of application of the EIA Directive.

- The proposal amends Art 3 EIA Directive, which defines the aims of Environmental Impact Assessment. **The new definition includes “population and human health”** into the factors that have to be taken into account. It is unclear how this term differs from the before used term “human beings”; it is however assumable that the new definition is wider, taking into account non-health related aspects. Also, Art 3 EIA Directive now explicitly refers to the **species and habitats** protected under the EUs Birds-Directive and the Habitat-Directive, **climate change aspects** and certain aspects concerning “man-made disaster risks”.
- **Coordination with other environmental EU Legislation:** Next to the inclusion of the specific issues governed by the Birds-Directive, the Habitats-Directive and the Marine Strategy Framework Directive into the factors that have to be taken into account in an EIA, the proposal also provides for procedural coordination with other EU legislation demanding an assessment of the effects of a project on the environment. Art 2 (3) of the EIA Directive as amended by the proposal provides that where EU legislation provides for more than one environmental assessment concerning a specific project, Member States have to introduce either a coordinated or a joint procedure. In the joint procedure, only one EIA is issued by one authority to fulfil all relevant assessments requirements. In the coordinated procedure, the assessments made by various authorities shall be coordinated. This procedures, in our opinion, may lead to a more thorough and holistic examination of the environmental impacts of a project.
- According to the Commission’s proposal, the **environmental report prepared by the developer has to include more and detailed information** concerning, i.a., considered alternatives to the project, including the baseline scenario, climate change impacts, greenhouse gas emissions, hydromorphological changes and uncertainties involved in the scientific forecasting methods used and the possible impacts of these scientific uncertainties. Also, disaster risks must be taken into account. The authority must ensure that the information provided by the developer in the environmental report is up-to-date. All these information obligations of the developer may lead to a more informed decision of the authority.
- **New time-frames:** The proposal introduces time-frames for public participation. The phase for public consultation on the environmental report shall not be shorter than 30 and longer than 60 days and can – in exceptional cases – be extended by 30 days. The time-limits for screening decisions (from 3 up to 6 months) were already mentioned. In EIA procedures, the deciding authority must conclude its EIA within 3 months after all relevant information has been gathered. This deadline may be extended by further 3 months. Clear time frames are important for well-structured participation processes. However, it is questionable whether – in very exceptional cases – a maximum of 90 days is a sufficient time span for effective public participation. Also, it is unclear why the time-spans are measured in months one time and in days another time and if there are any consequences linked to that differentiation.
- **Monitoring:** If development consent is granted even though adverse environmental effects are likely, monitoring measures must be included into the consent. Those measures must also be included in the information made public after the decision.
- To enable the Commission to take action, wherever necessary, Member States must adhere to stricter and more detailed **reporting obligations**. Also, the annexes to the

Directive (Annex II.A concerning the information obligation of the developer in screening procedures and Annex IV information included in the environmental report) can be amended via delegated acts by the Commission and thus the information obligation of the developer may be more easily **adapted to technical and scientific progress**.

### 3. Remaining Deficits

Although the proposal provides for some improvements, there are deficits remaining mainly regarding:

- No amendments to Annex I,
- No provisions regarding the obligation to choose the most environmental friendly alternative,
- No sanctions against the developer who is not respecting the EIA permit obligations
- no clear legal regime defined of the EIA permit and development consent,
- No clear provisions ensuring objectivity and fairness of the EIA report,
- no clear possibilities for the public in the neighbouring countries to participate directly in EIA procedure,
- no clear obligation that the EIA process should take place *before* the project is executed and possible sanctions,
- no provisions preventing the “salami slicing” procedure
- several access to justice issues, like: possibility of the public to challenge screening and scoping decisions as well as the EIA permit including the ones issued through legislative process, effective judicial review including suspensive effect or/and injunctive relief.

According to our opinion, the following points should additionally be included in an amendment to the EIA Directive in order to ensure effective public participation and access to justice and thus provide for effective environmental protection:

- Annex I is not amended by the proposal. However, there are projects having significant impact on the environment that thus should be included in this Annex and undergo mandatory EIA, like shale gases or offshore drilling. In general, the **thresholds** for different activities should also be thoroughly reviewed and possibly lowered during the process of review of the EIA, because they do not correspond to the present needs of protection of environment.
- **The EIA Directive still does not oblige Member States and the national authorities to pick the most environmental friendly alternative** when confronted with a project. The EIA Directive only demands an assessment of the environmental impacts of an envisaged project, **but does not oblige the authority to act upon that assessment**. Even though such provisions exist in certain Member States, the EIA Directive must include such a provision in order to ensure effective environmental protection across Europe. The duty to monitor projects that are consented to even if they have environmental impacts cannot substitute an obligation to pick an environmental friendly project alternative.
- **EIA Directive doesn't require any sanction against the developer who fails to respect the monitoring program or other obligations after the EIA permit/development consent is granted**. In Romania there are examples of such cases or even cases where compensation measures for projects developed in protected areas (Natura 2000), were not implemented. The EIA Directive contains no provision to force Member States to

prevent or apply sanctions in such cases. The public should also be informed about the way the monitoring program is carried out. While the proposal tries to coordinate the provisions of the EIA Directive with those of other EU Directives, some references to EU Environmental Legislation are missing. The EIA Directive should include, i.a., references to the (new) **Energy Efficiency Directive** and the **Water Framework Directive**.

- Next to the obligation to coordinate or join the different assessments of the effects on the environment of the projects, **the directive shall also require that assessments of related plans/programs (SEAs) and projects (EIAs) are coordinated**. If a plan or program, which is subject to SEA according to the Strategic Environmental Assessment Directive represents a compulsory basis for a project, than EIA for such project should not be carried out prior to the SEA. Results of SEA procedure for such plan should be taken into account and respected in EIA for the project which is regulated by the plan.
- **There is confusion between the EIA procedure and the development of consent procedure**. Development of consent is in some countries, (e.g. Romania, Bulgaria) a separate procedure issued by different authorities with no environmental competences. Development of consent is issued after the EIA permit and must comply with the stipulations of the EIA permit. Therefore the result of the consultations in the development consent procedure as it is mentioned in the new introduced letter g of art 1 paragraph 2 can't be a part of the EIA procedure because it is already finished and the EIA permit granted. Provisions of art 8 para 1 point a, b, c and para 2 are also confusing as they refer to including in the development consent (e.g. building permit) the details unspecific for the development consent procedure. EIA proposal should be very clear in defining the so called "one stop shop" procedure, or it will be impossible to apply in some Member States. According to such provisions, the final outcome of the EIA process would be not the EIA permit but directly the development consent (building permit in most cases or other) and that would raise a question mark regarding the competent authority to issue such act: the environmental authorities that would be competent for the EIA procedure or the local or county authorities that are competent for development consents? In any case a mixture of the two will certainly not improve the process and will not realise a better environmental protection.
- Regarding the provisions of art. 2 para 3, **it is not clear why the same authority should deal with the EIA procedure and also with issuing the development of consent, which in most cases are the building permit and how this "facilitation" should be carried on by the Member States**. In Romania such obligation would be very difficult to comply with due to the specific hierarchy and competences of the authorities.
- After introducing the "significant effects" in art 3, **the EIA Directive should provide a definition of such phrase so that it would be clear what are those insignificant effects that could be disregarded in the EIA process**. It is also important to know who and when decides what are the significant effects that are to be included in the EIA report and what are the insignificant effects that are being left out. Reasons for such decision should be provided and the public should have the right to contest such decision in court and to suspend the procedure until it the final decision is reached.
- Regarding the provisions of art 5 para 3, letter a, this provisions are not enough to also ensure the objectivity of the EIA report, nor the quality. In some Member States (e.g. Romania) there is already in place an accreditation procedure of the experts realizing the EIA reports and a technical committee analyzing the report, but the quality of the assessment is very low due to the fact that the accredited experts are hired by the developer directly not to give a fair analysis but to give one that would ensure obtaining

the EIA permit. The technical committees' members are not experts but representatives of relevant institutions and therefore they are not able to contradict the EIA report. **The new proposal should ensure a mechanism that secures the objectivity and fairness of the process, meaning that developers should not be able to make contact with any experts involved in the process, much less to pay them directly.**

- Regarding art 5 para 3 letter b, **it is not clear who the accredited experts used by the authorities might be.** If the experts are accredited on the same list both for the developer and the authorities, the problem of objectivity remains, as the expert used by the authority would not go against the developers that are their potential future clients. It is also not clear why so many experts and analysis are needed, consuming many resources and time, instead of creating an objective process where the developer is not hiring the experts for the EIA report.
- Regarding the provisions of art 7, **the modifications should ensure that the public concerned for the neighboring countries is able to participate into the procedure regardless of the position expressed by the public authorities.** This is a provision needed for compliance with Aarhus Convention.
- **The proposal does not introduce a clear obligation of a developer to undergo EIA or at least a screening procedure before the project is executed.** Provisions of art 8 para 3 "the competent authority shall conclude its environmental impact assessment of the project within three months" might create confusions in some countries like for example Estonia where the authorities are not conducting the assessment but only control whether it was done properly.
- Regarding the provisions of art 9 para 3 they might be interpreted in a way that **the EIA permit is not made public at all and no public notification is issued.** This would constitute noncompliance with Aarhus Convention art 6.9.
- The proposal should describe concrete measures **to avoid the use of the "salami slicing" procedure.** Splitting projects and assessing the effects separately is making the entire environmental assessment pointless and it should be one of the major concerns of the Commission to avoid and sanction the use of such practices in MS
- To comply with the Aarhus Convention a more detailed **public participation framework** should be established by the directive **for screening and scoping decisions** ensuring that the public is taking part in the procedure from the beginning. By including screening and scoping decisions into the procedures for which public participation is mandatory, the Access to Justice problem (see below) could be resolved as well, since the EIA Directive provides for mandatory review procedures concerning all decisions falling within the scope of the public participation provisions of the EIA Directive.
- **Access to Justice:** The proposal does not include a right to challenge screening and scoping decisions for the public concerned. This does not only constitute a breach of the Aarhus Convention, but also contradicts the case law of the ECJ. Such **rights to challenge (negative) screening and scoping decisions must be included into the EIA Directive.** The proposal does not amend the review procedure provided for in Art 11 EIA Directive, even though this procedure does not fully comply with Art 9 (2) and (4) Aarhus Convention, demanding for **effective judicial review of a decision including injunctive relief and/or**

**suspensive effect. There are no minimum time-frames during which the public may initiate review proceedings**, allowing the Member States to set too short time frames, effectively restraining the public from access to justice. We call upon the Commission to introduce such time-spans as well as the duty to provide for injunctive relief when an EIA decision is challenged by members of the public. If the EIA process is not finished by issuing the development consent, the members of the public should have the possibility to challenge directly the outcome of the EIA process (EIA decision issued by the environmental authority) directly, instead of waiting until the development consent is issued. **Regarding the projects adopted through a specific act of national legislation regulated by art 1 para 4, the public should have the possibility to challenge the final decision in court.** Such provision of EIA Directive would comply both with ECJ jurisprudence and Aarhus Convention.

We would welcome amendments to the proposal meeting the critical points mentioned above.

**Contact information:**

**name:** Catalina Radulescu  
**organization:** J&E  
**address:** Dvořákova 13, 60200 Brno  
**tel/fax:** 420575 229/420542 213373  
**e-mail:** [info@justiceandenvironment.org](mailto:info@justiceandenvironment.org)  
**web:** [www.justiceandenvironment.org](http://www.justiceandenvironment.org)

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