Manual of EUROPEAN ENVIRONMENTAL POLICY

Manual of European Environmental Policy

The following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.

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This section is the text of the Manual as published in 2012. It is therefore important to note the following:

- The contents have not been updated since 2012 and no guarantee is given of the accuracy of the contents given potential subsequent developments.
- The sections include links to external websites (e.g. to legal texts). These links continue to work as long as those links are not broken by those websites.
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Institute for European Environmental Policy

Environmental impact assessment

Formal references	
85/337/EEC (OJ L175 5.7.1985)	Directive on the effect of certain public and private projects on the environment
Proposed 11.6.80 – COM(80)313	
Amended by	
97/11/EC (OJ L73 14.03.1997)	Amendment
2003/35/EC (OJ L156 25.6.2003)	Amendment
2009/31/EC (OJ L140 5.6.2009)	Amendment
Codified by	
2011/92/EU (OJ L26 28.1.2012)	
Legal base	Article 192 TFEU (originally Article 130s EEC Treaty)
Binding dates	
Formal compliance (97/11/EC)	14 March 1999
Formal compliance (2003/35/EC)	25 June 2005

Purpose of the Directive

The Directive is better known as the Environmental Impact Assessment (EIA) Directive and can be thought of as an embodiment of the preventative approach to environmental protection. Before consent is given for certain development projects – such as large-scale industrial or infrastructure projects – an assessment is to be made of the effects they may have on the environment so that the competent authority that grants consent is aware of the consequences. To enable the assessment to be made, the developer has to supply information and the public, and certain authorities, have to be consulted. The Directive creates procedural rather than substantive obligations and does not in itself require that Member States refuse to approve projects that are damaging to the environment. The Directive was amended by Directive 97/11/EC which required national implementing legislation by 14th March 1999. The amendments extend the categories of projects in Annex I and II, clarify the treatment of Annex II projects, introduce a 'scoping' procedure and enhance provisions for publicity and consultation. The Directive was further amended by Directive 2003/35/EC in order to transpose the Århus Convention into EU legislation and to improve the rights for public participation. Directive 2009/31/EC amended the Annexes I and II of the Directive, by adding projects related to the transport, capture and storage of carbon dioxide. In 2011 the EIA Directive 85/337/EEC and its three amendments were codified into a single legislative act through Directive 2011/92/EU.

Summary of the Directive

General provisions

Projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are to be made subject to an assessment of their effects before development consent is given. The projects listed in an Annex I must be made subject to an assessment, while other projects, listed in an Annex II, are to be made subject to an assessment only if they are likely to have a significant effect on the environment.

As part of the EIA the effects on the following four factors are to be identified, described and assessed, as appropriate:

- Human beings, fauna and flora.
- Soil, water, air, climate and the landscape.
- Material assets and the cultural heritage.
- The interaction between all these factors.

Information supplied by the developer (see below) and gathered as a result of consultations (see below) must be taken into consideration in the development consent procedure. The public is to be informed of the content of the Decision and any conditions attached. In addition the public must be informed as to the reasons and considerations upon which the Decision was based, and the competent authority must if necessary, describe the measures, which will be taken to minimize adverse environmental effects.

Exemptions

In exceptional cases, a project may be exempted from the provisions of the Directive. In that event, the Member State must make public its reasons and must consider whether another form of assessment would be appropriate and whether the public should be informed of the information collected. The Member State must also inform the Commission, which must immediately inform the other Member States.

Projects whose details are adopted by a specific act of national legislation are exempt from all provisions of the Directive, as are projects serving national defence purposes.

Projects subject to assessment

The process for deciding whether a project is subject to an EIA is commonly known as ‘screening’. Project classes, which must be made subject to an EIA fall under 23 headings in Annex 1 and cover:

- Oil refineries.
- Large thermal power stations and nuclear power stations and reactors.
- Installations for reprocessing of nuclear fuels well as storage or disposal of radioactive waste.
- Iron and steel works.
- Installations for extracting and processing asbestos.
- Integrated chemical installations.

- Construction of motorways, express roads, railway lines and airports.
- Trading ports and inland waterways.
- Installations for incineration, treatment or landfill of hazardous waste.
- Incineration or chemical treatment of non-hazardous waste.
- Groundwater abstraction exceeding 10 million cu. metres/annum.
- Works for transferring water between river basins.
- Waste water treatment plants.
- Extraction of oil and gas.
- Dams.
- Pipelines for gas, oil and chemicals.
- Installations for intensive rearing of poultry or pigs.
- Pulp and paper plants.
- Quarries.
- Overhead power lines.
- Storage of petroleum and chemicals.
- Geological storage of carbon dioxide.
- Installations for carbon capture and storage.

For the below 12 project classes, which are listed in Annex II, an EIA *might* be required:

- Agriculture, silviculture and aquaculture.
- Extractive industry.
- Energy industry.
- Production and processing of metals.
- Mineral industry.
- Chemical industry.
- Food industry.
- Textile, leather, wood and paper industries.
- Rubber industry.
- Infrastructure projects.
- Other projects (includes nine specific categories, such as racing tracks).
- Tourism and leisure.

The above project classes for the Annex I and Annex II headings are described in the Directive in some detail and hence the headings above only give a broad indication of the projects for which an assessment may be required.

For Annex II projects a Member State must decide, based on a case-by-case examination, and/or by reference to thresholds or criteria, whether an EIA is required or not. Annex III gives details of the factors to be taken into account when examining a project or setting thresholds or criteria. These include the characteristics of the project, such as size and production of waste, the location of the project, for example in a specially protected or densely populated area, and the potential impact, for example, its geographical extent and reversibility.

The Decision by the competent authority whether to carry out an EIA or not must be made public.

Information to be supplied by the developer

The stage for setting the coverage and detail of the EIA process is known as "scoping" and is based on the information specified in Annex IV. The scoping stage evaluates which impacts and issues to consider and aims to ensure that the EIA provides all the relevant information. The Directive does not prescribe in what form this information must be presented, but as a minimum the developer must supply at least the following information (Article 5.3):

- A description of the project with information on site, design and size.
- The data required to identify and assess the main effects which the project is likely to have on the environment.
- A description of the measures envisaged to avoid, reduce and possibly remedy significant adverse effects.
- An outline of the main alternatives studied by the developer and the reasons for his choice.
- A non-technical summary of the above information.

Subject to the above minimum requirements, this information should be provided by the developer only in so far as the Member State considers it relevant to a given stage of the consent procedure, to the characteristics of the proposed project and to the environmental features likely to be affected, and consider that it is reasonable having regard to current knowledge (Article 5.1). Accordingly Member States can give some discretion to the competent authority as to how much information is required from the developer.

When describing the likely significant effects of the proposed project, the developer is required to cover both direct effects and any 'indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the project'. Any authorities with relevant information must make this available to the developer on request (Article 5.4).

During the scoping stage, before submitting the application for development consent, the developer has the right to request from the competent authority an opinion on the information to be required. By doing this the developer might avoid potential delays later on in the process as well as ensure a better quality assessment.

Where the developer requests from the competent authority an opinion on the information to be required by the developer, before submitting an application for development consent, the competent authority is required to provide this in accordance with Annex IV. In some Member States the competent authority is required to provide this information regardless of any requests from the developer.

Consultations

Any request for development consent and the information supplied by the developer must be made public in time to allow an opportunity to express an opinion before consent is granted.

Authorities with specific environmental responsibilities likely to be concerned by a project must also be given an opportunity to express their opinion. The detailed arrangements for this are a matter for the Member State. The amendment Directive 2003/35/EC requires Member States to ensure that the public concerned has access to a review procedure before a court of

law to challenge the substantive or procedural legality of Decisions and acts or omissions. According to the definition, 'the public concerned' would include also those who have an interest in the environmental decision-making procedures, such as NGOs. Where a project is likely to have effects in another Member State, the developer's information is to be forwarded to that Member State and should serve as a basis for any consultations between the two Member States.

Procedures are enhanced for the consultation with other Member States where a project is likely to have significant transboundary effects. This brings the Directive into line with the Espoo Convention.

Development of the Directive

The inspiration for this Directive comes, not from the land-use planning procedures of any of the Member States, nor from the procedures for authorization of industrial plant that existed in most, but from an item of legislation in the United States – the National Environment Policy Act of 1969 – known as NEPA. This is acknowledged in the second action programme on the environment of 1977 in which the Commission formally announced its intentions of making proposals on 'EIA'. The Commission had by then already asked consultants to study the subject, and then starting from the consultants' report[1] the Commission between 1977 and 1980 produced 20 internal drafts before formally proposing a Directive in 1980. Even during this gestation period, the proposal generated considerable interest with the European Parliament holding a hearing in January 1980 and one of the internal drafts even appeared in the press.

The requirements of NEPA were very different from those of the Directive. NEPA applied only to actions by a Federal agency and required the agency, that is, the promoter of the development, itself to prepare an 'environmental impact statement'. This idea of the developer preparing an assessment is to be found in the Commission's proposal of 1980 which would effectively have required two assessments: a first forming part of the published information provided by the developer, and a second prepared and made public by the competent authority. In the Directive as agreed only the developer has to supply information including data required to assess the main environmental effects.

The United Kingdom expressed its fears that opponents to a development would be provided with the opportunity to seize on some procedural failure as a ground for challenging a planning Decision in the courts. These fears may well have been fuelled by stories of the early days of NEPA in the United States where there had been much litigation, but where the tradition of resolving disputes over policy matters in the courts is well established. The United Kingdom was not the only country to have reservations but there is no doubt that the United Kingdom was the leading opponent of the Directive as proposed. Its reservations were maintained until November 1983 by which time the proposal had been amended in significant ways. However, at that point a Danish objection continued to delay agreement. The Danish Parliament – the *Folketing* – objected in principle to having to submit development projects to the procedures of the Directive when they were being authorized by an Act of Parliament on the grounds that this impinged upon their sovereignty. The Danish government refused to make any concession on this point which was eventually met by the Council agreeing to exempt any project 'the details of which are adopted by a specific act of national legislation'.

The European Parliament delivered an opinion in February 1982. As well as proposing detailed amendments it called on the Commission, as soon as possible, to submit a proposal to extend environmental assessment to public plans and programmes and not just to projects. This eventually led to Directive 2001/42/EC on strategic environmental assessment (SEA) in 2001.

The 1993 review of the EIA Directive led to the amendment Directive 97/11/EC. The review found that there was a danger that the discretion given by the Directive to Member States on establishing screening thresholds for Annex II projects could lead to a general devaluation of the provisions of Article 2 (1). It was largely for this reason that Directive 97/11/EC introduced a new Annex III that established screening criteria to be used for the establishment of thresholds and for the case-by-case screening of Annex II projects.

The 1993 review also identified concerns on the level and quality of the information provided to competent authorities within the EIA process. This led to the introduction of the new minimum information requirements introduced by Directive 97/11/EC.

Following the signature by the Community (June 1998) of the Århus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, the Community law had to be properly aligned with that Convention. Thus, the EIA Directive was amended by Directive 2003/35/EC, which sought to align the provisions on public participation with the Århus Convention.

Implementation of the Directive

The national transposition measures for Directive 85/337/EEC can be found in the Member States' provisions.

The national transposition measures for Directive 97/11/EC can be found in the Member States' provisions.

The national transposition measures for Directive 2003/35/EC can be found in the Member States' provisions.

The latest review (COM(2009)378) of the EIA Directive in 2009 found that when establishing thresholds for Annex II projects, Member States often exceed their margin of discretion, either by taking account only of some levels selection criteria in Annex III or by exempting some projects in advance. The review pointed out that the different threshold levels set by the Member States have clear implications for the amount of EIA activity in each of the Member States, even of similar size. Furthermore, there were still several cases in which cumulative effects were not taken into account, while problems remained when it came to eliminating ‘salami slicing’ practices, especially for big investment plans.

According to this review, many Member States have also pointed out that the lack of sufficient quality in the information used in the EIA documentation is a problem. There are major differences in the quality of EIA documentation, not only between different Member States but also within Member States themselves.

In 2008 the Commission published a guidance document[2] clarifying the scope and definition of project categories in Annexes I and II. It aims to ensure that those projects likely to have significant effects on the environment do not fall outside the scope of the Directive due to issues of interpretation. It is also intended to provide an overview of existing useful sources of information at EU level, including rulings of the European Court of Justice (ECJ), definitions provided in other Directives and relevant guidance documents.

Enforcement and court cases

There have been several cases decided by the ECJ in relation to the EIA Directive and in these, the ECJ has emphasized that the Directive is broad in scope and purpose and confines the Member State's degree of discretion. Most of the ECJ rulings focus on '*screening*' and the Decision as to whether or not to carry out an EIA. The ECJ has also provided interpretations of some of the project categories and the concept of '*development consent*', and has dealt with the issue of retention permissions. Some of the more relevant cases are discussed below.

A ruling of the ECJ (Case C–431/92) means that where a development can be identified on its own as a project within Annex I, it will not constitute a 'modification' for the purposes of Annex II. (The case related to an extension of over 300 MW to an existing power station in Germany. Germany, supported by the United Kingdom, had argued that the project fell under Annex II. The ECJ found in favour of the Commission which had argued that it fell under Annex I).

The preamble to the Directive makes it clear that Member States may set thresholds below which it will not be necessary to consider whether a project requires assessment. This contrasts with the Commission's argument in Case C–72/95 that the setting of thresholds did not remove the need for examining each Annex II project for potentially significant effects on the environment. The Court in that case held that Member States could set thresholds provided this did not have the effect of excluding whole classes of project. The preamble also states that the fact that a project is in a special protection area designated under the Birds Directive 79/409/EEC or Habitats Directive 92/43/EEC does not imply that it is automatically subject to assessment.

In case C-227/01, *Commission v Spain*, the Court confirmed that a long-distance project cannot be split up into successive shorter sections (the so-called salami slicing) in order to exclude both the project as a whole and the sections resulting from that division from the requirements of the Directive. The ECJ was asked by a Court in Madrid to interpret the Directive in a case brought against the Autonomous Community of Madrid by *Ecologistas en Acción* (a Spanish environmental organization) in 2007. The case concerned the construction of a main road in Madrid and five projects linked to this development. The Spanish legislation categorized the road as an urban road and the Court in Madrid wanted the ECJ to provide it with its opinion on whether or not urban roads are excluded from the requirements of the EIA Directive. However, the community of Madrid argued that the roads in question were not motorways or express roads, which always require an EIA. The reasoning behind this was based on the European Agreement on Main International Traffic Arteries (AGR)[3], which defines these roads but states that these definitions do not apply to 'built up areas' (Annex II, section 1.1 of the AGR). In her advisory opinion[4] to the Court, the Advocate-General pointed out that the Directive does not refer to the AGR when referring to motorways and express roads and hence it cannot be interpreted strictly with regard to the AGR definition. The ECJ also took into consideration the aim of the Directive, which is to

take into account the likely significant environmental impacts of a project before deciding on development consent. It argued that roads in urban areas can also have significant environmental impacts, because of already existing environmental pressures and the possible presence of archaeological sites. Based on these arguments, the Advocate-General considered that roads in built up areas are not excluded from the requirements of the EIA Directive. The same interpretation applies to Annex II projects (these have to be assessed based on criteria/thresholds to determine whether or not an EIA is required) listed in section 10(e), covering the construction of roads, harbours and port installations, including fishing harbours as well as changes and extensions to these. In another case (C-560/08, 15.12.2011) the ECJ ruled against Spain for the infringement of several Articles of the EIA Directive for the inadequate EIAs that took place at different times for the different stretches of the widening of the M-501 Motorway near Madrid. Infringements included the non-consideration of indirect and cumulative impacts as well as considerable changes made to one of the stretches from the time of conducting the EIA in 1998 to the commencement of work in 2005.

In June 2010 ECJ ruled that the Czech Republic was failing to comply with the EIA Directive. This case was opened in 2006, and although the Czech Republic amended its legislation in 2009, the Commission was still not convinced that the transposition ensured adequate access to justice. The transposed legislation in Czech Republic only applied to projects where the EIA began after 11 December 2009. The European Commission argued that the new legislation should be widened to include also projects for which the EIA was under way before that date and on 24 November 2010 it sent the Czech Republic a letter of formal notice[8]. In January 2012 Czech EIA law was amended, explicitly enabling the filing of a lawsuit even in connection with projects whose EIA process started before December 11 2009, thus ending the dispute with the European Commission.

According to the accompanying document of the 28th annual report on monitoring the application of Community law (SEC(2011)1684/2), in 2010 the Commission opened infringement procedures against Ireland, Spain, and Portugal concerning bad application of the EIA Directive and against Netherlands for not conforming to the transposition of the EIA Directive.

In case C-50/09 3.3.2011, the ECJ ruled against Ireland for failing to transpose Article 3 of the EIA Directive, which sets the sectors to be covered as well as requires a description of the direct and indirect effects of a project. Ireland argued that Article 4 is merely a provision drafted in general terms and that the details of the process are specific in Articles 4 to 11. However, in its judgement the ECJ stated that Article 3 lays down obligations that are fundamental for the EIA process and that the transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.

The European Commission published a booklet[9] with a collection of the most important rulings of the European Court of Justice related to the EIA Directive. The first part of the booklet summarised statements of the Court of Justice which could be considered as general principles of the EIA Directive or of the EU law as a whole and the second part contained statements of the Court, as they were pronounced in each particular case concerning appropriate Articles of the EIA Directive. The Commission's services will update this booklet regularly to take into account recent rulings of the Court of Justice.

Further developments

In July 2009 the Commission published a Communication (COM(2009)378) on the application and effectiveness of the EIA Directive. It suggested a single assessment procedure in cases where assessments under both the Habitats and EIA Directives apply. However, any plans to merge the EIA and SEA Directives were rejected, at least for now. The Communication mentioned the possibility of a greater role for comitology in amending all four Annexes of the EIA Directive, such as updating the EIA project list better to reflect the impacts of climate change. The possible introduction of monitoring into the Directive was also identified as an issue requiring further attention. The Communication was partly based on a review report[5] on the application and effectiveness of the EIA Directive, published in June 2009.

To address the issues above the Commission launched a consultation6, which ran until 24 September 2010. The introduction to the consultation pointed out that there are several options for revising the Directive ranging from a simple codification to more complex modifications regarding the requirements of the Directive.

The European Commission and the Belgian Presidency organised a conference for the 25th anniversary of the EIA Directive in Leuven, Belgium on 18-19 November 2010. The event brought together stakeholders involved in environmental impact assessments with representatives from European and international institutions, public administrations, industry and environment organisations and academics. The conference provided an opportunity to obtain the views of stakeholders on the strengths and weaknesses of the functioning of the EIA Directive in order to complement the public consultation on the review of the EIA Directive. Presentations from the conference are available at Commission's web page: http://ec.europa.eu/environment/eia/conference.htm.

As part of the review of the EIA Directive a report[10] to support the Impact Assessment of a revision to the EIA Directive was published in September 2010. The report provides data to contribute to the determination of the likely social, environmental, economic and administrative impacts of the identified policy options for revision of the EIA Directive. The new EIA Proposal is likely to be tabled by the Commission in 2012.

Related legislation

The following Directives are related to the Directives concerned with EIA:

- Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.
- Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.
- Directive 2008/1/EC concerning integrated pollution prevention and control.
- Directive 96/82/EC on the control of major accident hazards involving dangerous substances.

References

1 Jones C, Lee N and Wood C (1991) *UK Environmental Statements 1988–90: An Analysis*, Occasional Paper 29. EIA Centre, University of Manchester.

2 European Commission (2008) *Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment (EIA Directive), Interpretation of Definitions of Certain Project Categories of Annex I and II of the EIA Directive*, European Communities.

3 United Nations (1975) *European Agreement on Main International Traffic Arteries (with Annexes and Lists of Roads)*, Concluded at Geneva on 15 November 1975.

4 European Court of Justice (2008) Opinion of Advocate-General J. Kokott submitted on 30 April 2008 in Case C-142/07, *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid*.

5 European Commission (2009) *Study Concerning the Report on the Application and Effectiveness of the EIA Directive*, June 2009.

6 European Commission, Environment, Public Consultation on the Review of EIA Directive, http://ec.europa.eu/environment/consultations/eia.htm

7 European Commission (2010), *Accompanying Document to the Report from the Commission, 27th Annual Report on Monitoring the Application of EU Law (2009), COM(2010) 538*

8 European Commission Press Release (2010), *Environment: Commission Asks Czech Republic to comply with Court ruling on Environmental Impact Assessments* 24 November 2010, European Commission webpage. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1587&format=HTML&aged=1&language=EN&guiLanguage=en Accessed 6.4.2011.

9 European Commission (2010), *Environmental Impact Assessment of Projects, Rulings of Court of Justice*, http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf.

10 GHK (2010), *Collection of information and data to support the Impact Assessment study of the review of the EIA Directive*, A study for DG Environment, 30 September 2010, http://ec.europa.eu/environment/eia/pdf/collection_data.pdf.