

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 - Slovakia

Justice and Environment 2016

a Udolní 33, 602 00, Brno, CZ
t/f 36 1 3228462 / 36 1 4130297
fb /justiceandenvironment

e info@justiceandenvironment.org
w www.justiceandenvironment.org
tw JustEnviNet

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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 Slovakia

National summary: Slovakia

Respondents: one represent from EIA Unit on Ministry of Environment
one represent from competent district regional authority
three representatives from EIA expert assessors,
two representatives from public concerned

Period: July – August 2016

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 impacts 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.

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 aim is to identify the current views in some Member States, on how the problems (and/or if there is any) are resolved under the current legislation and to gather ideas how to solve them out pursuant to the amended text of the EIA Directive.

The questionnaire was addressed to competent authorities who carry out the EIA process, to 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.

1. Protection of cultural Landscapes and natural habitats

From the substantive point of view the amended Directive 2011/92/EU puts more 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.

Much more emphasis is also placed 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 strengthens the protection of cultural landscape. 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 Directive it states that the EIA should take into account also the protection of cultural landscape. Specifically, it requires that the enhanced protection of the cultural landscape is reflected in a way that the impact assessment on the environment deal also with the visual impact of the projects, in particular with changes in appearance or views on natural landscape and urban areas.

Questions:

According to your experience, is the protection of cultural heritage, natural habitats and species protected under the Habitats Directive, provided by national EIA legislation in adequate manner?

In respect to the question of habitat conservation, the representatives of the public concerned agreed, that the current legislative status does not provide adequate protection of habitats protected under the Habitats Directive. It is the connection between appropriate assessment under the Habitats Directive with the whole EIA process, in cases of the assessment of those activities which affect only the natural values represented by a network of protected areas Natura 2000, which seems to be problematic. According to representatives of the public concerned in such cases there should be clearly defined priority conservation values of Natura 2000.

The problem is also the fact that there is no obligation to have professional qualification for execution of an appropriate assessment on Natura 2000 sites under the Habitats Directive.

Representatives of EIA experts pointed out to the fact that they have problem with accessing relevant data on protected areas. From this reason it is frequent, that it is not possible to realistically assess the current status of an area in terms of natural values which are found there.

In the opinion of representatives of the state administration currently valid legislation (Nature protection Act vs. EIA Act) configures the framework for the protection of values, which are protected under the Habitats Directive. Explicit requirements of the EIA Directive amendment are regulated in the current national legislative.

The question of protection of the landscape is resolved in the EIA Act. It constitutes one of the official parts of the assessment report. Respondents agreed that the legislation is sufficient and in practice the requirements of the protection of the landscape are applied, for example in form of the requirements of the visualisation of the project, or requirements to process landscape studies.

However one from EIA experts highlighted the inability of the evaluator to assess the requirements for the landscape protection in relevant extent, due to the absence of a comprehensible methodology. The problem is also the lack of authorization procedures, wherein the requirements for the landscape protection would be taken into account.

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?

In terms of habitat protection, the representatives of the public concerned, as well as representatives of public administration, concur that it would be appropriate to make legislative amendments that would address the above mentioned issues.

However the representatives of the Ministry of Environment, perceive problems at the level of the application in practice and not in the non-compliance with the amendment of the EIA Directive. Therefore, they do not consider necessary adoption of modifications in the period of time specified for the implementation of the amendments to the EIA Directive.

It is not necessary to strengthen the protection of the landscape in the EIA Act, rather it is necessary to focus on its application in practice.

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, so situations where some provisions of the EIA Directive will not be applied or even situations where it will be possible to completely omit the obligation to carry out an EIA process for certain projects, under 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 to not to apply the Directive, if it concerns a project, whose sole purpose is only a reaction to the extraordinary incidents.

Questions:

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 establishes such an exception?

There prevailed a clear consensus among respondents that they have never met with such a situation in the practice.

If so, 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?

Ministry of the Environment points out, that in the current legislation concerning the SEA there already exist exemptions for similar purposes (strategic documents whose sole purpose is to serve national defense or civil emergency, including financial or budgetary strategy document), and therefore it is appropriate to amend the legislation on EIA process in a similar spirit.

Other respondents from among the public concerned, as well as from the assessors indicated that if there are legal provisions in this spirit, it should be as specific as possible. It should specify the exceptional circumstances in order to prevent the possible abuse of omitting the EIA process.

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 the 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.

Questions:

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

Most of the respondents have not encountered a situation where a person from the staff of competent national authorities would be in a situation of conflict of interest.

But one from the EIA experts has experienced a situation where the staff member of the EIA Department of a district state authority, took part in the screening of a project, for which he also processed the EIA documentation for investor.

Representatives of public concerned have also pointed out to the fact that appropriate assessment under the Habitats Directive as part of the EIA, is often processed by the State Nature Protection (state agency) for a fee, but then in respect to the same project they also issue an expert opinion as a basis for statement of Nature Protection state authority. Such a procedure can also be perceived as a conflict of interests.

How should be these obligations transposed into national legislation?

Most of the respondents, who have not experienced in the practice situations of conflict of interests within the EIA process did not see a need for EIA Act amendment in this area. However, as illustrate it above mentioned cases, also in this area conflict of interests may happen. Therefore it would be appropriate to adjust provisions of the EIA Act at least in general terms and thus to eliminate possibility of conflict of interest.

4. Expertise and quality of the EIA documentation

The underlying factor of the quality outcomes and condition for achievement of the purpose of EIA process is the expertise of the assessors, who carry out the EIA. The quality of their outcomes 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 the drafting of 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.

Questions

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?

Most of the respondents perceive the issue of quality and proficiency of outputs from the EIA process as the biggest problem of the existing legislation and practice. The investor is entitled to prepare the assessment report itself, at its own cost, without requiring professional qualifications. This situation is not good, because the result is often a documentation without required professional level (information) or “pro forma” documentation. The case is when the documentation does not meet legal requirements for the content and the structure and it contains “unnecessary”, meaningless text.

Respondents from among assessors also point out, that at present it is extremely easy to pass the test to get authorization for the elaboration of the EIA documentation (which is in the Slovak legislation already required for the expert opinion, which is an independent opponent opinion on the assessment report). They also pointed out to a system error that makes it possible to become professionally qualified person – EIA expert – for a person, who is technically educated, who in their opinion cannot assess the impact on the environment, but only the technical possibilities of the project.

The representatives of the public concerned, as well as assessors also pointed out, that it is the competent authority who is responsible for the poor quality of the documentation. If in a case of a poor quality EIA documentation, they return it for revision or reprocessing, it would be a shame for EIA experts and it may pressure them to increase their quality.

The representatives of the public concerned, assessors, as well as a representative of the district office pointed out to the fundamental problem of a non-existence of independence of EIA experts. These are in a contractual relationship with investors, who pays them directly and indirectly puts the pressure to have the assessment, in "his favour". The assessors also highlighted negative practice, when they were directly influenced to change the text of documentation; in such cases the assessor was under pressure of the investor, and was required to delete or modify certain passages of text, for example in relation to the identification of protected plant species in the area where the activity was proposed to take place.

The opposite view on this issue was presented by the representatives of the Ministry of Environment. They argued, that the current practice, but also vision of "tearing off" the financial links between the applicant and the assessor of documentation will not necessarily ensure quality of outcomes of the EIA process.

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

In the opinion of the Ministry of Environment improvement of the quality of EIA documentation would be partially guaranteed, if there was established an obligation that EIA documentation has to be produced by "professionally qualified persons". Regardless of the direction of the incoming cash flows, primarily should be observed the professional qualification of persons, bearing in mind the risk of new sanctions (deletion from the list of competent persons) in case of incorrect preparation of EIA documentation.

A similar view is shared by the assessors, as well as representatives of public concerned, but they consider it only as a necessary minimum that should happen in this area.

In the opinion of representatives of the public concerned, it would be appropriate to define in the EIA Act, that the first stage of EIA documentation should contain only information of a technical nature and should not replace Assessment Report (as it is currently allowed).

In the opinion of assessors and representatives of the public concerned, it would be appropriate to tighten up the exams that assessors have to pass, to obtain official EIA expert authorization, in order to avoid that applicant with mere technical education could become

eligible. Also it may be appropriate to think about possibility to require, from official EIA expert assessors to reach the level of court experts. Complying with such requirement and stricter accountability regime would undoubtedly contribute to increase the quality of documentation, as well as the responsibility for the outcomes.

The assessors, as well as representatives of the public concerned consider that the independence of assessors from investors could be ensured by the establishment of a fund, which would be used for the financing of EIA experts. Investors would pay an administrative fee into such fund and this fee would be derived from the amount of the investment.

One from the EIA experts, however, considers that the cooperation between investors and assessors is positive, given that the EIA expert is able to guide the investor in a good way. Cooperation can also lead to an acceptable agreement in terms of environmental impact. Therefore she sees the mechanism which would "separate" the investor from the assessor as becoming relevant in the stage of EIA process where expert opinions are to be prepared.

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 results from other Directives (e.g. the Habitats Directive, the Water Framework Directive). In relation to a proposed project this means, that it may be subject to multiple assessing of its impacts from different perspectives in response to the obligations under various Acts. This 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.

Questions:

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

MoE's opinion: In general we can say that the assessment under the Habitats Directive vs. assessment under the EIA Directive in the national legislation is coordinated and proceed according to EIA Act, observing the requirements of the appropriate assessment as provided for in the Nature Conservation Act, if it is decided so at the scoping stage of the EIA process.

The information on the assessment according to the Water Framework Directive is not publicly accessible before the EIA process starts. It is to be noted that assessment under the Water Framework Directive has not been applied yet in practice.

The assessors consider that it is always the work of an expert team whose composition depends on the specificities and character of the project in question. Based on these particularities experts from different areas qualified for assessments to be carried out under other regulations are subcontracted (e.g. appropriate assessment under the Habitats Directive, if necessary).

In the opinion of representatives of the public concerned the timing of all parts of assessment is very important here. In a case of a project, which could have a significant impact on Natura 2000 site, it would be appropriate to assess this in first, and only then execute the other part of the EIA process.

One from the public concerned representative points out that the Slovak legislation completely lacks procedural rules on how to implement the primary assessment under the Water Framework Directive.

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

It is widely agreed, that it is sufficient to have one EIA process, with clearly defined rules and timings, which should lead to the execution of individual assessments.

The representatives of the public concerned see as a good example the legislation in Czech Republic related to the appropriated assessment of Natura 2000 in EIA process (separate process included in the EIA process, separate methodology, separately determined eligibility for experts who could exercise the appropriated assessment).

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 question which Directive prior to the amendment did not regulate.

Questions

What do you think about introducing sanctions in national legislation? Do you think that the introduction of sanctions in EIA Act will contribute to achieve the objectives and purpose of the EIA Directive?

Generally, there was a sceptical attitude among respondents in respect to the question whether the sanctions will help to fulfil the purpose of the EIA process in the Slovak Republic.

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?

In the opinion of the Ministry of Environment stopping the permitting procedure in cases where investor consciously fails to comply with the conditions set out in the EIA process is already sufficient sanction for the investor. The Ministry also suggests as a sanction the removal from the list of professionally qualified persons for those assessors, who misrepresented or concealed essential data in EIA documentation.

7. The screening procedure

The amended Directive 2011/92/EU significantly clarifies and regulates the part of the EIA process called „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. However this should change on the basis of the amended Directive 2011/92/EU. There is no doubt that the decision from the screening procedure is an important milestone in the EIA process and thus it is necessary to pay adequate attention to it. .

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

Questions.

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

In the opinion of all respondents, this is a very significant part of the EIA process, which is already relatively well legislatively regulated.

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 only improvement identified by the representative of the assessors in relation to the screening process relates to the change of the project in process. It should be specified that, when the change of the project is so significant, must lead to the obligation to conduct a new EIA process; Question stays whether also small, insignificant changes in activities that frequently happen in every project, should lead to an obligation to conduct a new EIA process.

Contact information:

name: Imrich Vozár

organization: J&E

address: Komenského 21, 974 01 Banská Bystrica, Slovakia

tel/fax: 0948 158 393

e-mail: info@justiceandenvironment.org

web: www.justiceandenvironment.org

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