



EIA and Transport Infrastructure
Position Paper
2006



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Introduction

A) About J&E

Justice and Environment (J&E) is a network of public-interest environmental-law organisations based in EU Member States, including the Environmental Law Service (Czech Republic), the Environmental Management and Law Association (Hungary), the Estonian Fund for Nature (Estonia), ÖKOBÜRO (Austria), the Environmental Law Centre (Poland) and Via Iuris (Slovakia). J&E aims to use the legal system to protect people, nature and the environment. Our primary goal is to ensure proper implementation and enforcement of EU legislation through litigation, education, lobbying and exchange of information.

B) About the EIA Directive and transport-infrastructure projects

Upon EU entry, new Member States were obliged to harmonise national legislation with the Environmental Impact Assessment (EIA) Directive (Directive 85/337/EEC, as amended by Directive 97/11 EC), and to apply the directive correctly. Since 25 June 2005, all Member States have been obliged to transpose into their legislation Directive 35/2003/EC (the “public-participation directive”), which amended articles of the EIA Directive concerning public participation and access to justice in environmental matters.¹

Following the requirements and achieving the goals of the EIA Directive² is particularly important in the area of transport infrastructure. These projects are most likely to have serious environmental impacts, including:

- **direct effects of construction**, such as lost green space and agricultural land, altered landscape and threat to specially protected areas.
- **direct effects of use**, mainly increased air pollution and ambient noise along new roads.
- **indirect effects of induced traffic**, especially the negative influence on human health and the environment arising from increased automobile use.

Traffic-infrastructure cases also raise important issues regarding public participation in environmental decision-making. These projects tend to be politically sensitive, and pressure can be brought to bear on critics, limiting the effectiveness of public participation.

¹ In accordance with the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention), ratified by the EC in Council Decision 2005/370/EC.

² Among the main goals of the EIA Directive, as expressed in its Preamble, is ensuring that projects likely to have significant environmental impact go forward only after prior assessment of their likely effect on the environment, based on appropriate information supplied by the developer and with proper avenues for public participation.

It is important to deal with such cases at the EU level because traffic-infrastructure development in individual states is increasingly influenced and even determined by EC law and EU financial-support programs, mainly with respect to extending the Trans-European Transport Network to new Member States.

For all these reasons, J&E members chose implementation and transposition of the EIA Directive in transport-infrastructure cases as one of the focuses of its 2006 project, supported by DG Environment.

Problems

J&E member organisations are involved in many cases to which the EIA Directive applies, and they aim to promote its correct implementation. Many of these cases show that the competent authorities are unaware of, or are ignoring, the requirements of the directive and other relevant EC legislation.

Each J&E member prepared:

- a **legal analysis** of its country's legislation on environmental-impact assessment and its accordance with the EIA Directive.
- a **case study** illustrating the gaps in implementation of the EIA Directive in new highways and other traffic-infrastructure investments.³

A) Nonconformity and gaps in transposition of the EIA Directive

The analyses show that while the Member States differ in their procedures for environmental-impact assessment, they share common gaps in transposition of the directive. The source of these gaps lies in their national legislation. The following are the most common problem areas.

No opportunity to challenge screening decisions

In most of the investigated countries (four of the six), NGOs may not challenge so-called screening decisions — decisions on whether a project of the type categorised in Annex II to the EIA Directive is likely to have significant environmental impact and therefore requires assessment. In most of the countries this also applies to the public at large. The prohibition appears to be out of line with Article 10a of the EIA Directive and with established case law of the European Court of Justice.

It should be added, however, that whereas most old Member States allow for public participation at a relatively late stage (when the environmental report has already been prepared), most of the countries investigated (with the notable exception of Poland) provide such opportunities at an early stage of the EIA procedure. In the Czech Republic, Hungary and Slovakia the public can participate at the screening stage; in most of the investigated countries, public participation is granted at the scoping stage, at which the scope of the assessment is determined.

³ The legal analyses and case studies, with introductions and summaries of the main findings, are attached to this paper.

Separation of EIA and development-consent procedures

In some of the investigated countries EIAs are stand-alone procedures, separated from other procedures for development consent (the final decision which entitles the developer to proceed with the project). In most cases it is doubtful that the legal scheme sufficiently assures that EIA results are considered in granting development consent.

Neglect of some screening criteria

For works of the type listed in Annex II of the EIA Directive, whether the project's potential impact merits an EIA is decided in the so-called screening procedure. Criteria set out in Annex III of the EIA directive (e.g. project size and location, characteristics of the potential impact, accumulated impact in conjunction with other projects) are to be considered. All the investigated countries employ a twofold approach to screening: case-by case examination combined with a so-called categorical approach, e.g. setting thresholds or criteria.

Only in relation to case-by-case examination do the relevant laws clearly require competent authorities to use the selection criteria set out in Annex III. In relation to categorical screening, the laws transposing the EIA Directive rarely make clear that all such criteria should be employed. When authorities use this approach, there is a noticeable tendency to prefer criteria related to project size while neglecting other selection criteria set out in Annex III.

On a positive note, some of the countries investigated (Austria, Poland and Slovakia) have developed institutional instruments for assuring quality control of EIA documentation.

Lack of legal guarantees for effective public notification

None of the investigated countries have a clear legal provision requiring that the public be "informed in an adequate, timely and effective manner" that the decision-making process on a project has begun, as required by article 6.2 of the Aarhus Convention. Most countries have provisions that assure "timely" notification, but no country provides legal guarantees that the public is notified in an "effective manner."

Special (preferential) approach to transport projects

In most of the investigated countries, the law in one way or another provides a special approach to transport projects, particularly road construction. This special approach frequently lends itself to less-rigorous environmental control.

B) Faulty implementation of the EIA Directive

The following practices represent the most important examples of incorrect implementation of the EIA Directive in transport-infrastructure cases. They are common to most or all of the countries in question.

Failure to assess the whole project ("salami-slicing")

Investors often artificially cut a project into pieces for the purpose of winning legal approval. Through this process, known as "salami-slicing," smaller sections of the project are serially assessed and permitted. The less environmentally questionable parts of projects are authorised and built first, making continued development of the project a virtual fait accompli, even if the latter sections traverse environmentally valuable territory. This is contrary to Article

2.1 of the EIA Directive, which requires that “projects” likely to have significant effect on the environment — not parts of projects — are subject to the assessment.

*The Austrian A5 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).
Failure to assess all project impacts*

The EIA Directive requires the developer to supply all information necessary to assess all important direct and indirect impacts of a project.⁴ This mandate was not fulfilled in any of the studied cases, partly due to incorrect determination of the projects (see above).

In the Austrian, Czech and Hungarian cases, project impacts were not assessed in conjunction with the impact of other traffic structures in the region and the effect of induced traffic on human health (air quality, noise stress).

Failures to assess real alternatives

The EIA Directive requires the developer to provide the reasons for choosing a particular course for the project, taking into account environmental impacts, and to outline alternative courses. In all cases studied (and in many other ones), project opponents argue that the investors failed to consider and assess more environmentally favourable alternatives. In none of the cases did the authorities ask for further alternatives to be assessed.⁵

In the Polish case, all alternatives proposed by the developer and considered by the authorities assumed crossing of the SPA and were therefore almost equally harmful to site-conservation objectives.

Failure to guarantee effective and timely public participation (Article 6)

The intent of the EIA Directive is to ensure that the public gets sufficient information about a project’s impact; the public concerned⁶ has an opportunity for timely and effective participation in the decision-making process; and the results of public participation are given serious weight in considering consent. In none of the presented cases were these requirements fully respected. The range of shortcomings is wide, including:

- depriving part of public concerned the right to participate in development-consent procedures due to faulty delineation of the impact area (see the Hungarian case).
- inaccessible documents, lack of information about opportunities for public participation and short time limits for comments (see the Estonian case).
- not taking NGO and other public comments into account (see the Estonian and Czech cases).
- overly detailed and technical documentation, with no provision of “non-technical summaries” (see the Austrian case).

⁴ See Articles 3, 5.1 and 5.3 and Annex 4 of the EIA Directive.

⁵ The literal wording of Article 5.3 of the EIA Directive could be taken to mean that alternatives must be presented only when the developers themselves decide to “study” them. However, this interpretation clearly contravenes the purpose and spirit of the directive. The situation is different when the projects can have negative impacts on Natura 2000 areas. In these cases, under Article 6.4 of the Habitat Directive and Article 4.4 of the Bird Directive, only the alternative that does the least damage to protected areas and species can be approved. This means all possible (territorial) alternative versions of the project must be assessed so that the least damaging one can be chosen. These requirements were not satisfied in the Estonian, Polish and Czech cases.

⁶ See Article 1.2 of the EIA Directive and Article 2.5 of Aarhus Convention

Suggested solutions

J&E is convinced the following actions at both the national and EC levels will improve enforcement of EIA Directive aims in the respective Member States and correct the imperfections uncovered in the legal analyses and case studies.

1. National transposition acts should be amended to ensure that

- screening decisions are subject to judicial review.
- EIA results are taken into consideration in granting development consent.
- all criteria set out by the EIA Directive are given weight in screening procedures.
- the public is provided with all relevant information in an adequate, timely and effective manner.
- special regulations for transport-infrastructure projects, which can impinge on public-participation rights and restrict proper environmental-impact assessment, are eliminated.

2. National practices should be changed to ensure that

- entire projects (e.g. the planned highway, not its component sections) are subject to environmental-impact assessment.
- all potential project impacts, including indirect, cumulative and synergistic impacts, are properly described and considered.
- investors study and present all alternative courses of development so that options that do less health and environmental harm can be considered.
- effective and timely public participation is guaranteed — all information is presented in an accessible form within a reasonable time frame, and consent decisions take into account public concerns.

3. The European Commission should focus on the above-mentioned shortcomings when monitoring transposition and implementation of the EIA Directive (including the possibility of infringement procedures) and consider preparing appropriate guidance documents.

4. In the medium or long term, the Commission might consider amending the EIA Directive to make clearer the prohibition on “salami-slicing” of projects and the obligation to take into account all realistic alternatives to the project. The case studies show the importance of adhering to a logical sequence of concept and plan approval, forming the basis for permitting and executing projects with significant environmental effects and related processes under Directive 2001/42/EC (SEA Directive) and the EIA Directive.⁷

⁷ See *The Relationship between the EIA and SEA Directives: Final Report to the European Commission*, Imperial College London Consultants, August 2005 (http://ec.europa.eu/environment/eia/pdf/final_report_0508.pdf) for more comprehensive discussion and recommendations on this topic

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