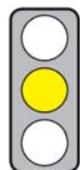


MAIN ISSUES

Objective of the Directive: Protection of the environment should be improved by adjusting the EU-wide provisions on the Environmental Impact Assessment (EIA).

Parties affected: Private and public developers, national authorities, the general public.



Pros: (1) The harmonisation of legislative provisions on EIAs in development consent proceedings may prevent competition between countries which is detrimental to the quality of the environment.

(2) Setting deadlines for the screening process, the duration of the EIA and the involvement of the public results in greater legal certainty and efficiency.

Cons: (1) The EIA should be limited to those environmental aspects which are actually affected by the planned project.

(2) As regards the screening process to determine whether a project is subject to the EIA, the extensive obligations to provide information are disproportionate. The duty to describe the measures to avoid major environmental effects, in particular, goes beyond what is required of a preliminary assessment.

(3) Empowering the Commission to modify retrospectively the assessment criteria for the screening decision is in breach of EU law.

CONTENT

Title

Proposal COM(2012) 628 of 26 October 2012 for a **Directive** of the European Parliament and of the Council amending Directive 2011/92/EU on the **assessment of the effects of certain public and private projects on the environment**

Brief Summary

In the absence of any indication to the contrary, page numbers refer to the Commission Proposal COM(2012) 628 and article numbers refer to the EIA Directive 2011/92/EU to be amended, in the proposed version.

► Background and objectives

- Public and private projects “likely to have significant effects on the environment” must undergo an environmental impact assessment (EIA) prior to receiving consent (Art. 2 (1)).
- An EIA identifies, describes and assesses the “significant effects” of a project (Art. 3) based on
 - environmental factors such as population, human health, biodiversity, soil, water, air and climate change, material assets, cultural heritage (e.g. buildings, archaeological treasures) and landscape;
 - the interaction between these environmental factors.
- The EIA Directive (2011/92/EU) sets EU-wide minimum requirements as to the type of projects subject to the EIA, the obligations of developers and the content of the EIA as well as the involvement of other authorities, the public and other Member States.
- According to the Commission (p. 2), the EIA Directive (2011/92/EU) is deficient in a number of respects and must be adapted to the political, legal and technical framework which has changed considerably.

► Projects subject to EIA, Screening

- An EIA is mandatory for the projects listed in Annex I (unchanged), e.g. refineries, nuclear power stations, motorways (Art. 4 (1)).
- The authority responsible for the EIA (“EIA Authority”) decides by way of “screening” whether a project listed in Annex II, e.g. an industrial installation, is subject to an EIA (Art. 4 (2)).
 - The developer must provide the EIA Authority with information for the screening relating to (new Art. 4 (3), new Annex II.A)
 - the characteristics and location of the project and its potential impact on the environment as well as
 - the measures to avoid or reduce the significant effects of the project on the environment.
 - During the screening process, the EIA Authority must take account of the selection criteria contained in the Directive (new Art. 4 (4), new Annex III).
 - The screening decision must
 - state how the criteria in have been taken into account (new Art. 4 (5) a),
 - give reasons why the project is or is not subject to an EIA (new Art. 4 (5) b),
 - be made within three months from the request for development consent; this deadline may be extended by an additional three months depending on the complexity, location and size of the project (new Art. 4 (6)).

► **Environmental report on projects subject to an EIA**

- The developer must prepare an “environmental report” containing the information that “may reasonably be required for making informed decisions on the environmental impacts of the proposed projects” (amended Art. 5 (1)). This includes (amended Annex IV)
 - descriptions of the project (physical characteristics, production processes, emissions),
 - descriptions of the “aspects of the environment likely to be significantly affected” (Art. 3) and
 - descriptions of alternatives to the project including those with the lowest environmental impact.
- The EIA Authority determines the “scope and level of detail” of the information to be included by the developer in the environmental report (amended Art. 5 (2), “scoping”). In particular it determines
 - the necessary decisions and opinions,
 - the authorities and public likely to be concerned,
 - the individual phases of the procedure and their duration,
 - the environmental features (Art. 3) “likely to be significantly affected”, and
 - the information to be submitted by the developer.

► **Involvement of other authorities**

Authorities whose environmental responsibilities are likely to be affected by the project must be able to express their opinion on the request for development consent and on the information provided by the developer (Art. 6 (1)).

► **Involvement of the public**

- The public must be informed “early” about the project which is subject to the EIA (Art. 6 (2)).
- The “public concerned” (Art. 1 (2) e) must
 - have access to all the information in the environmental report, the “main reports and advice” and other information which is available to the authorities (Art. 6 (3)),
 - be able to express its opinion to the EIA Authority while all options are still open and before the decision on the request for development consent is taken (Art. 6 (4)).
- The deadline within which the public concerned have to be consulted on the environmental report must not be shorter than 30 days or longer than 60 days. It may be extended, in exceptional cases, by a further 30 days depending on the nature, complexity, location or size of the project (new Art. 6 (7)).

► **Involvement of other Member States**

In the event that a project, subject to an EIA, is likely to have cross-border effects, the Member State in which the project is to be carried out must

- either voluntarily or on request, inform the affected Member State “as soon as possible” (Art. 7 (1) and
- involve the other affected Member State in the decision-making process (Art. 7 (2–4)).

► **Decision on development consent and duty to take information into consideration**

- Once the EIA Authority has all the information from the environmental report (Art. 5) and from the involvement of the public (Art. 6) and other Member States (Art. 7), the EIA must be concluded within three months. This deadline may be extended by a further three months depending on the nature, complexity, location and size of the project. (new Art. 8 (3))
- The EIA results must be “taken into consideration” in the decision on development consent (Art. 8 (1), sentence 1).
- The decision on development consent must contain “information” about (new Art. 8 (1), sentence 2)
 - the EIA (Art. 3) and the environmental conditions attached to the decision including the main measures for avoiding, reducing and, if possible, offsetting significant adverse effects,
 - the main reasons for choosing the project in the light of other alternatives considered,
 - a summary of the comments of the other authorities, the public concerned and other affected Member States (Art. 6 and 7),
 - a statement summarising how environmental considerations have been integrated into the development consent and how the results of consultations and the information gathered have been taken into account (Art. 5, 6 and 7).
- Where the project is expected to have significant adverse environmental effects, the EIA Authority will consider “as early as possible” (new Art. 8 (2), sentence 1),
 - whether the environmental report (Art. 5 (1)) must be revised and the project modified and
 - whether additional mitigation or compensation measures are needed.
- Where the project nevertheless receives consent, the consent must stipulate measures for monitoring the significant adverse environmental affects (new Art. 8 (2), sentence 2).

► **Future amendments by the Commission**

The Commission may adopt delegated acts, “in order to adapt to scientific and technical progress” (new Art. 12a and 12b, Art. 290 TFEU):

- the selection criteria for the screening process (new Annex III);
- the required information about characteristics, location, likely significant adverse environmental effects of the project and measures to avoid or reduce them (new Annex II.A);
- the information required in the environmental report (amended Annex IV).

Main Changes to the Status Quo

- ▶ It is a new requirement that the developer has to submit certain information during the screening process.
- ▶ Also new are the deadlines for the screening decision, the public consultation and the EIA itself.
- ▶ Up to now, the developer could request the EIA Authority to notify him of the information he had to provide ("scoping") when he submitted the application for development consent. Now, the EIA Authority must determine the "scope and level of detail" of the information to be included by the developer in the environmental report.
- ▶ Until now, the EIA Authority was only required to "take the EIA into consideration" in its decision on development consent. Now it must indicate how the EIA has been taken into consideration.
- ▶ It is new that, in the case of significant adverse environmental effects, the EIA Authority has to examine the need for modifications to the project and consider additional mitigating or compensation measures.
- ▶ Also new is the fact that the development consent must stipulate measures for monitoring significant adverse environmental effects.

Statement on Subsidiarity by the Commission

According to the Commission, due to the cross-border nature of many environmental problems – e.g. climate change – EU-wide EIA legislation is required. The number of cross-border projects, e.g. in the energy and transport sectors, is also rising. In addition, differing EIA regulations in the Member States may hamper trans-boundary economic activities and thereby also the proper functioning of the internal market. (p. 8)

Political Context

In its Midterm Review of the Sixth Community Environment Action Programme [COM(2007) 225] and in its report on the application and effectiveness of the EIA Directive [COM(2009) 378], the Commission criticised the inadequate assessment of environmental effects at national level. The original EIA Directive (85/337/EEC) and its subsequent amendments (97/11/EC, 2003/35/EC and 2009/31/EC) were codified into the current EIA Directive (2011/92/EU) without any significant modifications.

Legislative Procedure

26 October 2012	Adoption by the Commission
17 December 2012	Debated by the Council
Open	Adoption by European Parliament and the Council, publication in Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Environment
Committees of the European Parliament:	Environment, Health, Food Safety (leading), Rapporteur Andrea Zanzi (ALDE political group, IT);
Federal Ministries:	Environment (leading)
Committees of the German Bundestag:	Environment (leading)
Decision mode in the Council:	Qualified majority (Acceptance by majority of the Member States and with 255 of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 192 (1) TFEU (Environment)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The proposed **codification of the Environmental Impact Assessment** is basically sound because it **can prevent competition between countries** within the EU **which is detrimental to the environment** due to variations in the consideration given to the EIA.

The EIA should however remain restricted to those environmental aspects which are actually affected by the proposed project and account should be taken of already existing national measures under environmental and climate protection policy. Thus it must be ensured that the impact of a project on climate change are only incorporated into the EIA if they are not already covered by climate policy instruments. In the EU, industrial installations are subject to emissions trading. This stipulates an EU-wide maximum limit for overall emissions by the installations concerned. Since a new installation has no influence on this maximum

limit it is neither necessary nor reasonable to account for its emissions as harmful to the climate in the context of the EIA.

Impact on Efficiency and Individual Freedom of Choice

As regards the screening process to determine whether a project is subject to the EIA, **the developer should not be obliged to provide information on measures to counteract environmentally harmful effects. This obligation means the screening goes beyond what is required of a preliminary assessment** prior to the actual EIA. At this stage, the assessment of the effects on the environment has not usually been completed and a description of possible countermeasures is therefore only possible to a very limited extent or with significant additional effort. A developer should however be given the opportunity to describe such measures voluntarily during the screening process in order to be able to show, in conjunction with these measures, why his project should not, in his view, be subject to an EIA.

The obligatory consideration of project alternatives by the developer in his environmental report may, depending on how it is interpreted by the responsible authority, lead to significant additional effort for the developer. In particular, the identification of alternatives with the lowest impact on the environment demands a careful and time-consuming examination of projects which are not being planned and for which consent is not being applied for.

The proposed deadlines for the screening process, involvement of the public and conclusion of the EIA **result in more reliable planning** by developers and authorities and thereby lead to **greater legal certainty and efficiency in the EIA procedure.**

Impact on Growth and Employment

Not evident.

Impact on Europe as a Business Location

The harmonisation of EIA legislation makes it easier for international investors to understand the EIA and the development consent procedure thereby strengthening Europe as a business location. However, extending the assessment obligations of developers results in additional costs and impairs its quality as a business location.

Legal Assessment

Competency

Unproblematic. On the basis of its general competency in environmental matters (Art. 192 (1) TFEU), the EU can also issue minimum requirements for the EIA. It can also adopt measures which are conducive to the proper functioning of the internal market (Art. 114 TFEU).

Subsidiarity

Unproblematic.

Proportionality

The extensive obligations to provide information, which developers must already fulfil **at the screening stage**, risk bringing the actual EIA forward. Due to the extensive additional hours and costs involved, they are **disproportionate** at this early stage of the procedure.

Compatibility with EU Law

The empowerment of the Commission to adopt delegated acts in order **to modify the selection criteria for the screening process** (new Annex III) concerns the area of application of the EIA Directives. Since these are not “non-essential elements” (Art. 290 (1) TFEU) the empowerment **is in breach of EU law.**

Compatibility with German law

The proposed changes to the EIA Directive will necessitate numerous modifications to the German Environmental Impact Assessment Act (UVPG). These relate in particular to the conditions under which developers are subject to the EIA (§§ 3a–3c UVPG), notification of the documents which are likely to be required (§ 5 UVPG) and consideration of the EIA-result in the decision on development consent (§ 12 UVPG).

Conclusion

The harmonisation of legislative provisions on the EIA in development consent proceedings may prevent competition between countries which is detrimental to the quality of the environment. The proposed deadlines for the screening process, involvement of the public and conclusion of the EIA result in greater legal certainty and efficiency. The EIA should however remain restricted to those environmental aspects which are actually affected by the proposed project. As regards the screening process to determine whether a project is subject to the EIA the extensive obligations to provide information are disproportionate for developers. The duty to describe the measures to avoid major environmental effects, in particular, means the screening goes beyond what is required of a preliminary assessment. The empowerment of the Commission to modify the selection criteria for the screening process is in breach of EU law.