

Regulation of EIA Procedures

Survey made in Member States on how the national laws comply with the requirements of the revised EIA Directive

National Summary - Austria

Justice and Environment 2016

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I. Introduction

Justice and Environment has been for long time working on the issues of EIA. Recently and currently the most important in this area has been the amendment of the EIA directive which was approved on 16 April 2014 through the Directive of the European Parliament and Council no. 2014/52/EU, which amends Directive of the European Parliament and Council no. 2011/92/EU, on the assessment of the effects of certain public and private projects on the environment. It represents an essential amendment to the EIA directive which modifies its wording in a quite considerable manner and introduces new obligations for Member States.

Given the fact that the obligation to implement the modifications stemming from the amended EIA directive is to be complies with before 16 May 2017, currently the legislative works relative to this obligation are in process in majority of the Member States. This represents an opportunity to amend also other provisions relative to EIA at the national level of the Member States.

At this occasion Justice and Environment has prepared a collection of so-called examples of good practices which will be published on its website www.justiceandenvironment.org and freely distributable. Our intention was to share these examples of good legislative practice from various Member States with other Member States and inspire them during their legislative works. The collection of good practices contains 4 examples from 4 Member States – Slovakia, Czech Republic, Austria and Slovenia and they were prepared by partner organizations of the Justice and Environment.

II. Good practice in Austria

National summary: Austria

Respondents:

one representative from the EIA unit of the Federal Ministry of Agriculture, Forestry, Environment and Water Management

one representative from the public concerned (NGO)

one EIA expert

Period: July – September 2016

ÖKOBÜRO and J&E Austria conducted a short survey on the upcoming implementation of the EIA Directive amendment (2014/52/EU, amending 2011/92/EU) in Austria. The goal was to assess the need and extend for a proper implementation into Austrian national law, as well as already existing legislation, which implemented the goals of the amendment. The questionnaire has seven focus areas, which describe the main changes of the amendment.

To each of these areas, experts of governmental authorities, the NGO sector (WWF) and Ombudsman for the environment have been questioned to give their view of the amendment and the need for its implementation.

1. Protection of cultural landscapes and natural habitats

The amended Directive 2011/92/EU emphasises the need of preserving cultural heritage like urban historical sights and landscapes as a form of cultural diversity. It also stresses the need of preservation of species and habitats protected by the Habitat Directive 92/43/EEC. This is reflected in paragraphs 11, 16 of the Preamble to Directive 2014/52/EU and Article 3 of the amended Directive 2011/92/EU.

While the text of the Directive before the amendment in Article. 3 generally only reflects the fact that in the process of EIA has to be identify, describe and assess the impact of the "cultural heritage", in the amended text of Directive it states, that the EIA should take into account also the protection of cultural landscape. Specifically, the reflection of the enhanced protection of the cultural landscape should be reflected, so that the impact assessment on the environment dealt also with the visual impact of the projects, in particular changes in appearance or views on natural landscape and urban areas.

Seeing the proceedings in your country, do you think that the changes in the EIA directive were necessary? Will it be necessary, to incorporate these parts of the amended Directive 2011/92/EU into national legislation? If so, what would be the most appropriate way?

The Ministry of the Environment answered, that they do not expect, that the Austria EIA act is likely to need changes in this aspect, as it already entails the assessment of natural habitats and cultural landscapes in its annex II. Aside from protecting UNESCO sights, the EIA act refers to state legislation, which often entails the protection of townscapes. In everyday work, the authorities already laid a focus on the protection of the integrity of Natura 2000 areas. Landscape protection was already a part of EIAs since years, with all nine state nature protection laws containing their protection. On the contrary, the ministry is expecting other countries EIAs to become more similar to the ones in Austria.

The public environmental lawyer answered accordingly, in that he sees the Austria EIA act already in compliance with the amendment. He does not expect big changes in every day's work, as the state nature protection laws already asked for similar assessments.

The NGO expert answered, that he sees some issues with the implementation at the moment, as nine different state nature protection laws have slightly different scopes and might profit from the EIA amendment.

2. Exceptional circumstances, when the provisions of the EIA Directive will not apply

The amended Directive 2011/92/EU also regulates the possibility of exceptions, which make it possible, to not apply some provisions of the EIA Directive or also to completely omit the obligation to do an EIA process for certain projects, in exceptional circumstances. It may be a complete absence of an EIA process on exceptional grounds (see paragraph 20 of the preamble of Directive 2014/52/EU in conjunction with Art. 1 paragraph 3 and Art. 2 paragraph 4 of the Directive 2011/92/EU), or even the omission of one of its significant parts (see Art. 2 paragraph 5 of Directive 2011/92/EU).

Compared to the previous legal situation it extends the possibility not to apply the Directive, if it is a project, whose sole purpose is only a reaction to the extraordinary incidents.

Has there ever been, on the basis of your experience, a necessity, or a case where it would have been advisable to omit the EIA process due to exceptional circumstances? Is it essential that national legislation would establish such an exception?

ÖKOBÜRO does not have any knowledge of cases, where the omission of an EIA would have been necessary and thus sees no necessity for such an instrument. Quite on the contrary, we are aware, that often measures are taken as to avoid EIA proceedings at almost any cost. Therefore ÖKOBÜRO sees no need for additional possibilities in this direction.

The Ministry of the Environment commented on that, saying that they do not have reservations against such a tool, seeing as it would not be a completely new one because Directive 2011/92/EU already provided similar instruments. The Austrian EIA act has similar provisions in case of natural disasters which make it necessary to rearrange streets and railway tracks.

In which situations would it be appropriate and how could it be ensured, that the purpose of the EIA Directive is not undermined in such cases? How could the risk of possible misuses of exceptions be prevented? Do you see an increased risk of political influence and/or pressure for EIA omissions in case of controversial projects?

The Ministry of the Environment answered, that firstly there has been a similar rule in Directive 2011/92/EU, which means it cannot be seen as a completely new legal situation. The possibility of political influence is given, but is subject to the courts oversight. Also, the need to report such cases to the European Commission acts as a deterrent against misuse.

The Ombudsman for the environment answered, that he sees no necessity to such an instrument and is not aware of such cases.

The NGO answered, that it is not aware of any cases where there has been the need to omit the EIA.

3. Conflict of Interest

The amended Directive 2011/92/EU also regulates obligations of Member States, relating to measures which have to eliminate possible conflicts of interests of staff of the competent authorities involved in the EIA process (see paragraph 25 of the preamble of Directive 2014/52/EU in conjunction with the new Art. 9a of the amended Directive 2011/92/EU).

Compared to the previous legal situation this is a new question which the Directive prior to the amendment did not regulate.

Based on your experience, are there legitimate concerns about possible conflicts of interest of staff of the competent authorities in the area of EIA?

ÖKOBÜRO sees the possibility of political influence of the competent authority, albeit it is an issue of factual influence, not one of the law. The expected legal separation is already in place.

The Ministry of the Environment commented that the legal separation is already in place on both state and federal level.

The Ombudsman for the environment commented that while there is the legal separation already in place, influence of the authority can still be a problem in some cases. Especially so in matters where the authority is not the state government, but the Ministry of Infrastructure and Traffic. Also, the independence of experts sometimes seems to be an issue.

How should these obligations transposed into national legislation?

The Ministry of the Environment sees no need for additional transposition.

The Ombudsman for the environment does not have comments on this.

The NGO answered, that it sees no way, that the legislation has to be amended in this case. However, on the question of experts in the proceedings, the NGO would want to see clear rules on the financial reimbursement.

4. Expertise and quality of the EIA documentation

The underlying factor of quality, outcomes and achieving the purpose of EIA process is the expertise of assessors, which carried out the EIA and quality of their outcomes, which are reflected in the EIA documentation. This fact is reflected in the amended Directive 2011/92/EU, where it is clearly stated that the experts involved in drafting the report on the assessment of environmental impacts should be qualified and competent and sufficient expertise must be carried out in a high quality (paragraphs 32 and 33 of the preamble of the Directive 2014/52/EU in conjunction with Art. 5 paragraph. 3 of the text of the amended Directive 2011/92/EU).

Compared to the previous legal situation this is a new aspect which the Directive prior to the amendment did not regulate in detail.

Based on your experience, what do you think about quality and expertise of outcomes from the EIA process (assessment reports, expert opinion) in your current legal situation?

ÖKOBÜRO: Following a ruling by the highest administrative court (VwGH) in Austria, expert opinions can only be countered with other expert opinions, effectively barring other statements. While this might benefit the quality of the proceedings, those expert opinions of course are quite expensive and might not be affordable for the concerned public. The effective separation between the experts and the project solicitor might be an important step.

The Ministry of the Environment commented that the quality of EIA expert opinions in Austria is very high, regarding both the initial filings and the proceedings later on.

How should these obligations be reflected in national legislation, so they will meet with the objective pursued by the EIA Directive? Is it possible to achieve a better quality of the EIA process, without rupturing (especially financial) ties of assessors to investors?

The Ministry of the Environment answered that a better solution might be to focus on standardised and comparable outcomes in expert opinions, as well as rules on the contents. Additionally, assessments for prevention and compensation measures could be improved (e.g. "pools" for compensation, registered acknowledged measures)

The Ombudsman for the environment answered that the quality of expert opinions in EIA procedures is a question of resources. To combat the exclusion of the public, measures should be taken to provide the public with the necessary funds and/or to make the experts more independent from the project solicitors. One tool might be a public fund, paid for by the project solicitors.

The NGO also asked for more possibilities for the public concerned to be able to afford expert opinions.

5. Mandatory assessment pursuant to other Directives

The amended Directive 2011/92/EU (paragraph 37 of the preamble of the Directive 2014/52/EU in conjunction with Art. 2 paragraph 3 and Art 4 paragraph 4 of the amended Directive 2011/92/EU) reflects the fact, that the process of EIA is not the only process of its kind; the obligation to carry out an impact assessment also concludes from other Directives (e.g. the Habitats Directive, the Water Framework Directive). For a proposed project that means, that it may be required to carry out multiple assessments of its impact from different perspectives and as the obligations according to various Acts, which can be regarded as wasteful, uneconomic and bureaucratic.

Compared to the previous legal situation this is a new question which the Directive prior to the amendment did not regulate in detail.

What are your experiences with the fact, that there are a number of separate "assessments" which can overlap and there are also obligations, which require the investors to carry out various overlapping assessments?

ÖKOBÜRO points out, that the Ministry for the Environment already presented some ideas of having a "one-stop-shop" principle in other areas after the model of EIAs as well.

The Ministry for the Environment commented that additionally to the one stop shop principle, a clear separation between EIA projects and SEA planning might bring improvements.

Do you think, there is a better solution, to cover all kinds of assessment and evaluation of environmental impact under one roof (EIA), or is it better to leave them as separate processes? Please also indicate the reasons.

The Ministry for the Environment answered that while there is a reason for the separation of proceedings, the one stop shop principle would benefit other levels as well.

The NGO answered that EIAs are, aside from IPPC projects, currently the only ones, where NGOs can take part in Austria. While they too favour the one stop shop principle, those proceedings have to include the public as well.

6. Sanctions

A brand new feature is the obligation for Member states to establish sanctions in the EIA process, which should be "effective, proportionate and dissuasive" (paragraph 38 of the introductory part of the Directive 2014/52/EU in conjunction with the new Art. 10a, text of the amended Directive 2011/92/EU).

Compared to the previous legal situation this is a new aspect which the Directive prior to the amendment did not regulate.

What is your vision of introducing sanctions in national legislation? What do you think will the introduction of sanctions in EIA Act contribute to meeting the objectives and purpose of the EIA Directive?

ÖKOBÜRO assesses that sanctions might help to provide the completeness, timeliness and correctness of the project proposal.

The Ministry of the Environment commented that the completeness, timeliness and correctness of the project proposal is in the best interest of the project solicitor and thus not an issue.

Which breach of the EIA procedure should be punishable? Which entities should be subject to sanctions? What kind or form of penalties would you propose?

The Ministry of the Environment answered that they are not aware of any issues which might require sanctions.

The Ombudsman for the environment answered that the highest sanction already in place is the denial of the project therefore he is not aware of the need of additional sanctions.

The NGO answered that while usually the project needs some time to get all the required documentation, a timely and open process with public participation is a way better option than sanctions.

7. The screening procedure

The amended Directive 2011/92/EU significantly clarifies and regulates the part of the EIA process so called as a “screening procedure” (paragraphs 26-29 of the preamble of the Directive 2014/52/EU in conjunction with art. 4 paragraph 3 – 6 of the amended Directive 2011/92/EU). So far, in screening procedures, the EIA Directive has received little attention, but this, on the basis of the amended Directive 2011/92/EU, should be modified. It is in no doubt that the decision from screening procedure is an important milestone in the EIA process and is necessary to devote adequate attention on it.

Compared to the previous legal situation this is a new aspect which the Directive prior to the amendment did not regulate in detail.

What is the importance of screening in the actual national legislation in relation to the purpose and objectives of the EIA process?

ÖKOBÜRO assesses, that screening procedures are highly important for NGOs, as many projects are just below the necessary threshold of the EIA. These projects might have severe implications for the environment and their proceedings are only accessibly to the public in the case of an EIA. The highest administrative court of Austria (VwGH) ruled this summer, that NGOs have to have standing in some proceedings to question the need for an EIA, the details on this however are not yet clear.

The Ministry of the Environment commented, that seeing the numbers, screening procedures are of high importance in Austria. Public Participation was strengthened in the last amendment of the Austrian EIA act.

Will it be necessary, to make fundamental changes in the actual rules of screening procedures to fulfil the requirements of the amended Directive 2011/92/EU?

The Ministry of the Environment answered, that the amendment will make some changes in the EIA act necessary, but will most likely not influence the proceedings themselves.

The Ombudsman for the environment answered, that it is an issue that so many projects do not fall under the EIA act, even after a screening procedure (e.g. Vienna: 90% negative decisions). The main issue here seem to be the high thresholds.

The NGO answered, that screening procedures are an important tool for environmental protection, as the EIA, aside from IPPC projects, is the only proceeding with public participation and a lot of projects are just below the necessary thresholds (e.g. the threshold for water power plants is 15 MW, projects often have 14,9 MW in their documentation). Also, generally the thresholds seem too high in the relevant provisions.

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The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

