



## **Friends of the Earth Europe, Greenpeace, Justice and Environment and European Environmental Bureau position paper regarding the Review of the Environmental Impact Assessment (EIA) Directive<sup>1</sup>**

*Based on legal expertise provided by the Environmental Law Service, Czech Republic*

### **Introduction**

We welcome efforts by the European Commission to review the functioning of the Environmental Impact Assessment (EIA) Directive and to identify areas which need improvement. We also appreciate that the Commission has facilitated public consultations through web-based questionnaires.

However, the questionnaire provided does not allow respondents to express opinions on all the important aspects of the Directive, and specifically on its functioning in practice. It also does not allow respondents to provide examples to support their arguments, nor does it provide space for additional comments.

For these reasons we are submitting this paper to highlight what we consider to be the most pressing and important areas for improvement in the EIA Directive, and in standards of environmental assessment and decision-making in general. The document includes short examples illustrating our main points.

### **General evaluation of the EIA Directive**

Despite important problems and deficits concerning the current content of the Directive and namely of its implementation in practice (which are detailed below), the institutes and requirements established by the Directive can be considered as some of the most efficient horizontal measures of environmental protection in existence in Europe. The EIA procedure is in keeping with the polluter pays principle and aims to reduce pressure on the environment. This leads ultimately to social and economic costs for society being reduced.

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<sup>1</sup> This material reflects common experiences of our member organisations and is based on previously published NGO materials, among which the publications of Justice and Environment network (<http://www.justiceandenvironment.org/publications/>) should be explicitly mentioned.

We believe that the basic aims and ambitions of the Directive should be:

- no permit should be issued for any project likely to have significant environmental impacts without prior objective assessment of the project impacts on the environment and human health;
- all possible alternatives to projects with significant environmental impacts must be considered and evaluated, including 'zero'-alternative (no project at all), taking into account economic and social criteria, Best Available Technologies and Best Practice;
- selected and approved projects should be the least harmful alternative and must not represent unbearable burden for the affected territory;
- public participation in both the assessment and decision-making phases must be ensured, so that the public can effectively influence the project when all options are still open.

The Directive in its current form contributes to some extent to meeting these aims and any changes to the Directive text should enhance their achievement.

### **The most important specific issues (problem areas)**

#### **A review of the Directive should ensure the achievement of the following most important specific aims:**

- all Annex III criteria must be considered in the screening procedures;
- national thresholds for Annex II projects must be set in a clear and transparent manner;
- the public should have the right to participate in the screening and scoping procedures;
- screening and scoping decisions should be subject to direct and timely judicial review;
- whole projects must be subject to EIA (not part projects, known as "salami-slicing");
- all potential impacts of the projects (including indirect and cumulative) must be considered;
- all relevant alternatives must be studied and the ultimate choice justified;
- the quality of assessment must be verified and confirmed by an independent body;
- the outcomes of the assessment must be directly used and dealt with in the development consent procedure and must be subject to a direct and timely judicial review.

The above mentioned requirements are specified in the following sections concerning individual stages of EIA procedure and/or problematic aspects of the implementation of the current version of the Directive.

#### ***a) Screening and scoping***

The questionnaire asks if screening and current screening methods ensure that only projects likely to have significant environmental effects are subject to an EIA. In general, we are convinced this is the case. The questionnaire fails however to ask an opposite question – if, and under which conditions, screening ensures that all projects likely to have significant environmental effects are subject to EIA, as the Directive requires. The answer to such a question would be "not always". This is caused, for example, by the fact that in relation to categorical screening, the laws transposing the EIA Directive do not always make clear that all the Annex III criteria must be taken into account.

Some EU Member States do not allow for public participation in the screening/scoping stage. Others do but, contrary to the presumption of access to justice in the Aarhus Convention Article 9, the screening/scoping decision is not subject to a direct judicial review. In both cases, there is a risk that projects with significant impacts on the environment will not be assessed, or that EIAs will not deal with all the important aspects. The exclusion of the public appears to be not in line with Article 10a of the EIA Directive and with the case law of the European Court of Justice (e.g- case C-435/97, WWF and others, ECJ C-213/03; Delena Wells; ECJ C-75/08, Christopher Mellor). Access to justice against

EIA-screening decisions can also be derived from Article 9 paragraph 3 of the Aarhus Convention that provides for access to review procedures against “acts and omissions” that contravene environmental law. Furthermore, screening decisions and setting up Annex II thresholds are “decisions, acts and omissions” falling under Article 6 paragraph 1 b) and are therefore subject to Article 9 paragraph 2 of the Aarhus Convention.

**Holešov industrial estate – the Czech Republic**

*This industrial estate is the largest prepared as a “greenfield” project in the Czech Republic (the total area of the estate is approximately 360 ha). There is a drinking water spring near the border of the zone, which is at serious risk of contamination by industrial activity nearby. A further serious impact of the project is the absorption of large amounts of agricultural land. Despite all these facts, the competent authority decided that the estate shall not be assessed in an EIA procedure. A lawsuit against this “screening decision” was dismissed by the court.*

**Necessary changes:**

The Directive should explicitly express the right of the public to participate in the screening and scoping procedures and enable the public to legally challenge the screening decision.

**b) Necessity to assess the entirety of the project and all its impacts**

Investors often ask for assessment of and, subsequently, for permits for parts of the projects only (namely with regard to traffic infrastructure projects or energy projects). With this approach, known as “salami-slicing”, the less environmentally questionable parts of projects are authorized and built first, making continued development of the project a virtual *fait accompli*, even if, for instance in traffic infrastructure projects, the latter sections traverse environmentally valuable territory, or in the case of large scale energy projects, large amounts of waste are produced with its management submitted to a separate EIA. This is contrary to Article 2.1 of the EIA Directive which requires that “projects” likely to have significant effect on the environment are subject to the assessment.

According to Articles 3, 5.1 and 5.3 of the EIA Directive the developers shall supply the necessary information to assess all important direct and indirect impacts of a project. This duty is often not fulfilled, partly due to the projects being incorrectly defined (see above). The indirect effects of projects and the risks of their accumulation with other projects (planned or already existing) are not being taken into account. For example, when the impacts of new transport projects are assessed, it is not taken into consideration that the implementation of these projects would (directly or indirectly, by means of increased traffic) further increase the environmental burden on the area.

**A5 motorway - Austria**

*The motorway was “sliced” into six different parts and therefore six separate EIA proceedings were held (the A5 itself being only part of the planned Vienna-Brno highway). Separate assessment of different parts of the whole project did not provide for sufficiently comprehensive evaluation of all direct and indirect impacts of the entire project.*

**D8 motorway – Czech Republic**

*This motorway was divided into 7 artificial “projects” for the purpose of EIA and development consent procedures. The most controversial section of the highway, crossing the “České Středohoří” Special Protected Area (SPA), was not assessed in EIA before the developer began construction of another section between Ústí nad Labem city and the edge of the SPA. Meanwhile, development consent for another section was issued which led the highway to the borders of the SPA from the other side.*

**Necessary changes:**

The Directive should explicitly prohibit artificial dividing of the projects for the purpose of EIA and development consent procedures into small parts (“salami-slicing”). It should also emphasize that both direct and indirect (cumulative) impacts should be assessed with regard to the project as a whole.

**c) Assessment of the project alternatives**

The EIA Directive (Article 5.3) requires the developer to provide an outline of the main alternatives to the project and the reasons for choosing the preferred option, taking into account the environmental impacts. The phrasing of the Directive however, makes it possible for investors to argue that alternatives must be presented and assessed only when the developer decided to “study” them. In many cases the responsible authorities accept this approach, despite the argumentation of the public and project opponents that more environmentally favourable alternatives should be considered. This interpretation is not in compliance with the basic goals of the Directive (see above), with Article 5 and Annex II of the Espoo Convention or with the special requirements of other EU environmental norms (see namely Article 6.4 of the Habitat Directive). The project promoter should be required to investigate all reasonable alternatives, and after public participation, to include those reasonable alternatives in the assessment (on the basis of Aarhus Convention Article 6(8) which prescribes that public participation should be taken into due account). The question of what constitutes a “reasonable alternative” should be open to juridical review at the request of the public on the basis of Aarhus Convention Article 9. It is to be expected that an explicit duty to (re-)assess alternatives brought forward by the public during the public participation procedure would motivate developers to be more inclusive in their choice of alternatives beforehand in order not to lose time.

**Augustów city bypass road - Poland**

*In Poland, the law clearly requires that an environmental report includes a description of the alternatives studied by the developer, including a “zero” alternative and a “most environmentally friendly” alternative. There is also a clear requirement to indicate the reasons for the choice made. Despite this, in the case of the bypass road around Augustów city, crossing the Rospuda Valley, all alternatives proposed by the developer and considered by the authorities planned to cross the Rospuda Special Protected Area and were therefore almost equally contrary to site-conservation objectives.*

**Necessary changes:**

The Directive should require developers to present all relevant alternatives to the project and to compare their environmental, economic and social impacts. The Directive should also require that the least harmful alternative is chosen and permitted, including the zero-alternative (no project at all) or, if otherwise, a clear justification is given, that is potentially subject to judicial review.

**d) Overall quality of the assessment (environmental reports)**

The Directive does not include provisions to ensure quality control of the information provided by the developer (EIA report). Some countries have developed such instruments (e.g. the system of “expert opinions” in the Czech Republic or Slovakia) but the independence and objectivity of such evaluation is not always ensured.

### ***Mochovce blocks 3,4 in Slovakia***

*The expert audit of the EIA report and public participation in the Mochovce 3,4 EIA in Slovakia was carried out by consultancy firm DECOM, a 100% daughter company of the engineering firm VUJE, which has a key role in the construction of the power plant. This clear conflict of interest is now pending court review.*

### **Necessary changes:**

A requirement to establish independent systems of quality control of the information provided by the developer should be included into the Directive. It should be emphasized that the persons authorized to carry out such control must not be financially and/or functionally dependent on the developer.

### ***e) Public participation***

The process of EIA falls under article 6 of the Aarhus Convention as a form of public participation during the preparation of a project. The Aarhus Convention recognises that public participation in decision-making enhances the quality and the implementation of decisions, gives the public the opportunity to express its concerns, and enables public authorities to take due account of such concerns.

The EIA Directive should ensure that the public gets sufficient information about the project and its environmental impacts in an understandable form and that it has sufficient time to study it and to send comments. Concerned members of the public should have the opportunity for timely and effective participation in the decision-making process.

The range of shortcomings with regard to these requirements is quite wide, including the following problems:

- documents provided by developers are often very detailed and the accuracy of data included in them is hard to verify;
- timeframes for the public to check the documents and to send comments are too short;
- some of the public concerned is deprived the right to participate in development-consent procedures for various reasons (such as incorrect delineation of the impact area or separation of the development consent procedures from EIA combined with restrictive provisions regulating participation in these procedures);
- public comments are not seriously taken into account.

### ***A5 motorway – Austria***

*In the Austrian A5 highway case, “slicing” of the project into six different parts (see above) made public participation much more expensive and time consuming. Documents provided for each “section” were very detailed with no “non technical summaries”. Moreover, much of the technical information presented was outdated, and technical experts did not have respective authorizations and used wrong figures and assumptions.*

### ***Port of Saaremaa - Estonia***

*In the Estonian Port of Saaremaa case, the timeframes for presenting comments were only 5 days for commenting the proposed structure for the EIA report, 13 days for the EIA report and 16 days for commenting the supplemented version of EIA report. The Ministry of Environment has approved the EIA report without taking comments from non-government organizations into account.*

### ***The Temelín 3,4 nuclear power plant - Czech Republic***

*After publishing the EIA documentation, which according to the promoter consisted of 25 kg of material (a main report of over 600 pages and annexes), the public had the legally prescribed 30 days to react, and not more. This is under Czech law the standard time for any project and may be adequate for small projects with a limited scope, but clearly not for two nuclear reactors. The period for public participation was furthermore chosen during the public holidays (July and August), so that many members of the public only heard about the publication late or had limited time available to react. The public needs to have time to read the material, analyze it, have the possibility to acquire independent expertise, and to react.*

### **Necessary changes:**

The Directive should set minimum timeframes for the public to comment on the materials in the scope of EIA and development consent procedures. It should stipulate that the timeframes used must be proportional to the magnitude and complexity of the project. It should also explicitly require that the public concerned must have the right to participate directly in the development consent procedure (not only comment on the EIA report) and have access to justice on both the EIA and development consent procedures. The directive has to be brought in line with the interpretations of the Aarhus Convention Compliance Committee.

### **f) Access to judicial review**

According Article 10a of the EIA Directive, and in conformity with the requirements of the Aarhus Convention, concerned publics 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 the EIA directive. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

This provision is often not correctly implemented in practice, as the following problems illustrate:

- the screening and scoping decisions are in some Member States not subject to (direct) judicial review; the same applies to the final outcomes of the EIA procedures in the Member States in which EIA is a separate procedure (not integrated in the development consent);
- if EIA is separated from the development consent procedures, it is also common that the scope of subjects who have legal standing to appeal against the final development-consent ("principal decision") is restricted, in comparison to the definition of "public concerned" in Article 1.2 of the EIA Directive;
- in some countries, the scope of arguments which some subjects (neighbours, NGOs) can present in court is restricted;
- the judicial protection is often not efficient and timely, in particular because preliminary measures are not taken (injunctive reliefs not granted to the lawsuits);
- in many jurisdictions, access to justice is prohibitively expensive for affected publics or NGOs.

### ***motorway cases – Czech Republic***

*In the Czech Republic, lawsuits were submitted against EIA final opinions concerning **R52 and R55 high-speed roads, D1 motorway extension, and the Holešov industrial estate** screening decision. All these lawsuits were dismissed as "premature".*

### ***restrictive legislation and case law – Austria, Czech Republic***

*According to **Austrian** legislation, the affected individuals (e.g. landowners) may only ask for a review of infringement upon their ownership rights and rights to protection of health. They cannot object to violation of other provisions of environmental laws. In the **Czech Republic**, the NGOs can, according to the prevailing case law, only successfully challenge violations of their procedural rights;*

*objections concerning substantive shortcomings of the development-consents are often not taken into consideration by the court.*

**Necessary changes:**

The Directive should include a provision stating that the review procedures before court shall provide adequate and effective remedies, including injunctive relief (as Article 9/4 of the Aarhus Convention requires). It should be also guaranteed that all important outcomes of the EIA and decision making procedures are subject to review early enough after they are issued.

**g) EIAs on transboundary projects**

In the countries where EIA is separated from development consent procedure, the Member States concerned and their citizens can participate in the EIA itself, but not always in the subsequent decision-making procedures. Furthermore, translation problems occur in many transboundary procedures. Due to the complexity of EIA-procedures public authorities lack resources to translate the full EIA-documentation, making public participation meaningless.

Next to that, the rights of the public from the neighbouring Member State to participate in EIA and development consent procedures for projects with transboundary impacts should not be fully dependent on action or inaction of the authorities of the affected Member State according to Article 7.2 of the Directive. The Directive's wording derives from the Espoo Convention yet it ignores a central aspect of the Aarhus Convention that gives the right to participation and access to justice also to the public concerned outside a certain country. It is the discretion of the public concerned and not of a state whether to participate in a transboundary procedure or not.

**R52 high speed road – Czech Republic**

*In the screening stage of the EIA procedure for the R52 high speed road in the Czech Republic, the Austrian ministry (referring to the Espoo Convention) indicated that Austria wished to participate in the procedure and Austrian administrative bodies, municipalities, and NGOs sent their comments (although the EIA documentation was provided to the Austrian authorities only in Czech language). Despite this, the EIA was not carried out as a transboundary procedure, and no explanation was provided for this omission.*

**Necessary changes:**

Citizens from the neighbouring Member State should have the right to participate in EIA and development consent procedures for projects with transboundary impacts even if the Member State in question remains inactive and does not initiate consultation. An amendment to the definition of the “public concerned” should be considered with that regard. In line with the polluter pays principle the developer shall be responsible for providing translation of EIA documentation.

**Synergies of EIA with other environmental assessments and with development consent procedures**

**a) EIA and other environmental assessments**

Part III of the questionnaire includes questions concerning the possible improvement of the synergy of EIA with other environmental assessment procedures and relevant EU policies and directives. However, for practical reasons, the current review should aim for a better coordination of these individual assessments, but not for their unification. The risk of streamlining impact assessment procedures is that the quality of such assessments may be diminished due to lack of know-how and experience in authorities that do not have expertise in all environment related fields. The EIA

Directive should ensure that the assessments are coordinated on the national level. It should leave the decision up to Member States whether to implement a joint procedure or coordinate separate assessment procedures.

What is most needed is to adjust the requirements of SEA and EIA directives. The logical order of these assessments should be ensured, as should the respect of the results of SEA in subsequent EIA procedures. Repeated assessment (on the same level of details) shall be avoided, whereas at the same time the availability of information from earlier relevant SEA procedures should be ensured in subsequent EIA procedures. An EIA opinion for a specific project should not be carried out prior to an SEA and/or to an approval of a (compulsory) strategic plan (mostly land use plan) that should set the framework for the project. Results of SEA procedures (e.g. refusal of some specific project alternative, or a request to assess alternatives in more details) must not be omitted in consequent EIA and development consent procedures for specific projects. The logical sequence of SEA and EIA procedures should ensure that environmentally less damaging alternatives of the projects are permitted.

**Necessary changes:**

Assessments of related plans/programs (SEAs) and projects (EIAs) should be coordinated. If a plan or program, which is subject to SEA, represents a compulsory basis for a project, than EIA for such project should not be carried out prior to the SEA. Results of such SEA procedures should be taken into account and respected in EIAs. Repeated assessments at the same level of detail shall be avoided, and the availability of information from earlier relevant SEA procedures should be ensured in subsequent EIA procedures.

**b) EIA and development consents**

The questionnaire also asks if EIA decision and the development consent should obligatorily take the form of a single decision (in other words, if separate decisions first on EIA and then on development consent should be avoided). With regards to this, the experience of NGOs (some of the cases are mentioned above) shows that the situation when EIA is a separate procedure concluded not by a binding decision but by a non-binding “opinion” is the most problematic. This causes many problems, namely with regard to the requirements of the Directive concerning public participation and access to justice, and it also diminishes the chance that the results of the assessment will be seriously considered in the decision making process.

***Inaccurate transposition of Article 8 – Czech Republic***

*In the Czech Republic, where EIA is a separate procedure with no binding decision at the end, the laws regulating the development consent procedures do not require the developer to submit the whole environmental report to the decision-making authority, but only the final “EIA statement”. This results in a situation in which most of the information gathered in EIA “pursuant to Article 5” is in fact not taken into consideration in the development consent procedures which is not in compliance with Article 8 of the Directive.*

It is therefore crucial that directly after EIA, a binding decision concerning (at least) the environmental aspects of the project is issued. The decision should be based on the outcomes of the assessment. The public shall have the right to effectively influence both EIA and the content of such decisions. It can either be the single and final development consent, or it can be followed by another development consent, e.g. the land use permit. Both approaches can have positive as well as negative results. For example, if there are two separate decisions, there is a danger that the rights of the public to influence the second will be limited. On the other hand, if only one decision is issued, it

is more likely that the competence to issue this single key decision will be awarded to an authority whose main responsibility and interest is in project development, not environmental protection.

#### **Necessary changes:**

EIA should form an integral part of development consent procedure (or of one of the procedures) for the project. In other words, the Directive should require that EIA is concluded by a binding decision concerning (at least) the environmental aspects of the project.

#### **Specifically for nuclear projects**

The Scoping and the EIA statements need to offer concrete information on the option under consideration. We do not think that EIA can be conducted without naming the intended reactor type, as happened in Finland, Lithuania and currently in the Czech Republic (Temelin 3,4 where the EIS states, that any available reactors of Generation III can be chosen). The following information is necessary for Scoping and for EIA reports:

- Alternatives
  - energy supply alternatives (different scenarios, also energy efficiency, energy saving, all renewable energies);
  - economic comparison of the different options;
  - political and socio-political assessment of each scenario.
  
- Project data
  - Clearly defined type of reactor. The project has to be defined in detail and the environmental impacts including accident risk should be part of the EIA:
    - Technical data, emission data, e.g. tritium releases: it is not sufficient to state that the emissions will stay inside the legally permitted amount. There is a need for comparisons of all technological and policy options in the form of different energy scenarios.
  
  - Fuel supply
    - energy balance,
    - all environmental effects of the complete fuel cycle,
    - CO<sub>2</sub> generation;
  - type of wastes generated, further treatment
  - decommissioning,
  - final storage of radioactive wastes.

In case no choice has been made for a specific reactor design, information for each considered reactor type shall be provided in sufficient detail for a full justification procedure for the environmental impacts resulting from the project.

Before a nuclear installation receives development consent in the EU, the Environmental Impact Assessment needs to be concluded; this is also the case for changes in projects that already were licensed. Moreover, countries that could be affected by the impacts of the installation have the right to take part in a transboundary EIA process according to the Espoo Convention. The most commonly neglected aspects in EIA processes is the assessment of alternative options, the environmental impacts of the full fuel chain in comparison with alternatives (including mining, fuel production, waste management), the concrete reactor type, and severe accident scenarios based on realistic source terms, which are all indispensable for a meaningful assessment and justification of environmental impacts.

***Friends of the Earth Europe campaigns for sustainable and just societies and for the protection of the environment and unites more than 30 national European organisations with thousands of local groups. The organisation is part of the world's largest grassroots environmental network, Friends of the Earth International with member groups in 77 countries worldwide. The office in Brussels coordinates European campaigns and conducts advocacy work towards the European institutions.***

***Greenpeace is an independent global campaigning organization that acts to change attitudes and behaviour, to protect and conserve the environment and promote peace. Greenpeace has 3 million supporters and does not accept donations from governments, the EU, businesses or political parties. Greenpeace European Unit is part of the international Greenpeace network, active in over 40 countries worldwide. Based in Brussels, the Unit monitors and analyses the work of the EU institutions, exposes deficient EU policies and laws, and challenges EU decision-makers to implement progressive solutions.***

***Justice and Environment (J&E) is a non-profit non-governmental organisation registered in the Netherlands and seated in the Czech Republic. J&E has member organisations in 12 European countries. The mission of J&E is to protect people, the environment and nature by means of (environmental) law. We do this essentially by trying to ensure a proper implementation and enforcement of EU environmental legislation in the member states and by providing legal support to the public in areas such as environmental health, large transport infrastructure or climate change.***

***The European Environmental Bureau (EEB) is a federation of over 140 environmental citizens' organisations based in most EU Member States, most candidate and potential candidate countries as well as in a few neighbouring countries. These organisations range from local and national, to European and international. EEB's aim is to protect and improve the environment by influencing EU policy, promoting sustainable development objectives and ensuring that Europe's citizens can play a part in achieving these goals.***

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