

# Key Points of the New EU Directive on Environmental Impact Assessment

EIA

Legal Analysis

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## Legal Analysis

### Introduction

On 12<sup>th</sup> of March 2014, with adopting the Directive 2014/52/EU (hereinafter: Directive), the European Parliament performed substantial amendments to the Environmental Impact Assessment Directive 2011/92/EU (hereinafter: EIA Directive). The newly amended EIA rules entered into force on 15<sup>th</sup> of May 2014. The amendments are aimed at simplifying the rules for assessing the projects' potential effects on the environment and at reducing the administrative burden. Member States have to apply these new rules as from 16<sup>th</sup> of May 2017 at the latest and have to communicate to the European Commission the national legislation adopted in order to comply with the new Directive.

The EIA Directive now focuses on resource efficiency, climate change and disaster prevention, areas which are to be reflected better in the EIA procedure. Due to the amendments, Member States have to simplify their different environmental assessment procedures.

Precautionary actions need to be taken for certain projects which - because of their vulnerability to major accidents or natural disasters - are likely to have significant adverse effects on the environment. For such projects, it is important to consider their vulnerability (exposure and resilience), the risk of accidents and natural disasters occurring and the implications for the likelihood of significant adverse effects on the environment.

In case the projects do entail significant adverse effects on the environment, developers will be obliged to do the things necessary to avoid, prevent or reduce such effects. These projects shall be monitored and monitoring procedures will be determined by the Member States.

Also, conflict of interest must be avoided; if the specific scenario is given, where a competent authority is both the developer and a decision maker, a functional separation is to be implemented.

### Key amendments to the EIA Directive

#### Screening procedure

**Decisions in screening procedure** determining whether an EIA is required **shall be taken within 90 days** (that period can be extended, if the nature, complexity, location or size of the project makes it necessary), public consultations shall last at least 30 days. Due to Par. (36) of the Directive, Member States have to ensure that final decisions are taken within a reasonable period of time and the decisions in screening procedure must be made properly based on the updated screening criteria.

In screening procedures and environmental impact assessments, **the impact of the entire project in question** (including, where relevant, its subsurface and underground, during the construction, operational and demolition phases) **shall be taken into account**.

Where screening is required for a project, a Screening Report will need to be submitted (i.e. in case of projects in Annex No. II EIA is required only if significant effects on the environment are likely). The types of projects listed in Annexes No. I and No. II were not changed.

The selection criteria for Annex II projects in Annex No. III were varied and a new Annex No. IIA was also added. The Annex No. IIA sets out what information the developer has to provide when seeking a screening opinion. **These requirements will mean a more detailed level of information and analysis at an earlier stage of realization of a project.** For example, impacts from waste or use of natural resources will have to be explained, specific consideration will need to be given to impacts of a project on, and its resilience to, climate change, and impacts on cultural heritage and landscape. Furthermore, information on risks from major accidents or disasters, cumulative effects with any existing or planned projects and any mitigation works which would reduce the environmental impacts will have to be included as well.

During the screening process, mitigation measures can be considered. However, these will have to be specified and there is a requirement to retain such measures in the final development proposals. Due to Par. (35) of the Directive, **MSs have to ensure that mitigation and compensation measures are implemented, and that appropriate procedures are determined regarding the monitoring of significant adverse effects on the environment resulting from the construction and operation of a project.**

During the screening procedure, the information which the developer is required to provide shall be specified, focusing on the key aspects that allow the competent authority to make its determination. That determination should be made available to the public. **Competent authorities will need to provide enhanced explanation of their screening decisions.**

### **Scoping**

In order to improve the quality of an environmental impact assessment, to simplify the procedures and to streamline the decision-making process, the competent authority shall, when requested by the developer, issue an opinion on the scope and level of detail of the environmental information to be submitted in the form of an environmental impact assessment report (EIA Report). The scoping process is not mandatory for the developers but the EIA Report will be required to be based on the scoping opinion where one is requested.

**The new rules contain clearer requirements for the assessment of the projects' impact on biodiversity, climate change, disaster risks (including, for example, flooding) and the landscape.** These areas are covered generally, but the new rules will likely result in an increased emphasis in those. Additional requirements are inserted on topics, such as assessment of baselines and cumulative effects.

## The EIA Report

The output of the assessment is the EIA Report. **The Directive obliges the decision-maker to consider whether the EIA Report is up to date when making a decision to grant development consent, and provides powers to require further information.** This may mean more requests for developers to supply further and updated information, and also a better ground for decision-making for the authorities. There is also a new requirement for the consent to contain a reasoned conclusion by the competent authority on the significant effects of the project on the environment.

As the new rules set out, **experts involved in the preparation of environmental impact assessment reports should be “qualified and competent”**. A definition is not provided and it will therefore fall on Member States to draw their own conclusions. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality.

## Requirements of monitoring

New monitoring obligations, which can be applied to the implementation as well as the management of the project, will be introduced. The decision to grant development consent shall contain at least the reasoned conclusion and any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

**If development consent is granted, consideration must be given to whether any appropriate measures to monitor the significant adverse environmental effects of the project are required.** The measures must be proportionate to the nature, location and size of the project and existing monitoring arrangements may be used, if appropriate, with a view to avoid duplication of monitoring.

## New time limits

The duration of environmental assessments will be more predictable due to the timeframes introduced for the different stages of the procedure. In accordance with the proposals of the new Directive, **the provision on time-frames for consulting the public concerned on the environmental impact assessment report sets out that that period shall not be shorter than 30 days.** Additionally, authorities must provide screening decisions within 90 days of receipt of the necessary information. The deadline can be extended in exceptional circumstances where the nature, complexity, location or size of the project so required. In that event, the competent authority shall inform the developer in writing of the reasons justifying the extension and of the date when its determination is expected.

Member States may also set timeframes for the validity of any reasoned conclusions or opinions issued as part of the EIA procedure.

## Information and transparency

The grounds for development consent decisions must be clear and more transparent for the public. In order to strengthen public access to information and transparency, **timely environmental information with regard to the implementation of this Directive should also be accessible in electronic format.** The competent authority shall be required to substantiate its decision to grant development consent in respect of a project, indicating that it has taken into consideration the results of the consultations carried out and the relevant information gathered.

Member States have to establish at least a central portal or points of access, at the appropriate administrative level, that allow the public to access information easily and effectively.

With a view to reaching a complete assessment of the direct and indirect effects of a project on the environment, the competent authority has to undertake an analysis by examining the substance of the information provided by the developer and received through consultations, as well as considering any supplementary information, where appropriate.

In the case of projects adopted by a specific act of national legislation, Member States are to ensure that the objectives of the Directive relating to public consultation are achieved through legislative process.

## Penalties

Due to Article 10a of the Directive, **Member States are required to produce provisions reflecting to any infringements of the EIA Directive.** Those penalties must be effective, proportionate, and dissuasive. However, the nature of sanctions to be imposed is at the discretion of the Member States.

## Conclusions

The Directive is aimed at ensuring a high level of protection of the environment and human health through the establishment of common minimum requirements for the assessment of the effects of certain projects on the environment during the consenting process. In an attempt to achieve this aim, the amendments to the EIA Directive strengthen existing legislation. Developers, as well as competent authorities, need to be acutely aware of future requirements in an area that attracts a high level of legal challenge.

**Member States have to apply these rules as from the 16<sup>th</sup> of May 2017 at the latest.** They also need to communicate to the Commission the national legislation adopted in order to comply with the Directive.

The quality and the content of the EIA reports will be improved. In order to avoid conflicts of interest, there has to be an appropriate separation between conflicting functions of authorities. EIA reports shall be made more understandable for the public, especially as regards assessments of the current state of the environment and alternatives to the project.

Taking into account the substantive changes in the EIA Directive, the Member States should issue the amended EIA regulations in the next year of 2016 in order to allow sufficient consultation prior to that deadline. **Consequently, it is recommended, that Member States' legislators appropriately and gradually consider, inter alia, how to**

- **enhance the approach taken by developers to pre-assess proposals to enable a screening decision to be made;**
- **ensure that climate change, human health and resource efficiency will be assessed more effectively within EIA;**
- **improve the quality of the writing and review of environmental statements, by ensuring those who undertake the work have competent expertise to do so;**
- **improve efficiency and effectiveness of monitoring strategies tracking the delivery and success of design elements,**
- **improve efficiency and effectiveness of mitigation aiming to avoid, prevent or reduce significant adverse effects on the environment;**
- **improve transparency and accountability, and**
- **introduce penalties for infringements.**

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