

# Regulation of EIA Procedures

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

General Summary

***Justice and Environment 2016***

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## **Regulation of EIA Procedures**

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#### **General Summary**

On April 16, 2014 was approved Directive of European Parliament and the Council 2014/52/EU which amends Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. It is a crucial amendment to the EIA Directive, which has extended its wording quite significantly. It has also introduced new obligations for Member States.

Organization Justice and Environment created a questionnaire with purpose to find and compare whether the amended EIA Directive would address the real problems of the EIA process in the Member States. In this respect we also discussed and brought proposals how to implement the amendment in conjunction with the current practice.

The questionnaire has focused on seven areas, that the amendment of the EIA Directive defines in comparison with the current situation as new ones, or otherwise, and which were considered essential for the questionnaire. The point is to identify current views in some Member States, as how the problems (and/or if there is any) is solved under the current legislation and what are the ideas how to solve them pursuant to the amended text of the EIA Directive.

The questionnaire covered the following areas:

- protection of cultural Landscapes and natural habitats
- exceptional circumstances when the provisions of the EIA Directive will not apply
- conflict of Interests
- expertise and quality of the EIA documentation
- mandatory assessment pursuant to other Directives
- sanctions
- screening procedure

The questionnaire was addressed to the competent authorities who carry out the EIA process, to the representatives of the public concerned and selected assessors who carry out the EIA documentation. The wording of the questions was identical for all target groups.

Replies were received from respondents from Austria, Czech Republic, Estonia, Slovenia and Slovakia. Summaries from all these countries are listed in Annex.

## 1. Protection of cultural Landscapes and natural habitats

The amended Directive 2011/92/EU puts from a substantive point of view bigger emphasis on the importance and preservation of cultural heritage, which includes the historical monuments in the towns and cities and cultural landscape, as an integral part of cultural diversity.

It is also noticeable that much more emphasis is put on the protection of species and habitats protected under the Habitats Directive.

This is reflected in paragraphs 11 and 16 of the preamble of the Directive 2014/52/EU in conjunction with Art. 3 of the amended Directive 2011/92/EU.

Compared to the previous text of the Directive new text particularly strengthen the protection of cultural landscape. While before the amendment the text of the Directive in its Article 3 had generally only reflected the fact that in the process of EIA there was a need to identify, describe and assess the impact of the "cultural heritage", in the amended text of the 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 could deal also with the visual impact of the projects, in particular changes in appearance or views on natural landscape and urban areas.

In relation to the questions related to the increased emphasis on the protection of the cultural landscape and landscape character, it stems from responses from individual respondents that this issue is in already in some extent resolved in the existing pieces of legislation. It seems that it is not necessary to solve this question out by a separate legislative regulation in any of the participating countries, because requirements of the amended EIA Directive are already legally guaranteed.

However, respondents pointed out to the problems of the practical application of the protection of the landscape and cultural landscape. In this respect they see there a space for improvement and ways how the amendment of EIA Directive could improve the situation.

In general, the majority of participants said, that when comparing protection of the cultural landscape and landscape character with habitat conservation, the status of legislative provisions of the protection of habitats is incomparably better than the protection of the cultural landscape.

In respect to this issue there were detected significant differences among respondents where for instance respondents from public concerned, who were much more critical than other respondents (experts, staff of the state authorities).

## 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, which sole purpose is only a reaction to the extraordinary incidents.

In this area there was a predominant view that in the current practice in different countries there is only minimally reflected such a need, where any project for some exceptional reason, should be exempt from the obligation to perform the whole EIA process. It was also often noted that the current adjustment already allows the exclusion of the EIA process for projects that are necessary for national defence. It was also repeatedly underlined that current legislative adjustment is sufficient in this area.

As an option extending the scope of exemptions from the obligation to carry out the EIA, there were mentioned mostly projects that would directly respond to natural disasters.

There was a fairly strong consensus, that if the national legislators define the reasons that allow exemptions from the obligation to carry out the EIA, it should be done in a narrow manner with a very clear and precise definition

## 3. Conflict of Interests

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 Directive prior to the amendment did not regulate.

According to respondents, in some countries sometimes there occur situations, where the state is in the position of the project submitter, project assessor in the EIA process and as well as the competent authority in the EIA process for the project., Such situation is a clear conflict of interest. It was also pointed out that a political impact on the decisions of the competent authorities in the EIA process can be a potential source of conflict of interest.

Therefore, in general, the changes in the amended EIA Directive, under which it is possible to object the potential conflicts of interest, were well received.

On the other hand, for example respondents in Estonia pointed out, that in some cases, in fact, they cannot exclude a conflict of interests; if it is a small country where in a relatively specific area regarding the EIA process "everyone knows everyone".

#### 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 question which Directive prior to the amendment did not regulate in detail.

The binder in this area is a consensus among respondents, that the issue of professional outcomes of the EIA process is an important thing, which has a decisive influence on its overall quality. Due to the relatively diverse regulations in the individual countries it is not possible to pronounce one universal summarizing message, except one, that in each country there is a question, whether there are any better solutions than those which are currently used in practice.

#### 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 assessing of its impact from different perspectives and as the obligations according various Acts, which can be regarded as wasteful, uneconomic and bureaucratic.

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

In this area prevails an opinion which favours the existence of a single procedure which would include all necessary assessments; while the umbrella process should be an EIA process. Such adjustment would reduce bureaucratic burdens, simplify and make the processes more transparent and would allow to deal with a variety of conflicting issues in the framework of one procedure. Benefit for the public would be, that in the EIA process the public has guaranteed procedural rights, which would be automatically transferred to other needs assessment.

Slovenia and Austria already apply the principle of "one stop shop", which also covers the decision making procedure. In principle, it places all necessary procedures (relative to the project for which it is necessary to carry out the EIA process) under a general procedure; the procedure has to deal with all related issues.

In Estonia and Slovakia, however, respondents in this context identified a problem, which arises in the situation when there is an obligation to carry out an appropriate assessment on the Natura 2000 sites. This assessment is carried out in form of a whole EIA process, and that also in cases where an activity, would not be subject to EIA for any other reason than impacts on Natura 2000 areas. According to the respondents in Slovakia and Estonia, in such cases, performing the whole EIA process is unnecessary and expensive. In such situations it would be more beneficiary to establish a process that would allow to make only appropriate assessment process on the Natura 2000 sites, without the obligation to perform whole EIA process.

## 6. Sanctions

A brand new feature is the obligation for Members 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 question which Directive prior to the amendment did not regulate.

With the exception of Austria, in all countries there is a predominant view that sanctions can help to make EIA process better and more effective.

There was also consensus on the point when sanctions should be applied. This should affect an expert who provides untrue expert outputs or knowingly incomplete information. At the same time, sanctions should concern an investor, who would not fulfil conditions stemming from the EIA process – sanction would be the rejection of the project.

## 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 question which Directive prior to the amendment did not regulate in detail.

In this respect there prevailed among respondents an unequivocal view that the screening procedure has within the EIA process exceptional and very important position. This is due to the fact that much larger number of cases is subject to it than is the number of cases which are under regime of the mandatory EIA process.

In this regard, the respondents pointed out to the fact, that in the various countries the number of decisions from the screening procedure, stating that EIA process was not necessary to be carried out his much more higher than the number of the decisions from screening procedures, which impose obligations to carry out the whole process of EIA. In response to that, there were underlined several possible solutions e.g. changes in thresholds or a bigger public involvement in the screening procedures. Of course, latter applies to those countries, where the public has some minimum rights in the screening procedures.

### Findings

Findings of the questionnaire permit us to draw following conclusions:

1. Requirement of the amended EIA directive, relative to the increased protection of landscape character and cultural landscape is mainly an issue of application practice.
2. Exceptions which allow non-application of EIA directive should be formulated clearly and unequivocally and ideally in a way to only include natural catastrophes.
3. Obligation to regulate the conflict of interests in the national legislation is perceived as a movement forward.
4. Question of expertise of the outputs from the EIA process seems to be one of the most important issues brought by the amended EIA directive. Identification of a good

implementation solution may have a real impact on a positive evolution of the fulfilment of the purposes of the EIA directive.

5. In respect to the question of the overlap of the assessments according to other directives with the EIA process, there was a clear consensus that EIA should become an umbrella process, bearing in mind specificities of particular processes including the time aspect.

6. Sanctions should have impact mainly on the quality and expertise of the outputs from the EIA process. Sanction should affect mainly entities which consciously decrease the quality of the expertise or do not respect it.

7. Close attention should be paid to the regulation of the procedure of the screening given the fact that majority of the assessed projects terminates in this phase of the EIA process.

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