



## Justice and Environment and European Environmental Bureau

### position paper regarding the review of the Environmental Impact Assessment (EIA) Directive

**Subject:** Review of the 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

Dear Member of the ENVI Committee,

The European Commission has tabled a proposal<sup>1</sup> on the 16th of October 2012 to rationalize and review the rules and provisions<sup>2</sup> of the environmental impact assessment (EIA) procedure from its grounds.

To the proposal of the European Commission almost 600 amendments have been submitted<sup>3</sup> to the Committee on the Environment, Public Health and Food Safety until today.

Association Justice and Environment, our European network of Environmental Law Organisations, working in Europe and consisting of organisations from different countries dealing with environmental law, prepared a legal analysis and report in 2012 to the proposal of the European Commission.<sup>4</sup> In these papers we analysed and summarized those important issues, which are - based on the practical experiences of our lawyers from different Member States - of specific importance in order to facilitate the review of the Directive towards high level of environmental protection.

Taking into consideration the outcome of our work we would like to highlight the following points which we consider are paramount for a good and useful review of the text of the Directive:

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<sup>1</sup> <http://ec.europa.eu/environment/eia/pdf/COM-2012-628.pdf>

<sup>2</sup> The environmental impact assessment procedure aims to ensure, that projects which are likely to have significant effects on the environment, are subject to the relevant assessment before they are approved. Before any decision is taken to authorize such projects, the likely impacts it may have on the environment (during the construction and operation or following its liquidation) shall be identified and assessed. Developers can adjust projects to minimise negative impacts before they actually occur, and the competent authorities are also entitled to incorporate measures to avoid, reduce or compensate environmental impacts into the approval of the project. During different phases of the procedure members of the public are entitled to participate and give its opinion.

<sup>3</sup> [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0297\(COD\)&l=en#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0297(COD)&l=en#tab-0)

<sup>4</sup> [http://www.justiceandenvironment.org/files/file/2012/EIA%20position%20paper%20new%20Directive%2012\\_1.pdf](http://www.justiceandenvironment.org/files/file/2012/EIA%20position%20paper%20new%20Directive%2012_1.pdf)

## 1. Conformity of the Directive with the provisions of the Aarhus Convention

Based on our practical experiences and based on the relevant case law of the Aarhus Compliance Committee (ACCC) the current text of the Directive does not ensure the full compliance of the Directive with the provisions of the Aarhus Convention<sup>5</sup> regarding public participation,<sup>6</sup> whereas both the European Union and the Member States are parties to the Convention.

### Public participation in screening procedures

**Directive 2011/92/EU Article 2 paragraph (4), Article 4 paragraph (2):** The activities listed in Annex I of the Directive which do not fall under Annex 1. of the Convention are subject to mandatory public participation according to Article 6 (1) b) of the Convention. Permitting procedures for these projects must thus meet the public participation standards of the Convention.<sup>7</sup> The role of public participation in the screening processes of the Directive, including those for Annex II projects and those requiring consideration of trans-boundary consultation obligations, needs to be better defined.

We thus call on you to support amendments of Article 4, Article 2 and Article 7 of the Directive in a way to ensure public participation regarding screening procedures.

### Access to justice in screening and scoping procedures

**Directive 2011/92/EU Article 11:** In the framework of access to justice provisions, the Convention requires the parties, to provide adequate and effective remedies, including injunctive relief as appropriate, which shall be fair, equitable, timely and not prohibitively expensive. Article 9 (2) of the Convention has been implemented through Article 11 of the Directive, and should explicitly include screening and scoping decisions. This will clarify conformance with the Convention.<sup>8</sup> Therefore, members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process in all cases.

Similarly, Article 11 of the Directive is too vague and leaves a too wide margin of appreciation to the Member States and their national laws to decide the exact meaning of fair, equitable, timely and not prohibitively expensive legal remedies.<sup>9</sup>

In order to fulfil the requirement of „effective remedy” and „timely procedure”, the Directive shall include two major points: first of all, there should be a minimum time-span awarded to the public concerned to raise objections against a decision and start review proceedings before a court or another independent body. Secondly, the Directive should prohibit execution of decisions before the review procedure has been closed.

### Time frames for public participation

**Directive 2011/92/EU Article 6 paragraph (6):** The procedure and necessary steps for public participation in the EIA are specified in Article 6 of the Directive. Some of the provisions of the Convention are transposed literally; however, this does not automatically mean that the Convention is implemented correctly. The case law of the ACCC provides a useful guideline for setting time-frames. Whilst the characteristics of a project have to be taken into account when setting a time frame for public participation, a time-span of at least 6 weeks should be provided for in the EIA Directive as a minimum standard to prepare and participate effectively.

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<sup>5</sup> <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html>

<sup>6</sup> [http://www.justiceandenvironment.org/files/file/2012/EIA%20analysis%202012\(2\).pdf](http://www.justiceandenvironment.org/files/file/2012/EIA%20analysis%202012(2).pdf)

<sup>7</sup> Aarhus Convention Article 6. paragraph (1) point b).

<sup>8</sup> Aarhus Convention Article 9 paragraph (2), (3), (4), Article 6 paragraph (1) point (b), Article 6 paragraph (4).

<sup>9</sup> Compared to the provisions of Article 9 (4) of the Aarhus Convention.

### **Effective public participation**

**Directive 2011/92/EU Article 1 paragraph (2) point c), Article 6 paragraph (5):** Based on the provisions<sup>10</sup> of the Convention, public participation shall be provided when all options are open and effective public participation can take place. However in practice, both the provisions of the EIA Directive and the Industrial Emissions Directive<sup>11</sup> can be interpreted in a way that allows for public participation to take place after the project is already constructed or construction works have already started.

Therefore, based on our opinion, the Directive must provide a clear obligation to provide for public participation before any construction work has taken place. The IPPC Directive should be amended accordingly or alternatively, projects covered by the IPPC Directive should be included in Annex I of the Directive.

### **Outcomes of public participation**

**Directive 2011/92/EU Article 8:** Article 6 (8) of the Convention obliges the parties to ensure that due account is taken of the outcome of the public participation procedure. The corresponding provision of the Directive states that the results of the public participation procedure shall be taken “into consideration” by the competent authority. Whilst Article 8 of the Directive could be interpreted in consistency with the Convention, „a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention”.<sup>12</sup>In our opinion, a stronger wording of the Directive would serve legal certainty.

## **2. The quality of the environmental impact assessment studies**

**Directive 2011/92/EU Article 5 paragraph (1) point a):** At this moment the Directive does not ensure that the environmental impact assessment studies prepared or ordered by the developer contain objective, accurate and verifiable data, nor does it ensure that these studies comply with the expected appropriate quality standards (and are not copy-pasted from other studies of different projects).

In order to eliminate these inefficiencies, we encourage to introduce wording into the revised EIA Directive that obliges Member States to ensure the quality control and accountability of EIA studies. This can be ensured for example by establishing a registry of qualified EIA consultants, holding consultants directly accountable for false or fraudulent information or imposing a general code of conduct for EIA consultants.

Another step towards a transparent European EIA system would be to introduce in the text of the proposal the requirement of compulsory online publication of EIA studies.

## **3. Introduction of the alternatives of the proposed project and the requirement of selection of the most environmental friendly alternative**

**Directive 2011/92/EU Article 5 paragraph (1):** The present wording of the Directive does not require developers to take into account more alternatives of the planned project and evaluate them from environmental point of view.

In order to strengthen environmental aspects of project proposals we consider the Directive must require the elaboration and evaluation of project alternatives. This would help environmental

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<sup>10</sup> Aarhus Convention Article 6. paragraph (4).

<sup>11</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), OJ L 24, 290.1.2008, p. 8.

<sup>12</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 50.

authorities to choose and finally authorize the given project alternative, which is less harmful for the environment, based on the relevant guidance documents of the European Commission and on the exact details and place of the given project.

#### **4. Correspondence between EIA and SEA procedures**

Directive 2011/92/EU Article 2 paragraph (3): 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/programmes (SEAs) and projects (EIAs) are coordinated. If a plan or programme, which is subject to SEA according to the Strategic Environmental Assessment Directive<sup>13</sup> represents a compulsory basis for a project, then EIA for such project shall 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.

The amendment of the Directive in this way would terminate current contradictions of practice, where SEA and EIA procedures are launched parallel and irrespective of each other undermining the goals and aims of both Directives.

#### **5. Monitoring measures**

**Directive 2011/92/EU Article 8:** The actual wording of the Directive does not require the elaboration of a monitoring programme within the framework of the EIA procedure and its implementation, although it would serve the prevention and mitigation of negative environmental impacts and an obvious possibility for the relevant environmental authorities and the public concerned to follow up the impacts of already implemented projects.

We consider it necessary to include into the text of the Directive the introduction of monitoring measures in the framework of the EIA study, together with the relevant sanctions for those cases, when the monitoring programme is not implemented properly. Also the public concerned has to be given the right to be informed of the planned monitoring measures and of the implementation of these measures.

#### **6. Amendment of the Annexes of the Directive**

**Directive 2011/92/EU Annex I:** Technical progress and development makes the review of the Annexes of the Directive periodically inevitable. The extraction of unconventional fossil fuels, like shale gas is one of the priorities in an increasing number of the EU Member States, although at this moment we do not have enough scientific knowledge and practical experiences on the long-term consequences of this kind of industrial activities. Therefore we consider it important to include the activity of shale gas extraction into Annex I. of the Directive.

Finally, we would like to highlight, that the above listed and summarized needs for changes in the text of the Directive keep the flexibility of national legislation to adapt the exact text of national regulations to special needs and systems of the Member States. The aim of the revision is not to introduce more stringent regulations regarding EIA procedures, but to create a more effective system with less administrative burdens.

Experiences from practice show, that the current system is not working properly and not as effective as intended by the European decision-makers when they created the EIA Directive. We should learn from the practical experiences, from the practice of the ACCC and of the Court of Justice of the European Union.

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<sup>13</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

**Based on the arguments listed above we kindly ask you to consider these aspects and contribute to the review of the Directive in a way which promotes a high level of environmental protection and eliminates the practical barriers in the effective implementation of the Directive.**

**Please find attached the list with our voting recommendations.**