

The new EIA Directive

Scott Lyness
Landmark Chambers

Idea

- Commission report on effectiveness (7.09)
 - Screening: variable and exceeding margins of discretion
 - Quality: preparation, relationships with other Directives, coverage
 - Timeframes: variable and insufficient
- Consultation (6.10)
- Commission proposals for new Directive (10.12)
 - “lighten unnecessary administrative burdens and make it easier to assess potential impacts, without weakening existing environmental safeguards”

Adoption

- Watered down from earlier proposals
- Adopted 16.4.14; into force 15.5.14
- 2011/92/EU applies where screening or scoping procedure initiated or ES submitted before time limit for transposition 16.5.17 (2014/52/EU Art.s 2-3)

Purpose

- 41 recitals
- 3 of overarching relevance
 - Strengthen quality of EIA procedure
 - Enhance coherence with other EU legislation
 - Ensure issues of increasing environmental importance covered

Scope (1)

- First definition of EIA as process: report, consultation, examination, reasoned conclusion, decision (2011/92/EU Art. 1(2))
- Removal of exemption for projects adopted by specific act of national legislation... (2014/52/EU Art. 1(1)(c))
- But public consultation not required if Directive objectives met (2011/92/EU Art.2)

Scope (2)

- Can decide not to apply to projects responding to “civil emergencies” as well as defence (Art. 1(3))
- Exemption for specific projects maintained, but subject to criteria that EIA would adversely affect project purpose and Directive objectives met (Art. 2(4))
- Co-ordinated/joint procedures required where appropriate for EIA/Habitats assessments (Art. 2(3))

Screening (1)

- Proposed compulsory screening dropped
- Annex III selection criteria amended/clarified
 - Characteristics of project: eg vulnerability to “disasters” including those caused by climate change, “risks to human health”
 - Location: eg “riparian areas, river mouths”, “marine environment”
 - “Type and” characteristics of potential impact: eg “intensity” and “expected onset” of impact
- Member States may set thresholds or criteria to determine when screening, or assessment, not required, as well as when assessment required without screening (Art. 4(3))

Screening (2)

- When screening required, developer to provide information identified in new Annex IIA (Art. 4(4))
 - Description of project, aspects of environment to be likely to be significantly affected, likely significant effects, taking into account selection criteria in Annex III
- Determination on basis of developer information, taking into account results of “preliminary verifications or assessments” carried out under other Union legislation (Art.4(5))

Screening (3)

- Determination to be made public, whether or not EIA required, stating “main reasons” with “reference to the relevant criteria listed in Annex III” (Art. 4(5)(a))
- Where not required, must state “where proposed by the developer, features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects” (Art. 4(5)(b))
- Determination asap and within 90 days of receipt of developer information, subject to extension in exceptional cases (Art. 4(6))

Scoping

- Proposed mandatory scoping dropped
- Environmental report must be “based on” any scoping opinion (and include information reasonably required for reaching reasoned conclusion on effects) (Art. 5(1))
- Removal of requirement to consult developer (Art. 5(2))

Content (1)

- Factors to be covered under Article 3 by the “EIA” clarified eg:
 - “human beings, fauna and flora” now “population and human health” and “biodiversity, in particular species and habitats protected under the Habitats and Birds Directives
 - “vulnerability...to risks of major accidents and/or disasters”
- Reflected in refinement to Annex IV eg:
 - Description of project: operational phase “energy demand and energy used”,
 - Description of the “current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes...can be assessed with reasonable effort”
 - Description of the factors specified in Article 3(1): see above; and climate “(for example greenhouse gas emissions, impacts relevant to adaption)”
 - Description of the likely significant effects of the project: use of natural resources “considering as far as possible the sustainable availability of these resources”
 - Description of mitigation to include “where appropriate, any proposed monitoring arrangements (for example the preparation of a post-project analysis)”

Content (2)

- Alternatives
 - From: “an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects”
 - To: “a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment”; and
 - Annex IV: “Description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) and an indication of the main reasons for selecting the option chosen, including as comparison of the environmental effects”
- Description, not outline
- Reasonable: “reasonable alternatives studied” or “developer should study all reasonable alternatives”?

Preparation and consultation

- Preparation by undefined “competent experts” (Art. 5(3)(a))
- Competent authority to have access to “sufficient expertise to examine” report (Art. 5(3)(b))
- Consultation on report:
 - Designation of authorities to be based not just on “specific environmental responsibilities” but “local and regional competences (Art. 6(1))
 - Requirement to notify public electronically (Art. 6(2),(5))
 - Time frames: not shorter than 30 days and reasonable (Art. 6(6))
 - Transboundary consultations may be conducted through an appropriate joint body (Art. 7(4))

Decision (1)

- Refinement of existing requirements (Art. 8a)
- Grant must incorporate:
 - Reasoned conclusion
 - Environmental conditions, project features/measures to mitigate effects, monitoring measures
- Main reasons for refusal must be stated

Decision (2)

- Requirement that decision taken within a “reasonable period of time” (Art. 8a(5))
- Member States must ensure mitigation is “implemented by the developer” and determine monitoring procedures (Art. 8a(4))
- Must be satisfied reasoned conclusion is up-to-date at time of decision and may set timeframe for validity of reasoned conclusion (Art. 8a(6))

Notification

- Must inform public and consultation authorities “promptly” of decision “in accordance with the national procedures” (Art. 9(1))
- Information on public participation process must include “summary of the results of the consultations and the information gathered” pursuant to report and consultation (Art. 9(1))

Penalties

- Must lay down penalties for infringements of national provisions (Art. 10a)
- Unprescribed
- But must be “effective, proportionate and dissuasive”

Implications (1)

- Fundamental structure remains intact
- Formality and clarity to current good practice
- Consultation, referendum...
- Achieve objectives?
 - Discretion v. consistency?
 - More focussed EIA process?
 - Quality control?

Implications (2)

- Competent authorities:
 - Recognised need for sufficient expertise
 - Enhanced decision-making requirements including reasoned conclusions
 - Note requirement to avoid conflicts of interest eg separation of functions where also developer (Article 9a)
- Developers/practitioners:
 - Annex IIA report: mini Annex IV and mini EIA?
 - Advise on co-ordinated/joint procedures eg for EIA/Habitats
 - Stronger relationship with scoping opinion?
 - Confirm importance of alternatives, mitigation, monitoring
 - Checklists for new/refined topics