

Environmental Impact Assessment in Europe : Legal Basis and Recent Developments

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Abstract

The European Community (EC) began dealing with the subject of environmental impact assessment (EIA) in the mid-1970s. After ten years of preparatory work and more than 20 draft versions, the EC Council of Ministers adopted, in 1985, the Directive on the assessment of the effects of certain public and private projects on the environment (85/337/EEC). This directive requires the member states to make EIA mandatory for certain projects. Its Article 3 defines the purpose of the instrument: "The environmental impact assessment will identify, describe and assess the direct and indirect effects of a project.

There are no rules on scoping or on post-project analysis. However, member states are free to adopt, in their domestic legislation, more stringent rules regarding the scope and procedure of EIA. Consequently, they have developed national EIA systems which differ considerably from each other. Also, EIA practice in each of these countries is different from that in the others.

In 1992, the EC Council adopted the 'Flora, Fauna, Habitat' Directive which lays down an additional EIA requirement. Member states will have to develop a network of 'European' nature conservation areas. Each project or plan possibly endangering these areas will have to be assessed whether it is in line with the protection purposes laid down for them. Although the directive does not say so explicitly, this means that a kind of EIA will have to be carried out for those projects and plans.

For several years, the Commission has been developing proposals for a directive on EIA of plans and programmes ("strategic EIA"). This would supplement directive 85/337/EED, and would require an EIA for plans and programmes influencing decisions on specific projects (e.g. agricultural plans or energy programmes). At present, procedural and methodological questions of strategic EIA are being discussed extensively both within and without the European Union.

keywords : EIA within EU, strategic EIA

I . Introduction

Environmental impact assessment(EIA) as an instrument of precautionary environmental policy has been discussed

within the European Community (EC) ever since the early 1970s. At that time, the United States and Canada had introduced domestic legislation on this subject, and a few years later two of the EC member states—France and the Netherlands—had begun to follow suit. The Community was concerned that such national rules could result in a contortion of competition. In addition, it stressed the importance of a precautionary approach in its environmental action programmes. Consequently, it saw the need to develop Community provisions on the subject. Due to a lot of difficulties and different legal and administrative backgrounds in the member states this task could only be completed some ten years later.

In 1985, the EC Council finally adopted the Directive on the Assessment of the Environmental Effects of Certain Public and Private Projects¹⁾. EC directives basically are not immediately applicable within each member state. Rather, they only lay down binding objectives for these countries; the decision in which way these should best be met is left to each state individually. In consequence, the member states had to bring their domestic legal and administrative systems in line with the European requirements.

II. The EIA Directive of 1985

1. Overview

The EIA Directive deals with a number of important elements of EIA, but does not cover all aspects of a detailed, comprehensive and self-contained EIA system. Thus, the member states are given much discretion in deciding how

they want to implement the European provisions.

Basically, the directive relates to four subjects:

- (1) the range of projects which are to be subject to EIA,
- (2) the EIA procedure (i.e. the administrative process),
- (3) the information which the proponent is to submit to the competent authority in the assessment procedure
- (4) the role of the EIA results in the subsequent process of deciding whether or not the project in question should be realised or not.

It does not deal with methodological questions (e.g. methods to predict or to evaluate impacts.)

2. Projects for which EIA is necessary

The directive distinguishes between two categories of projects requiring an EIA: It makes EIA mandatory in all member countries for the projects listed in its Annex I. National authorities may only exempt individual projects of that kind from this obligation. On the other hand, as far as the projects listed in its Annex 2 are concerned, it is for each member country to decide which of them should be subject to EIA. The directive intends, however, that each member state should make EIA obligatory also for a fair range of Annex-II projects.

3. EIA Procedure

The directive leaves it to the member states whether they want to integrate the EIA process in administrative licensing and similar procedures already in existence, or to develop completely new EIA procedures. In any case it requires the following procedural steps:

- (1) The proponent is to submit certain information on the project and its environmental consequences to the competent authority (Article 5 and Annex III).

1) Official Journal of the European Community (OJEC) No.L 175 of 5 July 1985, p. 40.

- (2) This authority informs other authorities and the public about the project and makes the proponent's information available to them. It also grants them an opportunity to comment on the project and on the information (Article 6). In cases of possible transboundary impacts, the affected member states will also have to be involved (Article 7).
- (3) When deciding whether or not the project should be licensed, the authority will have to take all information and comments received during the process into consideration (Article 8).
- (4) The concerned public, and member states to which information has been sent under Article 7, will have to be informed about the decision (Article 9).

The directive does not deal with matters like the scoping process or post-project assessment.

4. Content of EIA

The content of EIA is addressed several times in the directive: On the one hand, Article 3 lays down the scope of EIA. It requires the member states to assess the impacts of the projects on human beings, flora and fauna, soil, water, air, climate and the landscape (including the interaction between these factors) as well as on material assets and the cultural heritage. On the other hand, Article 5 and Annex III specify the information to be submitted by the proponent to the competent authority. The list of items in Annex III is fairly detailed, but does not cover all aspects which may be necessary in an individual EIA procedure. For instance, there is no strict obligation to include project alternatives in each case (including the possibility not to proceed with the project).

5. EIA and Decision-making

The role of the EIA results in the decision-making process is only addressed briefly in the directive. Its Article 8 states that these results "must be taken into consideration in the development consent procedure". Additional requirements (for instance, environmental quality objectives, or rules relating to the importance of environmental concerns vis-a-vis other interests) may, however, be found in the domestic legislation of the member states, or in other EC directives.²⁾

III. Implementation of the 1985 EIA Directive in the Member States

By now, all 15 member states have implemented the directive by adapting their national legislation. A recent survey commissioned by the EU Commission³⁾ shows, however, that the various EIA systems in these countries differ considerably from each other. In particular, each state has defined individually the range of Annex-II projects for which it requires an EIA, and has laid down a specific EIA procedure in line with its own administrative system and environmental policy. Thus, the directive has not led to a uniform set of rules in the member states. Also, EIA practice differs considerably and in many aspects from country to country. In this context, the survey deals with the number and types of EIAs in each country, the provi-

2) For example, in various directives on water quality and ambient air quality.

3) Report from the Commission of the Implementation of Directive 85/337 /EEC on the assessment of the effects of certain public and private projects on the environment, doc. COM(93)28(final) of 2 April 1993. This report does not deal with Austria, Finland and Sweden as these states only joined the EC in 1995.

sion of environmental information and its quality control, consultative practice, decision-making and monitoring, guidance and training, and costs and benefits of EIA.

IV. Recent Development

1. The 'Flora, Fauna, Habitat' Directive of 1992

In 1992, the Council of the European Union adopted the 'Flora, Fauna, Habitat' Directive⁴ which lays down an additional EIA requirement. Member states will have to develop a network of 'European' nature conservation areas. These will then be protected by several special measures laid down in the directive. Inter alia, each project or plan possibly endangering those conservation areas will have to be assessed whether it is in line with the protection objectives laid down for them. Although the directive text does not say so explicitly, this means that a kind of EIA will have to be carried out for each of those projects and plans. In order to ascertain whether or not a specific activity will affect such conservation areas, the member states will probably have to subject most of their projects and plans to a screening test.

In this context, the 'Flora, Fauna, Habitat' Directive is particularly remarkable for the fact that it constitutes a first step towards a system of plan-related EIA.⁵ Although several member states still have a number of objections against a general system of this kind, there seems to have been no real opposition to require an adequate environmen-

tal assessment for the plans mentioned.

Another difference to the EIA Directive of 1985 is that the 'Flora, Fauna, Habitat' Directive states quite clearly how the EIA results are to be taken into account when deciding on the plan or project in question: Basically, an authority is not entitled to grant a permit for a project or to adopt a plan if these activities significantly affect the protection objectives for the areas in a negative way. Although there are some exceptions to this rule, it will considerably reduce the authority's range of discretion.

2. The Draft Directive to Amend Directive 85/337/EEC

Due to the differences of EIA legislation and practice in the member states, the EC Commission has, in 1994, proposed to amend Directive 85/337/EEC.⁶ This amendment aims at

- extending the range of projects for which an EIA has to be (or may be) carried out, and unifying the scope of EIA in the member states,
- making the EIA procedure more effective,
- improving the cooperation with neighbouring states in cases of possible transboundary impacts.

(1) Projects requiring an EIA

As far as the projects requiring an EIA are concerned, the Commission proposes to add further nuclear installations and also several sports and leisure facilities to the relevant lists in the directive. It also suggests to define some important terms such as "integrated chemical installations" and "modifications to projects".

One of the important changes proposed by the Commission relates to the way of determining whether or not to

4) Directive 92/43/EEC of 21 May 1992, OJEC No.L 206 of 22 July 1992, p. 7.

5) For this topic, see section 4.3 below.

6) Proposal No. 94/C 130/7 of 21 April 1994, EC OJ No. C 130 of 12 May 1994, p. 8.

carry out an EIA for a specific project. Hitherto, member states could develop lists of such projects so that each specific project meeting the criteria of such a list would require an EIA. The Commission proposal now distinguishes three categories of projects :

- (1) those for which an EIA is mandatory, basically, in each case;
- (2) those requiring an EIA if they possibly endanger specially protected areas; and
- (3) all other projects listed in the directive.

If the proposal is adopted the member states will have to lay down a provision in their domestic legislation that all of these projects will in principle require an EIA. As far as category (1) is concerned, the competent authority in each state may, in exceptional cases, exempt individual projects from this obligation. In this respect, the proposal will not change the directive. The new clauses relate, however, to categories (2) and (3). For projects of those groups, the competent authority will have to decide in each case whether an EIA should be carried out. In practice this will again mean that a screening test will be necessary for every such project. The authority will have to determine the need for an EIA in these cases on the basis of criteria laid down in a new annex of the proposal.

(2) EIA Procedure

Furthermore, the Commission suggests that member states should always include a scoping process in their domestic EIA procedure. As far as the object of EIA is concerned, it proposes that each case should not only look at a specific project at a defined site, but also include an assessment of the most important alternatives. Both these requirements represent elements of "good EIA practice" as it

has developed during the last 20 years.

(3) Transboundary Co-operation

In part, the Commission proposal is based on the international Convention on EIA in a Transboundary Context which was signed, besides 13 other states, by the then 12 EC member countries and the EC itself at Espoo (Finland) in 1991. This convention lays down obligations for co-operation of neighbouring states in cases where activities planned in one of them may have significant transboundary impacts. Inter alia, it contains an obligation of the state of origin to inform, at an early stage of planning, any affected state about those activities, and also deals with subjects such as

- participation of an affected state in the EIA procedure,
- the involvement of the concerned public of an affected state in that procedure,
- obligatory consultations between an affected state and the state of origin on the activity and EIA, and
- post-project analysis.

The convention will enter into force once it has been ratified by 16 states. By May 1995, nine countries⁷⁾ had already deposited their instruments of ratification, including five EC member states. Making the convention provisions legally binding also for the remaining ten Community member countries via an EC directive seems to be one way to accelerate this process. It remains to be seen, though whether the member states will agree to such a proposal, or whether they will prefer ratifying the convention individually.

⁷⁾ Albania, Austria, Bulgaria, Italy, Moldova, the Netherlands, Norway, Spain, and Sweden.

3. The Draft Directive on Strategic Environmental assessment

For several years, the Commission has been developing proposals for a directive on EIA of plans and programmes ("strategic EIA"). This would supplement Directive 85/337/EEC in an important area. Hitherto, EIA is mandatory only under European law for specific projects (e.g. a highway), and consequently cannot address far-reaching environmental problems which have to be solved at an earlier stage, i.e. (in the case of highways) already in the context of general transportation planning and/or regional planning. For instance, once the need for a new highway has been determined in these early planning stages, it becomes very difficult—or may even be impossible—at the subsequent project authorisation level to question the necessity of the project. Conversely, plans and programmes often lay down far-reaching decisions which have even more serious environmental consequences than individual projects. Furthermore, many of them (for instance, housing programmes) deal with large numbers of projects which individually do not require an EIA (e.g. a land-use plan determining the site for 50 or 500 new houses; subsequently, the normal building permit procedure for a single private house usually will not include an EIA).

For these reasons the Commission proposes to make EIA mandatory also for plans and programmes that influence decisions on specific projects or other activities. Therefore, agricultural plans, energy programmes, land-use plans and other similar activities would be subject to EIA. However, it is not clear yet to what extent the provisions relating to EIA of projects—especially the procedural rules—should also be applied in cases of strategic EIA. Thus, there are still

different points of view as far as this Commission proposal is concerned. At present, procedural and methodological questions connected with EIA of plans and programmes are being discussed extensively both within and without the European Union. Several EC member states have already some experience with plan-related EIA, for instance with EIA of waste management plans or local development plans.

V. Conclusions

Within the framework of Directive 85/337/EEC, each of the 15 EC member states has developed its own EIA system. Due to a number of recent developments at European level, many of these systems will probably have to be modified during the coming years. If the present proposals are adopted the following additional requirements will have to be met:

- each member state will have to require an EIA for relevant programmes and plans as well as for more projects than at present,
- in each case, relevant project alternatives will have to be assessed as well,
- the EIA procedure for projects will have to include both a screening and a scoping process,
- in cases of transboundary EIA, co-operation between the concerned countries will have to be improved. The public in the affected country will have to be granted the right to participate in the EIA procedure in the same way as the public of the country of origin.

However, some of the Commission proposals are still being discussed controversially by the EC member states. As far as these items are concerned, it is to be hoped that

the states will come to an agreement fairly soon, and that the new directives will be some what more ambitious than Directive 85/337/EEC. In any case, it will take some time to implement the new European legislation in such a way that the various domestic EIA systems will become not only more similar to each other, but also more efficient.

While the European legislative basis thus is changing in several ways, the problem remains how the practical application of EIA may be improved. In this context, the Commission report of 1993 points out a number of differences

between the member states. This is a subject, however, which does not only concern EIA, but may be found in relation to all European environmental legislation. Thus, the Commission has recently begun to examine it more closely. This, however, is a separate topic which cannot be dealt with here. In the context of EIA, clear rules on the role of the assessment results in the decision making process, and the development of environmental quality objectives and similar standards on a high level (precautionary approach), would probably contribute much to its effectiveness.