

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 – Czech Republic

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 the Czech Republic

National summary: Czech Republic

Respondents: JUDr. Mgr. R. S., Regional Authority, Natural Resources, Protection and EIA
Unit
Mgr. J. B., EIA expert assessment processor
M. P., environmental, non-governmental organization

Term: July – August 2016

On 16 April 2014, Directive 2014/52/EU of the European Parliament and of the Council was adopted, amending Directive 2011/92/EU on the assessment of the impacts of certain public and private projects on the environment. It is a crucial amendment to the EIA Directive, which significantly extends its scope and introduces new obligations for Member States.

This questionnaire focuses on seven areas which are newly being regulated by the amendment of Directive and are considered key for the purposes of the questionnaire. Its aim is to assess the current perception of this issue in the Member States, whether and how the current legislation addresses potential problems, and what solution to these problems the amendment suggests.

The questionnaire aims at various stakeholders: competent authorities carrying out the EIA process, representatives of the public concerned, and selected assessors who carry out the EIA documentation.

1. Protection of cultural landscapes and natural habitats

From a factual point of view amended Directive 2011/92/EU lays more stress on preserving cultural heritage comprising urban historical sights and landscapes as they are integral parts of cultural diversity.

It is worth mentioning that Directive puts more emphasis on preservation of species and habitats protected under the Habitats Directive. This is reflected into paragraph 11 and 16 of the Preamble to Directive 2014/52/EU in conjunction with Article 3 of amended Directive 2011/92/EU.

Compared with previous version of Directive, protection of landscape is partially intensified now. In the previous version of Directive, Article 3 only reflected the fact that in the EIA procedure there has to be identified, described and evaluated the effect on cultural heritage. In the amended version, this Article states that during the EIA procedure the landscape protection should be taken into consideration as well. More precisely, the intensified landscape protection should be reflected in a way that environmental impact assessment would include even visual impact of assessed projects, especially changes regarding overall appearance of landscapes 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? From stakeholders' answers:

Stakeholders' opinions on necessity of the amendment differ. R. S. and M. P. believe that changes were necessary (according to R. S. only changes regarding landscape protection, not the Habitats Directive). J. B. is not convinced about the necessity of the amendment – he questions the improvement of landscape protection through new assessment standards. He considers regional landscape studies and formulation of vision of municipalities at the local community level as a reasonable instrument for landscape protection. J. B. believes that any applications made “from above” are in this case ineffective.

Respondents do not agree on whether and how to incorporate relevant parts of the amended Directive into Czech legislation. According to R. S., the solution is a comprehensible amendment of acts protecting particular fields of environment which would both logically and terminologically build on current legislation.

The Ministry of the Environment of the Czech Republic has already taken steps to transposition of the Directive and submitted a proposal of amendment of the Act no. 100/2001 Coll. on Environmental Impact Assessment which is being discussed in the Chamber of Deputies of the Parliament of the Czech Republic. The Ministry suggests, among other things, to add the following text to the act: “Impacts on biological diversity are being assessed with particular regard to European important species, birds and European habitats.”

In your experience, is the protection of cultural heritage and natural habitats and species under the Habitats Directive, sufficiently guaranteed by the national EIA legislation? Frank Bold answer:

Within the EIA procedure, impacts on public health and environment are being assessed, including impacts on fauna and flora, ecosystems, soil, geological environment, water, climate and landscape, natural resources, tangible assets and cultural sights, and their reciprocal impact and connection.

The EIA procedure is only one of several methods of preserving nature and cultural heritage that exists within Czech legal order. These values should be subsequently protected by relevant authorities (issuing binding decisions) in proceedings following up EIA procedure (planning and construction proceeding). Protection of cultural heritage, habitats and species is reflected in several acts (e. g. Act no. 114/1992 Coll., on Nature and Landscape Protection, Act no. 20/1987 Coll., on State Care for Monuments) or implementing decrees (e. g. Decree no. 166/2005 Coll., on the NATURA 2000 network or Decree no. 395/1992 Coll., defining specially protected species of plants and animals).

Despite extensive law framework focused on cultural heritage protection and specially protected species, enforceability of these rules sometimes gets very problematic. In case of various construction projects values of nature protection or heritage preservation are not taken into consideration. Investors often neglect necessity of applying for an exemption from protection of specially protected species or of obtaining an opinion of a heritage preservation institute. Some of Czech voluntary associations and active citizens point out these facts to competent authorities and call for proper procedures of authorities in line with the Czech legislation (e.g.: Jeseníky: Protected landscape area as a business zone).

2. Exceptional circumstances under which the provisions of the EIA Directive will not be applied

The amended Directive 2011/92/EU also regulates the possibility of exceptions, which makes it possible not to apply some provisions of the EIA Directive, or even 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 previous legislation, there is extended possibility of not applying this Directive to projects whose sole purpose is the response to emergencies.

How to ensure that the purpose of EIA Directive is not undermined in such cases (should any exceptions be accepted at all) and how to avoid risk of possible misuse? How could the risk of possible misuse of exceptions be prevented? Do you see an increased risk of political influence and/or pressure for EIA omissions in case of controversial projects? From stakeholders' answers:

The whole EIA procedure takes several months. In case of emergency it is necessary to set a more flexible system which will be able to react to exceptional incidents such as natural disasters. For this reason, the Directive introduces the possibility of leaving out phase of project assessment during the EIA procedure. However, respondents either do not agree with these exceptions or suggest their maximum reduction. R. S. would keep the scope of the assessment based on factual questions but he would simplify the whole assessment procedure. On the contrary, J. B. would prefer multi-stage assessment system as a safety measure for those emergency situations.

M. P. points out possible misuse of these exceptions and suggests establishing a monitoring committee within the European Commission as a safety measure. This committee would provide the European Commission with an annual report on the EIA Directive fulfilment. The committee could help prevent political influence in the EIA procedure which, according to M.

P., is present in the Czech Republic. R. S. thinks that possible misuse could be prevented through methodological work of the Ministry of the Environment. He is not aware of any political influence, as well as J. B.

Has there ever been, in 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? Frank Bold answer:

There already is an exception from the obligation to conduct project assessment during the EIA procedure in the Czech legislation. Project that is decided by the government in state of emergency and state of war, urgent reasons of defense or implementation of international treaties binding on the Czech Republic, is not subjected to the EIA procedure. The exception applies even to projects where the purpose is to prevent consequences immediately or reduce non-predictable accidents that could severely endanger health, safety, property or environment.

It can be also mentioned that the Czech government has recently initiated simplification of the EIA procedure, regarding 11 transport projects which are considered a priority and are in advanced phase of preparations. Normally these projects should be assessed in a new EIA procedure because they got assessment reviews during effectiveness of "old" Act on Environmental Impact Assessment (before the Czech Republic joined the European Union). Amendment of the Act on Environmental Impact Assessment will ensure that the priority projects will not be repeatedly discussed and will only obtain a new opinion of the competent authority (see Library of prepared legislation).

We believe that exceptions regarding public law rules should be interpreted in a restrictive manner. It is not acceptable to adapt interpretation of the exceptions to attempt for the maximum possible simplification of construction projects. Implementation of such projects should be based on the most recent environmental impact assessment. From this point of view, the initiated exception for key transport projects can be seen as a deviation from general rules which can result in future similar incidents regarding making decisions with serious environmental impact.

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 area which Directive prior to the amendment did not regulate.

In your opinion, how should these obligations be transposed into national legislation? From stakeholders' answers:

Both J. B. and M. P. think that possible conflict of interest of staff of authorities may occur in the Czech Republic. According to J. B., this might happen because the influence of regional authorities on functioning of the national administration at regional level is significant.

It is well known that head department positions are politically dependent. J. B. offers a possible solution to this problem - a new independent agency which would assess projects instead of regions, as is the current practice. M. P. would solve possible conflict of interest in a similar way, although he would not prefer establishing a new agency. He would rather shift the assessment procedure to a region not bordering on the region applying for EIA opinion so that possible system bias would be limited.

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

Possible conflict of interest can be seen in the appeal process against negative conclusion of screening procedure in case the Ministry of the Environment is the assessor. In this case, the superior authority is a minister who receives a proposal for decision from the appeal committee. This provision should prevent any potential bias of the appeal committee members.

The conflict of interest can occur even in cases dealt by regional authorities. Officials are legally obliged to work and decide impartially, regardless of their own opinions, and refrain from everything that may put at risk confidence in their impartiality. Moreover, they have to refrain from any actions that might result in conflict of public and personal interest. In particular, it is forbidden to misuse any information gained in connection with their work for their own or somebody else's profit.

Negative conclusion of the screening procedure can be challenged at court, and legality of the whole EIA procedure can be evaluated by an independent court arbiter.

We have not experienced any case when there would be any doubt about possible independence of officials in the EIA procedure.

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 who carry out the EIA, and quality of their outcomes which is 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 amended Directive 2011/92/EU).

Compared with previous legislation, this is a new issue that was not dealt with in detail in the old version of the Directive.

How should these obligations be reflected in national legislation in order to meet the objective pursued by the EIA Directive? Is it possible to achieve a better-quality EIA process, without rupturing (especially financial) ties of assessors to investors? From stakeholders' answers:

R. S. considers the average output quality very good so far, poor-quality instances are more of an exception. Therefore, he does not find financial separation of an investor and report processor very effective. Similarly, J. B. thinks that aspects of expertise and competency are ensured sufficiently through authorization procedure. If expert opinion would be prepared exclusively by individuals commercially independent from obtaining both business and public sector contracts, this could contribute to more objective and independent reports, as J. B. says. In this case, separation of authorization for assessment report and expert opinion would be needed.

M. P. would simplify the procedure of certificate withdrawal for processors of assessment report and expert opinion. M. P. also suggests separating processors of assessment report and expert opinion. Processors of expert opinion should not work on assessment report, as both M. P. and J. B. suggest.

Based on your experience, what do you think about the current quality and expertise of outcomes from the EIA process (assessment reports, expert opinion)? Frank Bold answer:

Based on our practical experience, EIA procedure outputs often do not reach high quality. Assessment conclusions are usually very vague and stated requirements are difficult to enforce so in the end they do not serve their purpose. In general, the assessment report is very often influenced by the investor. In most cases, reports state only negligible impact on environment. The expert opinion is then influenced by the report because the assessment processor builds on the report.

5. Mandatory assessment pursuant to other Directives

Amended Directive 2011/92/EU (paragraph 37 of the Preamble to Directive 2014/52/EU in conjunction with Article 2 paragraph 3 and Article 4 paragraph 4 of amended Directive 2011/92/EU) reflects the fact that the EIA procedure is not the only one of this kind.

Obligation to ensure environmental impact assessment arises from other directives as well (e. g. Habitat Directive, Water Framework Directive). What this means for proposed project is that multiple assessments from various points of view can be required, which can be seen as redundant, uneconomic and bureaucratic.

Compared with previous legislation, this is a new issue that was not dealt with in the last version of Directive.

Do you think it is better to include all kinds of assessment and evaluation of environmental impact under one roof (EIA), or should they be treated as separate processes? Please also indicate the reasons. From stakeholders' answers:

Regarding this question, respondents believe that it is better to assess the project within one (major) assessment. As R. S. supposes, this assessment should be more of a general character and more specific questions should be assessed in subsequent procedures.

J. B. adds one more reason. In the assessment procedure, it is necessary to balance opposing or dissimilar requirements of national administration authorities and other participating parties, which is easier in one united procedure. In addition, M. P. suggests that text of the assessment should be easily comprehensible for public so that people are able to understand and use the information. The assessment should provide clear answer to the question whether the project can be implemented or not and, if it can, then under what factual, time and legal circumstances and solutions.

What is your experience with the fact that there is a number of several potentially overlapping "assessments" which the investors are obligated to carry out? Frank Bold answer:

Any significant construction project usually goes through several procedures. In these, the project is assessed with respect to possible infringement of public interest. Apart from EIA procedure, it is planning and construction proceeding, proceedings regarding wood species harvesting, or regarding exception from protection of specially protected species. All these procedures are important for protection of values that are covered by the EIA procedure in the first phase. The project gradually gets detailed and therefore also the assessment of its environmental impact has to become more specific in the course of time. These procedures can be costly and take long time, however, we believe they are reasonable.

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 of the amended Directive 2011/92/EU).

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

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? From stakeholders' answers:

According to respondents, serious errors in assessment reports as well as errors in opposing expert opinions should be penalized. For example, authorization can be withdrawn as a kind of such penalty. Basically, this type of penalty can already be found in legislation. Such withdrawal should be prompt, as M. P. says. Two significant expert errors, including two faulty reports sent back for revision, should be sufficient reason for the withdrawal.

Both processors preparing assessment report and expert opinion should be penalized for serious errors. J. B. adds that for investors, refusing authorization (e. g. construction permit) is a sufficient penalty. If any infringement is recorded afterwards, the whole EIA procedure has to be repeated.

What is your vision of introducing sanctions in national legislation? In your opinion, will the introduction of sanctions contribute to meeting the objectives and purpose of the EIA Directive? Frank Bold answer:

Some types of penalties could help to provide better enforceability of obligations regarding EIA procedure. For investors, these may be penalties for insufficiently made report or assessment, alternatively infringement of requirements stated in the final EIA assessment of public authority. Penalties could be imposed upon officials in case of not meeting deadlines for assessment or not reporting conflict of interest.

7. Screening procedure

Amended Directive 2011/92/EU significantly clarifies and adapts the screening procedure as a part of EIA procedure (paragraphs 26-29 of the Preamble to Directive 2014/52/EU in conjunction with Article 4 paragraph 3-6 of amended Directive 2011/92/EU). So far the Directive has paid little attention to this part of the procedure; however, on the basis of amended Directive 2011/92/EU there should be progress. Decision issued in terms of a

phase of screening procedure is without any doubt a significant turning point in the EIA procedure and deserves great attention.

Compared with previous legislation, it is once again a new issue that was not covered in the last version of the Directive.

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? From stakeholders' answers:

Respondents disagree on this question. Both J. B. and R. S. believe that the present-day legislation covering screening procedure is fully sufficient and no fundamental change is needed.

In order to fulfil amended version of Directive 2011/92/EU, M. P. would introduce a possibility of appeal against conclusion of the screening procedure even for individuals. From his point of view, it would be appropriate to grant suspensory effect to actions against conclusions of the screening procedure. According to M. P., introducing this effect would effectively prevent terminating of the EIA procedure in the phase of screening procedure with regard to disputable construction projects.

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

In Czech legal order, the phase is divided into two parts. For projects which are always reviewed in EIA assessment, the aim is to set out information which has to be completed or specified in the report. The screening procedure then identifies individual problematic questions that were not dealt with in the notification phase.

For other projects, the aim of the screening procedure is to assess whether the project or its change can significantly impact environment, or else, if it can either individually or in connection with other projects significantly influence Sites of Community Importance or Special Protection Areas. If the answer is yes, the project will be assessed on the basis of the Act on Environmental Impact Assessment (the phase of assessment expert opinion, public hearing and final assessment of public authority).

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