



**Implementation of the EIA Directive
and Transport Infrastructure**
Case Study Summary
2006



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Introduction

Justice & Environment (J&E) is a network of public-interest environmental law organisations based in EU member states. J&E aims to use law to protect people, the environment and nature. Our primary goal is to ensure the correct implementation and enforcement of EU legislation through the use of EU law in litigation, educational activities, lobbying and exchanges of information.

Having started its work as an informal network in 2003, the first full-year work plan was developed by J&E in 2006. Implementation and transposition of Directive 85/337/EEC (EIA Directive), as amended by directives 97/11 EC and 2003/35/EC, particularly in cases of transport-infrastructure investments, has been chosen by J&E members as one of three first legal areas to be worked on. In 2006, all six J&E members (i.e. Environmental Law Service, Czech Republic; coordinator of the topic; Oekobuero, Austria; Estonian Fund for Nature; Environmental Management and Law Association, Hungary; Environmental Law Center, Poland; Via Iuris, Slovakia) have been involved with this topic.

The J&E work on this area was focused on weak points of the EIA Directive (and other related EC norms, namely SEA, Bird and habitat directives). Also, implementation of proposed new highways and other traffic infrastructure investments and their effects on environment (nature, human health) in respective countries. J&E considers these cases crucial for both environmental protection (the infrastructure projects often have very serious impacts) and from public participation in the development consent proceedings. These cases are politically very sensitive, causing various pressures on the project's opponents.

Another reason for J&E interest in this topic is that this field becomes more and more determined and influenced by planned EU transport networks and EU financial support programs (process of Transport Infrastructure Needs Assessment (TINA), the idea of co-ordinating infrastructure projects in these countries, extending the Trans-European Transport Network to the new Member States).

Comparative analysis

These cases have been selected by J&E members as problematic examples of implementation of the EIA Directive in transport-infrastructure cases within their countries:

Case	Country	Description of the project	Timeline
Motorway A5 Vienna-Drasenhofen (Mikulov-CZ)	Austria	Planned and partly permitted Austrian section of Brno-Vienna highway corridor. The project has been sliced into six EIA-proceedings. Critical as to alternatives, traffic, figures, salami-slicing, air, noise, climate, effective public participation.	2003-
High-speed road R52 Pohořelice – Mikulov (Drasenhofen-AUT)	Czech Republic	Planned Czech section of Brno-Vienna highway corridor, projected through unique landscape areas of south Moravia. Supposed to become a part of TEN-T network.	2003-
Port of Saaremaa	Estonia	A port to host cruise and passenger traffic for 3-4 months a year (some documents reflect possibility of additional purposes of the port)	2003-2005
Bypass road of the Main Road No. 10	Hungary	A bypass road close to Budapest, which would affect mostly rural settlements North-West from Budapest.	2003-
Augustów Bypass through the Rospuda River Valley	Poland	A bypass road around Augustów city, crossing the River Rospuda Valley. The plan includes building a large flyover over the river, what could significantly upset water conditions.	1999-
Expressway R1 Žarnovica – Šášovské Podhradie	Slovakia	A section of an expressway planned to connect western and eastern part of Slovakia. It would considerably influence living conditions in the Žiar nad Hronom city.	1998-

A. Factual description of cases (most important and common points)

All presented cases, except Estonian, deal with ground communications (motorways, high-speed roads), which form, or will form, parts of basic national traffic-networks. Czech and Austrian cases form parts of one cross-border project (Brno – Vienna highway, planned to become a component of the TEN – T network).

In all of the “motorway” cases, completion of the projects and their subsequent use would have a similar impact on environment and human health, that is typical for this kind of development in general. Impacts include:

- **direct effects of construction.** Primarily, loss of green space and agricultural-land, negative impact upon the landscape, endangerment to protected areas and species (mostly including NATURA 2000 sites and species), extensive use of natural resources (for construction materials) and the unbalancing of water conditions. In some cases, expropriation of land or buildings (and their destruction) would take place as well.
- **direct effects of use.** Primarily, an increase in air pollution and ambient noise levels along the new roads¹, including soil and water pollution
- **indirect effects of induced traffic**, allowing increased automobile use in the respective regions. This will subsequently generate additional impacts on human health, protected areas, cultural monuments, etc.

Some of these impacts, namely those concerning protected areas and water quality, are also present in the Estonian seaport case. Additionally, its indirect and cumulative effects will influence living conditions within local communities.

In all presented cases, there are active opponents of the projects (the alternative presented by the developer), who were or are actively participating in EIA and (where it was possible) other legal procedures. These opponents represent environmental NGOs (“citizen’s groups” in Austrian case²), local citizens (except in the Polish case, for reasons mentioned in footnote 1), as well as Czech and Hungarian municipal authorities. In all cases, opponents highlighted the above-mentioned negative effects, criticized the quality of presented-documents and proposed alternative (mostly territorial) solutions.

With the exception of the Estonian case, the final development-permits for the project have not yet been issued, or were canceled by courts (in Austrian case, four of six permits for separate parts of the project were issued. See the problem of “salami slicing” below). In all cases, the court proceedings were carried out.

¹ At the same time, in cases concerning the bypasses, the investors, authorities and part of the public supporting the projects, argue that they would improve the air quality and noise situation in the towns affected by oppressive traffic. This is typical especially for the Polish case.

² In Austria, NGOs could not participate in proceedings that started before June 2005, when the directive 2003/35/EC came into force. However, affected people could participate as a special form of “citizens’ groups.

B. Common and most important legal problems concerning the implementation of EIA Directives

EIA procedures (i.e., assessment of the project impact on environments) have varying jurisdictions in the legal systems of respective countries, mainly in “development consent procedures,” which include final and binding decisions to determine if the projects can be carried out or not and, if so, under what circumstances. This sometimes makes comparisons of the legal aspects of cases difficult. The following problems, concerning implementation of EIA directives and other EU norms, are common to all or a majority of the presented cases:

Failure to carry out environmental impact assessments of the whole project (Article 2.1)

A typical problem, particularly in transport-infrastructure cases, consists of the fact that investors often artificially “cut” the projects into pieces, for the purpose of legal procedures (so called “salami-slicing”). Only short sections of projects (especially roads) are then assessed and permitted. The environmentally less questionable parts of projects are mostly “logically” authorised and built first, which in fact predetermines the following route of a project, even across an environmentally valuable territory. This is contrary to article 2.1 of EIA directive, which requires that “projects” (and not parts of them) likely to have significant effects on the environment are subject to assessment. Austrian, Hungarian, and (taking into consideration the trans-boundary impacts – see below) Czech cases illustrate this approach.

The Austrian A5 motorway was “sliced” into six different parts and therefore six separate EIA/permit proceedings. Four of the EIA-permits have already been issued³. Two EIA proceedings are pending.

Similarly, in the Slovak case, the expressway R1 was sliced into a few sections which were handled as separate proceedings. Although there is general discussion about whether to build this expressway or a different (northern) variant of west-east highway connection, in reality both these variants have been already planned. Fragments of both are already constructed. Thus, citizens are able to question only small sections of the road, but not the overall project.

In the Hungarian case, a specific problem lay in the fact that, although the impact-area was delineated correctly, the environmental impact of the project *within the entire impact area* was not assessed. This was a reason why the permit was cancelled by court-order.

The Estonian seaport case represents yet another aspect of this problem. Only the impact of *part of the whole project* (in the scope of water management permit procedure) was officially subject to EIA. The documentation, presented by the developer, did not include a clear description of the project.⁴ Therefore, the data

³ There were appeals filed against these permits, but appellate procedure has no suspending power. This means construction of the four parts might begin during the pending appeal proceeding. Currently, however, no A5 construction can begin, because the public-procurement decision has been challenged by the forfeit investors group and this appeal has suspending power.

⁴ It was not clear whether the developer wanted to build a cruise-harbor for summer time or a port for whole-year-round exploitation; it was also unclear what kind of ships would be visiting the port. Will it be used only for cruise ships and passengers or also for ro-ro ships or maybe even for cargo shipping?

required to identify and assess the main effects, which the project is likely to have on the environment, were insufficient.⁵

This approach inevitably leads to breaching of the requirements of articles 3 and 5 of the EIA directive (see below). Assessment of only parts of the whole project, does not provide a sufficiently comprehensive evaluation of all direct and indirect impacts of the project and their interactions.⁶

Failure to assess all effects of projects (Article 3 and 5)

Articles 3, 5.1 and 5.3, together with Annex 4 of the EIA directive, basically require that the developer supply all information necessary, so that all important direct and indirect effects of the projects are assessed. This was not carried-out in any of the cases. Partially, as already mentioned, this was due to incorrect determinations of the projects. Another general reason was (according to the arguments of the projects' opponents), lack (or poor quality) of documentation and data supplied by the developer, by often omitting indirect effects of the investment.

In the Czech and Hungarian cases, the impact of the projects were not assessed in combination with the impact of other traffic structures in the region and with the effects of induced traffic on human health (air quality, noise stress).⁷

In the Austrian case, alleged wrong traffic-assumptions and calculations downplayed assessments of air/noise impact. Furthermore, additional planned motorway connections in the same corridor were not considered at all in the EIA proceeding and were subsequently downplayed in the respective environmental impact.⁸

In the Slovak case, beyond the fact that the negative impacts, especially noise and emissions, on the already highly polluted city were underestimated, one of the final "recommended" variants by the Final EIA Statement included a more than 3 km long variant, which was not assessed in the EIA procedure at all.

In the Polish case, documentation presented by the developer, underestimated the number of protected bird species which may be affected by the project, and did not

⁵ In case C-201/02 (Delena Wells) the *European Court of Justice* stated that "where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision, which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment **must be identified and assessed at the time of the procedure relating to the principal decision.**" Therefore, it should be considered whether the water use permit for port of Saaremaa constitutes a principal permit in the meaning of ECJ interpretation. According to national courts, the water use permit could set only the conditions for building three quays in the water, but not the conditions of exploitation of the port, nor the conditions for activities carried out on shore. The principal decision about whether the port is to be built, was a decision about a detailed land-use plan. However, this plan did not constitute a „development consent“ in the meaning of EIA Act at the time. It must be concluded, that failure to set up a decision-making procedure for this kind of construction, with great environmental impact and without determining in what stage the principal decision was made, has led to failure to carry out an EIA for the whole project.

⁶ See for example ECJ judgements C-392/96 of 21 Sept 1999 (Commission vs Ireland) or C-227/01 of 16 Sept 2004 (railtracks Valencia).

⁷ At present, noise and air pollutants (micro-particles) in the area south to Brno (2nd largest city in Czech Republic) already exceed legal limits. Thousands of people in many villages and Brno city-districts would be exposed to even higher traffic volumes as a result of the of additional transport structures, including the R 52 high-speed road. Another deficiency of the assessment of this project relates to the fact that its trans-boundary impacts were not taken into account.

⁸ Planned S8 Marchfeldschnellstraße from Vienna to Slovak D2 motorway was not considered. S8 would directly affiliate to S1, S2 (southern alignment of A5).

consider the full range of likely potential impacts on them. Further, it did not adequately consider the cumulative impact of the project on the affected SPA (mainly its integrity⁹) in conjunction with other road projects affecting the same SPA, or its impacts on wetland habitats/species, etc.

Failures to assess real alternatives (Article 5.3)

The interpretation of article 5.3 requirement, according to which, information provided by the developer shall include “an outline of the main alternatives studied by the developer” and an indication of the main reasons for his choice, taking into account environmental effects, is obviously one of the most difficult problems. This concerns not only the presented cases, but implementation of EIA directives in general. The problems must be analyzed differently within general terms and within the cases that “NATURA 2000 sites” become affected.

In all presented cases, the project-opponents argued that the investors failed to consider and assess alternatives for the project, which, according to their opinion, would be more environmentally favorable. The opponents also argued that both EIA directive and domestic law requires that such alternatives be taken into consideration.

In the Hungarian case, the consistent stand of the project developer was that he is not obliged to assess any other alternatives, than the “zero alternative”, which was declared as obviously unsustainable, and the promoted variant of the project. The non-assessed alternatives covered e.g. alternative transportation methods to individual motor vehicles, and, significantly, traffic routes for the bypass. At the court stage, although the plaintiff held that no real alternatives were assessed by the project developer, and thus Article. 5.3 of the EIA Directive was breached, the court did not share this view. The court undoubtedly took a conservative stand in this matter, explaining that the project developer is not under an obligation to find a systemic solution to the traffic problem but can concentrate on the lawfulness of its preferred solution.

In Czech, Austrian, Slovak and Polish cases, the information provided by the developer contained technical alternatives of the same corridors. For example, in the Polish case, all alternatives proposed by the developer and considered by the authorities assumed crossing the Rospuda Valley within the SPA and, as such, they are almost equally harmful for the site conservation objectives. The two most important alternatives were: building a tunnel below the Rospuda River or building a flyover over it (the latter one has been finally chosen by the developer). In the Slovak case, the variants considered only one section of the proposed expressway (less than half of its length).

Also in the Estonian case, the EIA report did not include assessment of alternative locations. It referred in this respect, to earlier studies, preferring conclusions of a feasibility study, which have been made mainly on basis of financial calculations and without environmental considerations.

In all these cases, the authorities accepted this approach and did not ask for further alternatives. This fact raises an important conceptual question, whether, solely in light of article. 5.3 of the EIA Directive, a road-construction project developer has to study alternatives to individual motor vehicle traffic, such as railway or waterway transportation, or limit his focus to technological options, building perhaps, extensive

⁹ See Article 6.3 of the Directive 92/43/EEC (Habitat Directive)

“sub-variants” within the planned road. The wording of EIA Directives makes an interpretation that alternatives must be presented only when the developer himself decides to “study” what is literally possible. These provisions were transposed into (e.g.) Hungarian and Czech, law. This interpretation, however, clearly contravenes the purpose and spirit of the EIA Directive.

The situation is different in cases when the projects have negative impacts on “NATURA 2000 areas.” In these cases, according to article. 6.4 of the Habitat Directive and article. 4.4 of the Bird directive, only alternatives with least damaging impact on the protected areas/species can be approved. This means that all possible (territorial) alternatives of the projects must be assessed, so that the less damaging one can be chosen. These requirements were not satisfied in Estonian, Polish and Czech cases.

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

Article 6 of the EIA Directive (together with articles 8 and 9) should guarantee that the public

- a) receives sufficient information about the impact of projects,
- b) who is concerned have effective and timely opportunities to participate in decision making procedures and that
- c) result of public participation be seriously taken into consideration in the development consent procedure.

These requirements were not fully respected in any of the presented cases.

In the Hungarian case, a large part of the concerned public, due to the mistake made regarding delineation and assessment of the impact area (see above), was deprived of the right to participate in the permitting (development consent) procedure. The fact that both the municipalities and the public of the Budapest 3rd District had absolutely no chance to comment and influence the decision-making, was one of the main reasons why the development consent was canceled by the court.

In the Estonian case, the EIA report and additional materials were available only at the office of Ministry of Environment (except for the last version of EIA which was made available in local community office as well). The timeframes for presenting comments were greatly abbreviated – 5 days for commenting on the EIA program (structure for the EIA report), 13 days for commenting on the EIA report and 16 days for commenting on the supplemented version of EIA report. The Ministry of Environment approved the EIA report without taking the NGO’s comments under consideration. The possibilities for the public to participate in subsequent water-use permit proceedings were quite limited. The announcement about the procedure was inadequate in terms of requirements of article. 6.2 of the EIA Directive. There was e.g., no possibility of presenting comments or questions to the competent authority, nor time to schedule these actions. Other permits necessary for the project’s realisation were not issued in the course of public proceedings.

In the Slovak case, an official notice-board was used to inform the public about the EIA procedure, but none of the available alternatives. Moreover, there were no maps or pictures of the proposed road published at all, only brief textual information. A scoping decision was never delivered to the city Žiar nad Hronom and the general public never had any chance to see this document and comment on it.

In the Czech case, the objections and demands of the public have not yet been taken into account in the EIA final opinion, issued by Ministry of Environment. Opportunities for the public concerned to participate in subsequent decision-making procedures are generally limited, according to Czech law, and thus not in full compliance with article. 6.4 of the EIA Directive. Czech law currently fails to define the term “public concerned”. Moreover, the lawsuit filed by a local NGO and a property owner against the EIA final opinion was refused by the court, with the reasoning that the EIA opinion is not a binding decision according to the Czech law. This is a breach of article.10a of the EIA directive, as amended by directive 35/2003/EC, which requires that the public concerned have access to judicial review of any decisions, acts or omissions, subject to the public participation provisions of the directive.

In the Austrian case, “slicing” of the project into six different parts and therefore six separate EIA/permit proceedings (see above), has the side-effect that public participation is much more expensive and time consuming. The documents provided by the developer are very detailed, with no “non technical” summaries, which makes it difficult for the public to understand them. Moreover, the technical information presented so far was outdated. Developer technical experts did not have relevant information and used incorrect figures and assumptions.

Failure to meet requirements of trans-boundary assessment (Article7)

As mentioned above, the Czech and Austrian cases deal with two parts of one project; the Vienna-Brno highway. It is self-evident that both “national” parts of the project have significant effects on the environment of both EU Member states. Thus, according to article. 7 of the EIA Directive (and the Espoo Convention), each of these parts should have been subject to a trans-border assessment .

This requirement was not fulfilled. In the Czech case, no assessment according to article 7 of the EIA Directive and Espoo Convention was required, despite the fact that, in the initial (screening) stage of the EIA procedure, the Austrian ministry indicated that Austria wished to participate. Austrian administrative bodies, municipalities, and NGOs sent their comments. In the Austrian case, only one of six EIA/permit proceedings (see above), dealing with the section of the project closest to the border, was officially reported to the Czech Republic, as required by article. 7.1 of the EIA Directive. The Czech ministry expressed the wish to participate in this EIA procedure. Subsequently, Austria sent the project documentation to the Czech Republic, but only in German-language text. This led to the circumstance that, the last day of the term for comments in Austria, there was no word of the project presented in Czech Republic, as required by article. 7.3 of the EIA Directive. Further circumstances are not clear in this moment.

Confusion of the logical order of the EIA and SEA procedures, relative to the requirements of EIA and SEA directives

The Czech and Austrian cases illustrate insufficient correlation between the requirements of the EIA Directive and Directive 2001/42/EC (assessment of the effects of certain plans and programs on the environment), the SEA directive. The corridor of the Czech part of the Brno – Vienna highway is contained in the proposal of the land use plan, which has not yet been approved . The impact of this plan was not assessed in a SEA procedure pursuant to the SEA directive and valid Czech law. The fact that the EIA final opinion was issued prior to the land-use plan approval, although not directly breaching the EC law, is confusing to the logical order of the SEA and EIA

procedures.¹⁰ In Austria, no SEA procedure complying with the SEA directive, including assessment of economic needs and alternatives of the respective motorway, was held.¹¹

Similarly, in the Estonian case, the port-establishment procedure was not carried out in accordance to article 5.1 and Annex I (h) of the SEA Directive. Subsequently, with the Habitat directive as well, as no site alternatives were identified, described or evaluated during the planning proceedings or later stages of the process, including the EIA proceedings (see above).

Conclusions

The cases, assembled in the present collection, document numerous examples of incorrect implementation of the EIA Directive, as well as other EC norms, in the respective EU member states. Some of them can be proven typical for environmental decision making procedures in these countries in general, and particularly concerning assessment and permission of transport infrastructure projects. This particularly concerns:

- failures to carry out environmental impact assessment of the whole project (“salami-slicing” of the roads)
- insufficient assessment of all the impacts of the projects, particularly indirect and synergic effects
- non-assessment of real alternatives of the projects
- failure to guarantee effective and timely public participation, especially to present all information in reasonable form and time frames and to take into account comments by the public

It is clear that the competent authorities are not aware of the requirements of the EIA Directive and other EU legislation, or that they are ignoring these requirements for sake of economic development. Some understanding of the problems point to various legislative levels. These ‘reasons’ are described in J&E legal analysis of the EIA Directive transposition.

The cases also show the importance of adherence to the logical sequence of approval of concepts, forming the basis for execution of projects with significant impact on the environment, as well as the actual permissions for these projects, and the connected SEA and EIA processes. Otherwise, the requirements for selection of environmentally less damaging alternatives to the project are unconscionably breached, particularly in cases of interference in NATURA 2000 localities.

¹⁰ This fact is a core reason for the conflict of the project with Bird and Habitat Directives (see above). It should be on the level of the land-use plan proposal (and related SEA procedure), when alternative corridors of the highway are assessed. In this case, however, when preparing the land-use plan proposal, the authorities refused to consider any other alternatives with reference to the already existing EIA final opinion. The alternatives were not assessed, either in the SEA or EIA process.

¹¹ Moreover, there has still been no official agreement between the Czech Republic and Austria about the border connection, which could make all procedures, up to now, useless.

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The publication has been made possible through funding from the European Commission – DG Environment.

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