

Transposition and implementation of the 2014 Directive on the assessment of the effects of certain public and private projects on the environment

KEY FINDINGS

This briefing aims to answer the request from the European Parliament's Committee on Petitions regarding the transposition and implementation of Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive). It presents the key elements of this Directive which deserve the EP's attention during the next legislature, as they need to be reflected in the Member States' legal framework as from 16 May 2017 to ensure their implementation. The amendments brought by Directive 2014/52/EU aim to improve the quality of Environmental Impact Assessment reports and the information gathered, as well as to reinforce environmental protection in the assessment of the impacts on the environment. The main changes include:

- the coverage of environmental issues required in the EIA report is extended, i.a. to include climate change and biodiversity;
- the requirements for the assessment of cumulative effects are provided in greater detail;
- the assessment of reasonable alternatives is broadened;
- monitoring procedures of the projects are to be carried out;
- public participation and access to information are improved: Information to be contained in the EIA report is expanded and the development consent decision needs to be justified.

The Commission is currently looking at the legislation notified by Member States to assess the correct transposition. According to the 2017 Commission Report on monitoring the application of EU law, the Commission has initiated infringement procedures against 21 Member States for late transposition of Directive 2014/52/EU.

Definitions

This briefing uses specific terminology which requires definition for the sake of clarity. The following definitions are in line with the Treaty on the Functioning of the European Union TFEU and with the terminology used by the Court of Justice of the European Union (CJEU).

Transposition

The legal or regulatory act(s) by which a piece of EU law is incorporated into the national legal order.



<i>Application</i>	The practical application of the national transposing provisions to a concrete situation or to a number of situations.
<i>Implementation</i>	The general term covering both transposition and application.
<i>Enforcement</i>	The measures taken by public authorities to ensure a correct application of the provisions of EU law. Where EU public authorities take action against a Member State in a specific case, these actions would be considered part of the enforcement measures.

1. THE IMPLEMENTATION OF THE EIA DIRECTIVE

1.1. Introduction

This briefing aims to answer the request of the European Parliament's Committee on Petitions regarding the implementation of Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive). The briefing presents the key elements brought by the Directive. These elements deserve the EP's attention during the next legislature, as they need to be reflected in the Member States' legal framework as from 16 May 2017 to ensure their implementation.

The European Union is founded on the rule of law which is one of the values stated under Article 2 of the Treaty of the European Union (TEU) and shared with all EU Member States. As described in the recent Commission Communication on a new EU Framework to strengthen the Rule of Law¹, it means that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts².

Proper implementation of EU law is essential to deliver the EU policy goals as defined in the Treaties and secondary legislation. The late or incorrect transposition of directives into national law is a barrier to implementation affecting all EU policies and all EU Member States. Weak or non-implementation means depriving citizens and businesses of potential benefits derived from the objectives of EU legislation. Therefore, non-implementation and lack of enforcement affects the credibility of the Union³.

The Member States and the European Commission have a shared responsibility in implementing and enforcing European law, which is also recognised in jurisprudence of the CJEU⁴. According to Article 4(3) (sub-paragraph 2) TEU, Member States must implement the Treaty obligations and those arising from secondary legislation. Article 192(4) reiterates this obligation specifically for the implementation of environmental measures adopted at EU level. The role of the Commission, as guardian of the Treaties, is to ensure the correct application of those obligations (Article 17(1) TEU). Monitoring and enhancing the application of EU law has been a priority of the Juncker Commission⁵ and is a key part of the Better Regulation Package adopted in 2015⁶.

The European Parliament performs a crucial role in ensuring enforcement and implementation of EU law. This role is played by exercising its powers of scrutiny through the different means at its disposal. For example, according to Article 14 TEU the European Parliament exercises functions of political control of the Commission, including its enforcement and implementation policy, together with its legislative, budgetary and consultation functions. The Commission submits annually to the European Parliament and the Council a report on the monitoring of the application of EU law. The European Parliament's role of representing the 'Union's citizens' makes it the natural receptor of petitions by EU citizens under the auspices of its Committee on Petitions.

Shortcomings in the transposition and/or application of EU law by Member States are not only detected by the Commission's own investigations but they are brought to its attention by complaints from members of

¹ COM(2014) 158 final/2.

² Commission Communication on a new EU Framework to strengthen the rule of law, COM(2014) 158 final/2.

³ Commission "White Paper on European Governance", COM (2001) 428 final.

⁴ Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paras. 58-60.

⁵ Monitoring the application of European Union law. 2015 Annual Report, COM (2016) 463 final, 15.7.2016.

⁶ COM(2015)215 final.

the public, businesses, NGOs or other organisations. While monitoring the implementation of EU environmental law might require a high degree of technical expertise required, citizens' complaints remain the main source of information on the application of EU environmental law⁷.

1.2. The EIA Directive

The EIA Directive came into force in 1985 and required Member States to ensure that before a development consent is given, any public or private projects which are likely to have significant effects on the environment regarding their nature, size or location, are made subject to an Environmental Impact Assessment of their effects on the environment. The projects listed in Annex I of the EIA Directive are subject to a mandatory EIA. Those listed in Annex II are subject to a screening procedure, followed by an EIA when thresholds established at national level or a case-by-case examination so demand.

The purpose of the Directive is to make sure an assessment is made of the effects of public and private projects on the environment in order to attain one of the EU's objectives: the protection of the environment and the quality of life⁸. The Directive reflects the precautionary principle and aims to harmonise at EU level the types of projects that should be subject to an EIA, the content of the assessment, and the main procedural obligations of developers.

The EIA Directive has been implemented in the EU for 30 years. The criteria and procedures for assessment have been reviewed and updated several times. Some of the amendments were adopted to adapt the Directive to technical developments, for example the introduction in 2009 of Carbon Capture and Storage (CCS) in the list of projects in Annex I and II of the Directive⁹. Other amendments responded to the need to ensure the implementation of International Conventions such as the requirements regarding public participation of the Aarhus Convention. The Directive and its amendments were codified in Directive 2011/92/EU.

25 years after its adoption, the Commission started a review process and published in July 2009 a report on the application and effectiveness of the EIA Directive¹⁰, highlighting the need for simplification. In June 2010 a public consultation was launched and on 26 October 2012 the Commission published a proposal for a new Directive amending the recently adopted Directive 2011/92. The proposal aimed to address certain problems of implementation, reduce unnecessary administrative burdens, simplify the assessment procedure, and reinforce certain levels of environmental protection taking into account emerging challenges such as resource efficiency, climate change, biodiversity and disaster prevention. Directive 2014/52 amending Directive 2011/92 was adopted in April 2014 and entered into force on 16 May 2014. Member States had to adopt their transposing legislation and communicate it to the Commission by 16 May 2017.

The EIA Directive establishes that every six years from 16 May 2017, Member States have to inform the Commission on the implementation of the Directive. This implies that Member States have to collect information and communicate statistical data on its implementation, such as the number of projects subject to EIAs under Annex I and Annex II, the breakdown of EIAs according to project categories, the average duration of the EIA process, and the average direct costs of EIAs. Information and data on the impact of the application of the Directive on small and medium-sized enterprises (SMEs) also has to be provided.

⁷ Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2016.

⁸ CJEU, Case C-420/11 *Jutta Leth v Republik Österreich, Land Niederösterreich*, para 34.

⁹ Through the adoption of the CCS Directive in 2009.

¹⁰ COM(2009)378.

1.2.1. Main elements of the EIA Directive

The EIA Directive ensures that environmental considerations are taken into account as early as possible in the decision-making process¹¹. Article 3 of the Directive is the fundamental provision establishing the content of the impact assessment, in other words, the direct and indirect significant effects of a project on environmental factors such as: population and human health, biodiversity with particular attention to species and habitats protected under the nature directives, land, soil, water, air and climate, material assets, cultural heritage and landscape, as well as the interaction between all of them.

The EIA involves three stages: screening, scoping and preparation of the EIA report. Screening is the phase when the competent authority makes a decision on whether an EIA is required in relation to projects subject to Article 4(2) and listed in Annex II of the Directive¹².

A scoping opinion may be requested from the Competent Authority with the aim of defining the content and extent of the assessment and specifying the information to be included in the EIA report. This phase concerns both projects regulated under Article 4(1) and listed under Annex I that are mandatorily subject to EIA, and projects listed under Annex II which fall within the criteria or thresholds required to be subject to an EIA¹³.

The EIA report has to be delivered by the developer of a project and contains an assessment of the project's impacts on the environment. The outputs of the assessment as per Article 5 include: information regarding the project, the baseline scenario, the likely significant effect of the project, the proposed alternatives, the features and measures to mitigate the adverse significant effects, a non-technical summary, and any additional information specified in Annex IV of the EIA Directive¹⁴.

Directive 2014/52/EU defines environmental impact assessment by referring to the process complementing the three above-mentioned stages, and consists of: i) the preparation of an environmental impact assessment report by the developer, ii) the carrying out of consultations, iii) the examination by the Competent Authority of the information represented in the EIA report and any supplementary information provided, where necessary, by the developer and any relevant information received through the consultations, iv) the reasoned conclusion by the Competent Authority on the significant effects of the project on the environment, taking into account the results of the examination, and v) the integration of the Competent Authority's reasoned conclusion into any of the decisions referred to in Article 8a, to either grant or to refuse development consent.

1.3. The legislative amendments brought by Directive 2014/52/EU

The amendments brought by Directive 2014/52/EU aim to improve the quality of the EIA reports, of the information gathered and of the assessment of the impacts on the environment. The main changes include:

- the scope: the coverage of environmental issues required in the EIA report is extended as new requirements related to climate change, biodiversity, risk of major accidents and/or disasters are introduced;
- the requirements for the assessment of cumulative effects are provided in greater detail;
- the assessment of reasonable alternatives is broadened;
- monitoring procedures of the projects are to be carried out;
- improvement of public participation and access to information: the information to be contained in the Environmental Impact Assessment report is expanded and the development consent decision needs to be justified.

1.3.1. Scope

The starting point of the assessment process is the **baseline scenario**. This is a description of the current status and trends of the environmental factors in and around the area where the project will be located, and against which the significant effects should be evaluated. It is the basis for monitoring once the project is initiated. Directive 2014/52/EC requires that the EIA report includes a description of the baseline scenario.

¹¹ Article 6(4) of the EIA Directive.

¹² Environmental implementation Assessment of projects. Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU), 2017 at:

http://ec.europa.eu/environment/eia/pdf/EIA_guidance_EIA_report_final.pdf

¹³ Ibid

¹⁴ Ibid

The **environmental factors** to be covered through the assessment in the EIA report have been broadened by the 2014 Directive to cover biodiversity, climate change, and the risk of major accidents and disasters. The impact of a project on **climate change** is further described in Annex IV in relation to climate change mitigation, for example regarding the nature and magnitude of greenhouse gas emissions and climate change adaptation, considering the vulnerability of the project to climate changes, and its capacity to adapt.

Article 3 refers to the direct and indirect significant effects on **biodiversity**, with particular attention to species and habitats protected under the nature directives. The assessment should be carried out in coordination with the appropriate assessment required under Article 6(3) of the Habitats Directive for any plan or project likely to have a significant effect on Natura 2000 site, even if it is implemented outside these sites. The EIA has a wider remit and has to assess impact on biodiversity even in cases in which the project does not impact upon a Natura 2000 site¹⁵. In that sense Articles 3 and 10 of the Habitats Directive recognise the importance of ensuring the ecological coherence of the Natura 2000 sites.

The consideration of the impacts of a project on biodiversity requires that the assessment looks into the impact of the project on the interactions and variety of species and ecosystems. The Commission published a guidance document in 2013 on the integration of biodiversity considerations into an EIA including examples of key questions that should be asked in order to assess impacts on biodiversity effectively¹⁶. The Guidelines for Ecological Impact Assessment in the UK are also a useful tool in that they suggest general ecological considerations or issues related to designated sites which should be considered when establishing a baseline scenario for the development of an EIA¹⁷.

The consistency of an EIA with the Marine Strategy Framework Directive adopted in 2008, implies that the EIA should consider the impacts on the marine environment for projects within marine areas¹⁸.

The Guidelines refer to a case in Italy where Terna, the Italian electricity grid operator, has developed an innovative methodology for the installation of marine cables that minimises the environmental impact of submarine grid interconnections between Malta and Sicily and protects meadows of the rare sea grass 'Posidonia oceanica'. It is based on the use of a corridor foreseen for this cable to cross an area that is home to 'Posidonia oceanica', a seagrass that is declining (according to the RedList) and provides a habitat for many species. In order to protect the 'Posidonia oceanica' as well as other seabed species from harm, Terna refrained from using the drilling technique most commonly used for marine cable installation¹⁹.

Some exceptions to the scope of the Directive include projects in response to civil emergencies. According to the CJEU exceptions need to be interpreted restrictively (e.g. CJEU Case *WWF and others*²⁰). The Directive has eliminated the exception whereby projects covered by specific national legislation achieving the same objectives of the Directive would not be subject to an EIA.

1.3.2. Cumulative effects

Directive 2014/52/EU requires the EIA report to assess the cumulative effects. In this sense, the baseline scenario is also meant to cover existing or approved projects in the vicinity, in order to assess the cumulative effects. Annex IV (5) requires the developer to provide a description of the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary positive and negative effects of the project. The description of the cumulation of effects with other existing and/or approved projects should take into account any existing environmental problems relating to areas of particular importance likely to be affected or the use of natural resources.

The CJEU has insisted on the need to carry out a strict cumulative assessment in the recent case *Marktgemeinde Strabwalchen* which concerned the authorisation to undertake exploratory drilling within that territory in Austria up to a depth of 4,150 metres²¹. The Court considered that while the exploratory

¹⁵ Ibid

¹⁶ Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment, European Union, 2013, p. 32-33 at <http://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf>

¹⁷ Guidelines for Ecological Impact Assessment in the UK (IEEM, 2006) at: http://www.ieem.net/data/files/Resource_Library/Technical_Guidance_Series/EcIA_Guidelines/TGSEcIA-EcIA_Guidelines-Terrestrial_Freshwater_Coastal.pdf

¹⁸ Ibid

¹⁹ Ibid, page 45.

²⁰ CJEU, Case C-435/97 *WWF and others*.

²¹ G Van Carster, L Reins, *EU Environmental Law*, Elgar European Law, 2017.

drillings are commercial by nature, they do not meet the requirements for a mandatory EIA on the basis of Annex I of the EIA Directive related to 'extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 metres³/day in the case of gas'. However, deep drillings are referred to in Annex II and they would include exploratory drillings. The Court highlighted that 'notwithstanding the discretion enjoyed by national authorities in relation to the projects listed in Annex II, the characteristics of the project must be assessed in relation to its cumulative effects with other projects'²².

The assessment of cumulative effects also means that projects cannot be artificially split to circumvent the obligation of an EIA. An example of this jurisprudence on this is the case of *Ecologistas en Acción* where the Court stated that the 'failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of the Directive'²³.

1.3.3. Alternatives

Directive 2014/52/EU has amended Article 5 in relation to the information that the developer should provide when an environmental impact assessment is required. The developer should provide a description of the reasonable alternatives that have been assessed relevant to the project and its characteristics. According to Annex IV the alternatives cover 'the project design, technologies, location, size and scale'. The EIA report should not only describe the alternatives but also provide the reasons for the option chosen, including a comparison of the effects of the project on the environment.

1.3.4. Monitoring requirements

The new Article 8a requires that the decision to grant development consent includes not only the reasoned conclusion but also information on the environmental conditions attached to the decision; a description of the measures envisaged to avoid, prevent, reduce or offset the adverse effects on the environment; and the monitoring measures. It requires Member States to ensure that the foreseen measures are implemented by the developer and to determine the procedures for monitoring the significant adverse effects on the environment. The type of parameters to be monitored and the duration of the monitoring measures shall be related to the nature, location and size of the project as well as the significance of its effects on the environment.

However, as duplication of monitoring should be avoided, existing monitoring arrangements resulting from the implementation of other EU legislation, could be used if they are appropriate to the objectives of the EIA.

1.3.5. Public participation and public access to information

One of the key elements of the EIA process is public participation. Directive 2014/52/EU further strengthens the provisions for this by referring to an effective participation of the public concerned in the decision-making procedure. This entails that information has to be provided on the request for development consent, the fact that the project is subject to an EIA, the involvement of the Competent Authority, the possible decision or draft decision if there is one, and the arrangements for public participation. It requires Member States to ensure that the public is informed electronically and by public notices before decisions are taken and that the relevant information is electronically available through at least a central portal or easily accessible points of access at the appropriate administrative level. The timeframes for consulting the public concerned on the EIA report should be 30 days.

The EIA Directive provides not only for public participation prior to the decision, it also requires disclosure of information on the decision taken. The Directive requires that the development consent procedure evidences how the results of the consultation and information collected are taken into account. The interpretation of this requirement by the Court provided a certain flexibility to Member States in that it did not require the decision information to contain the reasons underlying the Competent Authority's decision on the need for

²² CJEU, Case C-531/13 *Marktgemeinde Strabwalchen and others*

²³ CJEU, Case C-142/07 *Ecologistas en acción-CODA v Ayuntamiento de Madrid*; Case C-435/97 *WWF and Others*, Case C-392/96 *Commission v Ireland*, Case C-2/07 *Abraham and Others*.

an EIA. However, if an interested party requests it, the Competent Authority is obliged to communicate the reasons for the decision and the relevant documents²⁴.

The 2014 Directive clarifies this point further and introduces a new article 8a which specifies that the information to be provided on the decision to grant or to refuse a development consent has to contain the main reasons for it. The Directive requires that relevant information is provided such as the content of the decision, the reasoned conclusions, the environmental conditions required for the project development, the features of the project and measures envisaged to avoid, prevent, reduce or offset the adverse effects on the environment, the reasons and considerations motivating the decision.

This provision expands the scope of the EIA to the project development phase. Member States need to set monitoring procedures for adverse effects on the environment. The content of the decision to be published should also include a description of how any significant adverse effects on the environment are avoided, prevented, reduced or offset and should cover both construction and operational phases (Annex IV).

Article 11 refers to access to justice for the public concerned and recognises that the public, where it has sufficient interest or where its right to have its environment protected has been impaired, should have access to a review procedure before a court or an independent and impartial body to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. The Directive therefore regulates access to justice for those acts that could be subject to public participation.

1.3.6. Consistency of procedures

The Directive aims at strengthening the consistency of existing assessment procedures under different legal acts, such as the appropriate assessment procedure under the Habitats Directive 92/43/EEC or the integrated pollution prevention control procedure under the Industrial Emissions Directive 2010/75/EC. Member States have the possibility to either ensure the coordination of the procedures or their integration into a joint procedure for development consent covering all the different elements. However, they have to ensure that coordinated and/or joint procedures comply with the requirements under Articles 3 and 5 to 10 of the Directive, including the public participation requirements.

Under the coordinated procedure, Member States need to ensure that the various individual assessments of the environmental impacts of a project required by the relevant EU legislation are coordinated by designating an authority responsible for it. Under the joint procedure, a single assessment of the environmental impacts of a particular project shall be delivered covering all the elements required by the relevant EU legislation.

The joint or coordinated procedures aim at reducing administrative burdens.

1.4. The transposition of the 2014 Directive

Transposition into national legislation of EU directives is mandatory. According to Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Article 192(4) requires Member States to adopt all measures of national law necessary to implement the different measures adopted in pursuance of EU environmental policy.

Monitoring timely transposition is a Commission priority and is considered essential to ensure the effectiveness of European policies²⁵.

Directive 2014/52/EU includes a specific article requiring Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 16 May 2017. Member States therefore had three years to transpose the Directive from the moment it entered into force. Member States have to communicate the main provisions of national law which they have adopted to transpose the Directive.

The Commission is currently looking at the legislation notified by Member States in order to assess the correct transposition. The 2017 Report on monitoring the application of EU law foresees that important

²⁴ CJEU, Case C-182/10 *Solvay and Others* and Case C-332/04 *Commission v Spain*.

²⁵ 29th Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7. 30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7.

implementation work in 2018 will include legal action to ensure complete transposition by Member States of Directive 2014/52/EU. There is no public information on this analysis yet.

However, according to the 2017 Commission Report on monitoring the application of EU law, out of the 113 cases of late transposition initiated in 2017, the Commission has initiated infringement procedures against 21 Member States for late transposition of Directive 2014/52/EU. It is anticipated that the start of these cases will have an immediate impact, given that Article 260(3) TFEU (as amended by the Lisbon Treaty) enables the CJEU to impose financial penalties directly²⁶ without the need for a prior ruling against a Member State for failing to notify the transposing measures. When lodging the case to the CJEU, the Commission may propose the amount of the lump sum or penalty payments, which cannot be exceeded when defined in the CJEU judgement, as well as the due date for payment.

Some public information is available on the French transposition as the French Council of State has already stated that some of the provisions of Decree 2016-1110 of 11 August transposing the Directive were voided in relation to the transposition of Article 6(1) regarding participation of authorities likely to be concerned by a project due to their environmental responsibilities or local and regional competence. In addition, it has been determined the absence of a mechanism to avoid conflict of interest foreseen under the new Article 9a.

In 2016 the Commission closed a case against Spain for incorrect transposition of the EIA Directive in the Tourism Act in the Balearic Islands as well as a case against Poland for incorrect transposition of the EIA Directive in relation to maintenance works. The Commission also closed, in 2017, a pending case against Slovakia for incorrect transposition of the EIA Directive 2011/92/EC, six years after the latest time limit for transposition (June 2011).

Given the legislative changes introduced by Directive 2014/52/EU, it is considered a good practice that the Irish government issued a paper presenting the significant provisions of the 2014 Directive which require transposition. It also indicated the measures intended to transpose those elements of the Directive where transposition is mandatory and the non-mandatory provisions, where relevant, to maintain existing Irish law provisions. The paper proposes an approach requiring regulatory changes consistent with full transposition and achievement of the aims of the Directive²⁷. For example, to meet the requirements of the first part of Art 6(2) (effective public participation) it is foreseen that there will be a requirement that all the specified information will be publicly accessible via the Competent Authority's website and on the planning authority's website.

1.5. The implementation of the EIA Directive

1.5.1. The evolution of the EU enforcement policy

The European Commission is in charge of designing and executing the EU enforcement policy, which is critical for the credibility of the Union and for the protection of public interests such as the environment²⁸.

In May 2016, the Commission launched the Environmental Implementation Review (EIR), a two-year cycle initiative to improve the implementation of existing EU environmental policy and legislation²⁹. The first EU Environmental Implementation Review analysed the reasons why Member States seem to have so many problems to implement environmental legislation. It identified the following common root causes for poor implementation: ineffective coordination between local, regional and national authorities; lack of administrative capacity and insufficient financing; lack of knowledge and data; insufficient systems to ensure compliance monitoring and enforcement, including effective and proportionate sanctions; and lack of integration and policy coherence.

At the same time, the Commission has worked closely with national authorities and other stakeholders to support compliance and resolve problems at an early stage. In February 2017 Environmental Implementation Review country reports were issued which gave the first ever comprehensive overview of how Member States

²⁶ Detailed guidelines about the application of Art. 260(3) TFEU are contained in Commission Communication "Implementation of Article 260(3) of the Treaty", SEC(2010) 1371.

²⁷ https://www.housing.gov.ie/sites/default/files/publications/files/key_issues_in_transposition_of_2014_eia_directive_-_stakeholder_consultation_document_02may2017.pdf

²⁸ Commission "White Paper on European Governance", COM (2001) 428 final available at: http://ec.europa.eu/environment/pubs/pdf/Final_report_study_benefits_enforcement.pdf

²⁹ Commission Communication, 'The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results', COM (2017) 63 final, 3.2.2017.

apply EU environmental policies and laws on the ground. On the basis of these reports, the Commission started country dialogues with the Member States.

Ensuring implementation of EU environmental law is a priority objective in the Seventh Environmental Action Programme which regulates the Commission's actions in this policy area from January 2014 to 2020³⁰ and the Commission's 2012 Communication which aims to improve implementation of environmental law³¹ by setting up better information systems.

The EU implementation and enforcement policy has evolved progressively over the past 15 years. The recent Commission Communication 'EU law: Better results through better application'³², adopted in December 2016, stated that in order to deliver policy results an approach which focuses on problems where enforcement action can make a real difference, is essential. The Commission indicated also that it would give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework.

The enforcement measures undertaken under Article 258 TFEU are the only ones with a legal basis under the Treaties for the Commission to exercise its role as Guardian of the Treaties by initiating an infringement procedure against a Member State. A formal infringement procedure reflects the specificity of the Union's legal system³³ enabling the Union to ensure that obligations of States are fulfilled³⁴. This procedure recognises the Commission's power to deliver a Reasoned Opinion if it considers that a Member State has failed to fulfil an obligation under the Treaties after having given the State concerned the opportunity to submit its observations. This article has evolved and led to the establishment of two main phases of the infringement procedure. The first one starts with the issuance of the Letter of Formal Notice, where the Commission requests the Member State to submit its observations in relation to certain facts and legal arguments regarding a presumed breach of EU law. The second phase is linked to the Reasoned Opinion, which delimits the subject-matter of the dispute, so that it cannot thereafter be extended. In the Reasoned Opinion, the Commission argues that the Member State has failed to comply with EU law and requests it to correct the situation.

The EU Pilot is the administrative phase prior to the infringement procedure. It is accompanied by an IT platform which enables an exchange of information and documents between the Commission and the relevant Member State. Under this system, a Member State has ten weeks to answer a request for information on a potential breach of EU law or to adopt the necessary measures to comply with it. The Commission also has ten weeks in which to decide whether to close a case or to send a Letter of Formal Notice, thus opening an infringement procedure. However, as there are no mandatory rules regulating this procedure, this phase generally takes longer. This might be the reason why the Commission has announced that it will launch infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen as useful in a given case³⁵.

1.5.2. Implementation problems

The implementation problems of the EIA Directive are generally underpinned by information which the Commission obtains through complaints and petitions. The impact assessment for the EIA Directive 2014/52/EU recognised that the EIA represents about 12% of the infringement cases initiated by the Commission in relation to EU environmental legislation³⁶.

In 2016, 70 complaints out of 348 new complaints registered that year were related to the EIA Directive. The Court issued a ruling condemning Bulgaria for failing to protect the unique habitats and species in the Kaliakra regions in violation of the EIA Directive, the Birds Directive and the Habitats Directive³⁷.

³⁰ Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN>

³¹ Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final.

³² Commission Communication 'EU law: Better results through better application', C (2016) 8600, OJ C 18, 19.01 2017.

³³ Case C-304/02, Commission of the European Communities v French Republic, [2005] ECR I-06263.

³⁴ Case C-20/59, Government of the Italian Republic v High Authority of the European Coal and Steel Community, [1960] ECR 325.

³⁵ Commission Communication 'EU law: Better results through better application', C (2016) 8600, OJ C 18, 19.01 2017.

³⁶ Impact Assessment of the Proposal for a Directive amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, SWD(2012) 355 final, 26.10.2012

³⁷ CJEU, Case C-141/14 Commission v Bulgaria.

In 2017 there was an increase in the number of complaints related to the implementation of environmental legislation submitted to the Commission by citizens. Out of 518 complaints on environment, 128 were related to EIA Directive. In 2017 out of 307 cases related to environmental legislation there were 40 infringement cases regarding the Impact Assessment Directive. Out of those, 22 were new infringement cases initiated in 2017 in the environmental field.

In 2017 the Court issued a ruling condemning Germany for failing to fulfil its obligations to ensure that an appropriate and comprehensive assessment was conducted of the implications of authorisation for the construction of a coal-fired power plant in Moorburg, near Hamburg. While this assessment fell under the Habitats Directive, it is relevant to mention it given the consistency requirement under the EIA Directive 2014/52/EU³⁸.

In 2017 the Court also issued a preliminary ruling regarding the implementation of the EIA Directive in Italy³⁹. It stated that, in the event of failure to carry out an environmental impact assessment, Member States are required to nullify the unlawful consequences of that failure. EU law does not prevent the conduct of an impact assessment after the project concerned has been constructed and has entered into operation, as long as the relevant national rules do not allow the requirements of EU law to be circumvented and the assessment covers both the past and future environmental impact of the project⁴⁰.

The above-mentioned actions concern the implementation of EIA Directive 2011/92/EC. No action involving Directive 20014/52/EU has been identified yet.

The EIA Directive is based on the concept of ‘significance’ of the effects (or impacts) on the environment. The assessment of significance relies on informed, expert judgement on what is important or acceptable with regard to the impacts triggered by a project. However, the EIA Directive does not provide any clear definition of this. It requires the significant effects to be described in the EIA report in an appropriate manner (Article 3 of the Directive), so that it ultimately allows for decision-making.

The CJEU has clarified, in the context of the AA, that ‘in the light, in particular, of the precautionary principle, the probability of a risk that a plan or project will have a significant effect on a site concerned exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned’⁴¹.

The Commission Guidance suggests that significance has to be substantiated according to a transparent methodology explaining the approach to the assessment, allowing others to see the weight attached to different factors and to understand the rationale of the assessment⁴². For example, the Special report of the Institute of Environmental Management and Assessment (IEMA) explains that the assessment’s findings are regularly set out as different levels of significance (e.g. major, moderate, minor, etc.) recognising the inherent subjectivity of the assessment. This approach is considered a good practice⁴³.

Similarly the IMPERIA Project aims to collect good practices and develop new methods and tools to enhance effective and good-quality impact assessments. It proposes the use of multi-criteria analysis methods to collect, organise and present the possible impacts of developments and plans in a systematic, comprehensive and transparent way. The key deliverable of the project is the ARVI method which is an excel-based tool for impact significance assessment and for the comparison of alternatives. It allows experts to assess different types of impacts, to follow uniform principles and to report on the reasoning chains in an illustrative manner⁴⁴.

³⁸ CJEU, Case C-142/16 Commission v Germany.

³⁹ 2017 Annual report on Monitoring the Application of EU law.

⁴⁰ CJEU, Cases C-196/16 and C-197/16 requested by the court in Comune di Corridonia.

⁴¹ Case C-6/04 Commission v. United Kingdom, ECR [2005] I-09017 and C-418/04 Commission v. Ireland, ECR [2007] I-10947.

⁴² Environmental implementation Assessment of projects. Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU), 2017 at: http://ec.europa.eu/environment/eia/pdf/EIA_guidance_EIA_report_final.pdf

⁴³ The IEMA special report: The State of Environmental Impact assessment practice in the UK

⁴⁴ Environmental implementation Assessment of projects. Guidance on the preparation of the Environmental Impact Assessment Report (Directive 2011/92/EU as amended by 2014/52/EU), 2017

1.6. Conclusion and recommendations

The reviewed EIA Directive 2014/52/EU entered into force on 15 May 2014. The analysis of its implementation covers a very short period and there is little publicly accessible information. The changes adopted in the new Directive eliminate some of the implementation problems identified in the previous version and insert several additional measures to reinforce environmental protection and to ensure improved effectiveness, reduce administrative complexity and increase economic efficiency by streamlining procedures under several Directives⁴⁵. These changes need to be monitored in order to ensure the appropriate impact of the Directive as defined in its objectives.

It is worth highlighting that the EIA Directive establishes that every six years from 16 May 2017, Member States have to inform the Commission on the implementation of the Directive. This implies that Member States have to collect information and communicate statistical data on its implementation. This provides a good opportunity for the European Parliament to monitor the implementation of this Directive.

Issues which would merit attention are:

- legal frameworks ensuring the development of joint or coordinated procedures when appropriate assessments are required;
- consideration of resource efficiency, climate change and biodiversity as environmental factors to be included in the assessment;
- approaches to deal with cumulative impacts;
- the level of detail of the information provided in EIA reports;
- the capacity and methods for the Competent Authorities to deal with the amount of information;
- the approach and the level of detail of the alternatives to be assessed and the reasons for the option chosen;
- measures to ensure appropriate follow up of an EIA through appropriate procedures for monitoring the significant adverse effects on the environment;
- information enabling public participation and public access to information prior to the decision to grant or refuse development consent and as well as after the decision has been made.

⁴⁵ Recitals 29, 35 and 37 of Directive 2014/52/EU.

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