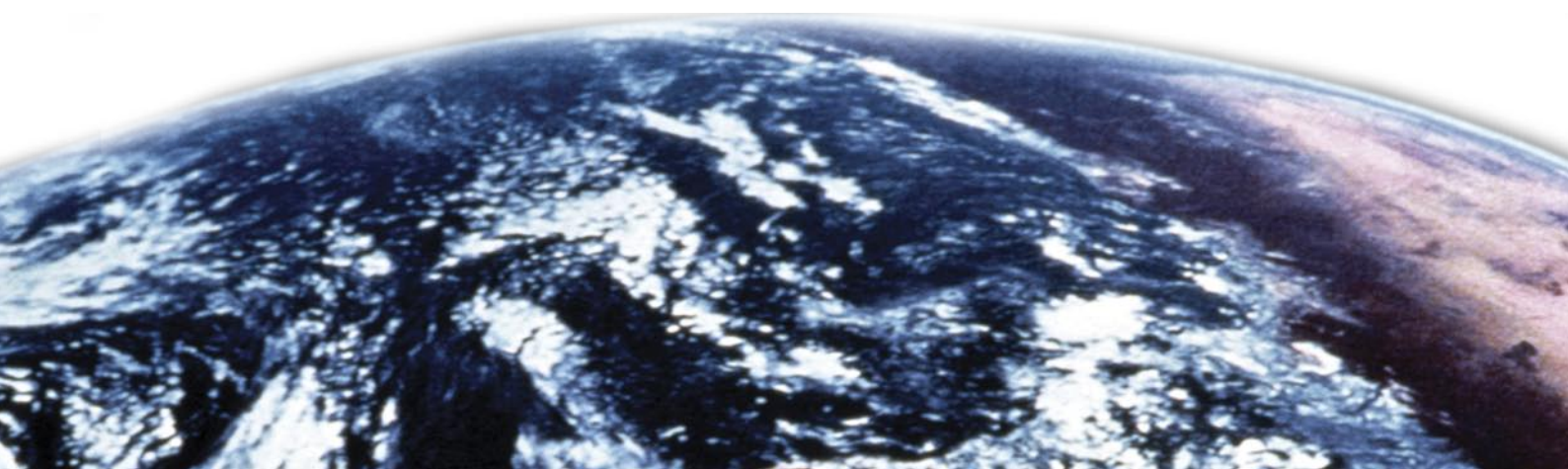




EUROPEAN  
COMMISSION

Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive), as amended

## **CLARIFICATION OF THE APPLICATION OF ARTICLE 2(3) OF THE EIA DIRECTIVE**



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# CLARIFICATION OF THE APPLICATION OF ARTICLE 2(3) OF THE EIA DIRECTIVE

## 1 INTRODUCTION

1.1 Article 2(3) of the 'EIA' Directive (Directive 85/337/EEC<sup>1</sup> on the assessment of the effects of certain public and private projects on the environment as amended by Directives 97/11/EC<sup>2</sup> and 2003/35/EC<sup>3</sup>) provides that Member States may, in exceptional cases, exempt specific projects in whole, or in part, from the provisions of the Directive.

1.2 The EIA Directive specifies which procedures must be followed by Member States and by the European Commission when an exemption from environmental impact assessment is invoked under Art. 2(3). However, no indication is provided in the Directive of how the term "exceptional cases" should be interpreted, and experience shows that doubts may arise as to when the provisions of this Article can be legitimately invoked.

1.3 The aim of this document is to assist Member States' authorities in deciding when and how Art. 2(3) of the EIA Directive should be applied. The document was prepared by experts in EIA from EU Member States and the European Economic Area, and by the Environment Directorate-General of the European Commission.

1.4 This document represents only the views of the Commission services and is not of a binding nature. The present version is not meant to be definitive. The document may be revised in the future, on the basis of further experience in the implementation of the EIA Directive and to reflect any future case law. It must be emphasised that, in the last resort, it rests with the European Court of Justice (ECJ) to interpret a Directive.

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<sup>1</sup>OJ L 175, 5.7.1985, p. 40

<sup>2</sup>OJ L 73, 14.3.1997, p. 5

<sup>3</sup>OJ L 156, 25.6.2003, p. 17

## 2 CLARIFICATION OF THE APPLICATION OF ARTICLE 2(3) OF THE EIA DIRECTIVE

2.1 Under the Environmental Impact Assessment ("EIA") Directive (Directive 85/337/EEC as amended) projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location must be made subject to an assessment of the environmental effects (Art. 2(1)). Article 2(3) of the Directive provides for an exemption, in exceptional cases, from the above general requirement.

### **Article 2(3) of Directive 85/337/EEC as amended by Directives 97/11/EC and 2003/35/EC<sup>4</sup>**

Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member State shall:

- (a) consider whether another form of assessment would be appropriate;
- (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;
- (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.

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<sup>4</sup>The text of Art. 2(3) points (a) and (b) of the EIA Directive has been modified by Directive 2003/35/EC as regards the provisions for informing the public, with effect from 25 June 2005.

Prior to these amendments, Art. 2(3), points (a) and (b) read as follows:

*(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;*

*(b) make available to the public concerned the information relating to the exemption and the reasons for granting it.*

## **Background**

2.2 A provision for an exemption for “exceptional cases” and for a “simplified form of assessment” was included in the original proposal for a Directive in 1980 (COM(80)313 final), though these terms were not described or defined.

2.3 During subsequent negotiations a number of different approaches were explored, but it was not until September 1982 that the draft text included grounds for invoking the exemption for what are now Annex 1 projects. One of the grounds was that, due to its limited size or other exceptional circumstances, the project would not be likely to have significant effects on the environment. This shows the difference between the scope of Annex 1 as proposed at that stage and Annex 1 as finally agreed, since in the final text there is an assumption that all projects now contained in the annex are likely to have significant environmental effects. The two other grounds in the draft text were the project’s similarity to other projects which had already been subject to an environmental assessment, and the urgent need to construct the project for security reasons.

2.4 There were still, however, differences of opinion between Member States as to whether exemptions should be permitted or how they might be applied. Many opposed the first two of the above grounds, though a certain consensus emerged on the third (security reasons). A revised draft also included an exemption for circumstances where construction could not be postponed in order to avoid an immediate danger or catastrophe. This text was subsequently abandoned, and the final version emerged following Council deliberations in November and December 1983.

## **Directive text**

2.5 Article 2(3) provides for Member States to exempt specific projects from the requirements of the Directive in “exceptional cases” and, in such cases, for the possibility of an alternative form of assessment. It sets out the procedural steps to be taken when the exemption is used. It also requires the Commission to report every year to the Council on how the provision has been applied. Article 2(3) was slightly amended by Directive 97/11/EC by the inclusion of the words “without prejudice to Article 7” (transboundary provisions) and the substitution of “where appropriate,” in 2(3)(c) by “where applicable”. It was further amended with effect from 25 June 2005 by Directive 2003/35/EC, one of whose objectives was to incorporate the Aarhus Convention provisions on public participation and access to justice. The main effect of this amendment was to remove Member States’ discretion on whether information about other forms of assessment could be made available to the public.

2.6 Article 2(3) does not define “exceptional cases” or provide examples of the kind of cases that might come within its scope. There have been very few cases where Article 2(3) has been invoked, and none of them provides sufficiently firm precedents on which to base clarifying guidance. In any case the position of the ECJ is that “the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question” (see judgment in case C-201/02 (Delena Wells), paragraph 37).

## **Transposition**

2.7 Transposition of Article 2(3) into national legislation should be seen as an option, not as an obligation. If a Member State does not use this option, it has a more stringent regime than that required by the Directive since there is no possibility for this specific exemption. In any event, if a Member State considers that it may need to use this exemption in the future, it may transpose Article 2(3) into its national legislation. If this option is used, it is recommended for reasons of legal certainty that the wording of the transposing legislation follows that of the Directive as closely as possible, to avoid implementation which goes beyond the conditions of the Directive. Member States should ensure that their procedures include a screening requirement for exceptional cases to determine whether the project falls within the scope of the Directive.

### **Meaning of “exceptional cases”**

2.8 The term “exceptional cases” is likely to be interpreted narrowly by the European Court of Justice. ECJ rulings in relation to the exemptions in Articles 1(4) (national defence) and 1(5) (projects adopted by specific act of national legislation) indicate that there should be a restrictive interpretation of the provision. In the Bolzano case C-435/97 the Court said about Article 1(4) “Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively”. In Linster C-287/98, paragraph 49, the Court said “Article 1(5) of the Directive should be interpreted having regard to the objectives of the Directive and to the fact that, since it is a provision limiting the Directive’s field of application, it must be interpreted restrictively.” It is therefore unlikely that the Court would accept that, just because a case can be shown to be exceptional, the Article 2(3) exemption would necessarily be justified. It would be unreasonable to apply the exemption in a case where the factors which make it exceptional do not preclude full compliance with the Directive.

2.9 For a case to be considered as exceptional and qualify for the exemption all the following criteria would normally need to be met:

- an urgent and substantial need for the project;
- inability to undertake the project earlier;
- inability to meet the full requirements of the Directive.

2.10 The need for the project would have to be such that failure to proceed with it would be likely to present a serious threat, for example to life, health or human welfare; to the environment (e.g. contamination of land, water or air, or flooding); to political, administrative or economic stability; or to security. Although there is no direct correlation between the exemption and civil emergencies, the sort of circumstance where it might apply could well fall within the term civil emergency. It is worth noting that Article 3(8) of the Strategic Environmental Assessment (SEA) Directive 2001/42/EC includes an exemption for plans and programmes the sole purpose of which is to serve civil emergency. Whilst the backgrounds to the EIA and SEA Directives are different, there is a connection between the two in that the latter applies to plans and programmes in the core sectors which set the framework for future development consent of projects under the EIA Directive.

2.11 The exemption would generally be justified only if the emergency which gave rise to the project could not have been foreseen, or if it could have been foreseen but the project could not have been undertaken earlier. An anti-flooding project might, for example, be considered to be a measure to meet a potential emergency sufficiently urgent to warrant the exemption being invoked. However, if flooding has occurred at the same place on a number of previous occasions, and the project is a belated measure to deal with a potential future emergency, then the exemption is unlikely to be warranted. On the other hand there can be emergencies, including some natural disasters, which could have been anticipated but not prevented and which give rise to projects (such as reconstruction work or works to prevent additional damage) which might well qualify for the exemption.

2.12 As indicated in paragraph 2.8 above, the circumstances of an exceptional case must be such as to make compliance with all the requirements of the Directive impossible or impracticable, for example where a development needs to be approved and completed so quickly that there is insufficient time to prepare all the environmental information required under Article 5(1), or to conduct a public consultation exercise prior to the decision to proceed with it.

### **Confidentiality constraints**

2.13 There might be circumstances where the disclosure of environmental information would not be in the public interest or might even prejudice the interests that the Directive is designed to protect. This could be, for example, where the need to protect a habitat dictates that its location should be kept secret. Article 10 is relevant to such cases. It states that the provisions of the Directive do not affect the obligation on competent authorities to “respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.” There is a read-across here to measures such as those that implement Directive 2003/4/EC<sup>5</sup> on public access to environmental information, Article 4 of which allows Member States to refuse a request for environmental information if disclosure would adversely affect, amongst other things, “the protection of the environment to which such information relates, such as the location of rare species”. That Article goes on to emphasise that in every case the public interest served by disclosure must be weighed against the interest served by refusal. To the extent that environmental information could be withheld by virtue of Article 10 of the EIA Directive, therefore, there would be no need to invoke the Article 2(3) exemption.

### **Actions when Article 2(3) is used**

2.14 A Member State invoking the Article 2(3) exemption must consider whether it is possible to undertake another form of assessment. Where another form of assessment is possible and considered to be appropriate, the information obtained must be made available to the public. This is a similar obligation to that which applies under Article 6(2) in relation to environmental information, so Member States should consider making any environmental information obtained under another assessment available in the same way.

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<sup>5</sup>OJ L 41, 14.2.2003, p.26

2.15 Assessments could take a number of different forms. Where, for example, a project comprises several stages, it might be appropriate to carry out a “part-stage” EIA covering only some of them. While compliance with EIA requirements might be precluded in the first stage by the urgency of the project, it might be entirely feasible for subsequent stages. This would be a proportionate response to the exceptional case, ensuring that the requirements of the Directive were followed to as great an extent as possible.

2.16 A partial EIA might be appropriate where, for example, most elements of Annex IV to the Directive can be included but, because of the exceptional circumstances, not all of those elements. Such a case might be where only some of the data required to identify and assess the likely main effects of the development on the environment could be produced at the outset (for example, where surveys to establish the possible presence of protected species would be needed over at least a 1-year period but the urgency of the project requires work to be commenced within a shorter period). Another example might be where an urgent and unexpected need to dispose of hazardous waste arises, and the most suitable out of a large number of potential landfill sites has to be identified quickly, but there is insufficient time to carry out a full assessment of each. In such a case an assessment of the most pressing environmental considerations (such as effects on groundwater) at each site might be undertaken. As far as possible, however, the information required under Article 5(3) should be provided.

2.17 It is a basic principle of the Directive that EIA must be carried out before a project receives development consent. However, there might be circumstances where an ex-post approach, where all environmental effects are assessed and reviewed after the project has begun, could be considered where the urgency of the project precludes an earlier assessment.

### **Informing the Commission**

2.18 Paragraph (c) of Article 2(3) requires a Member State which uses the exemption to inform the Commission before granting consent to the project. Reasons justifying the exemption and, where it applies, the information made available to the public, must be sent to the Commission.

2.19 Given that the exemption will normally be invoked in circumstances requiring immediate action when there are many urgent demands on competent authorities, it is recommended that Member States devise internal procedures, possibly including a standard pro forma, to ensure that this notification requirement is not overlooked. The reasons justifying the exemption should specify not just why the situation is exceptional or urgent, but why compliance with EIA requirements is not possible. As this must be sent to the Commission before consent for the project is granted, Member States need to act quickly. It is recommended that, as well as sending a formal letter to the Commission, electronic notification should be used.

2.20 The Commission is required to forward the documents which it has received under the Article 2(3)(c) requirement to the other Member States, though there is no specific provision for a Member State to comment on them.



## 2.21 Summary of main points

- The term "exceptional cases" is likely to be interpreted narrowly;
- an important criterion for justifying use of Article 2(3) is that full compliance with the Directive is not possible, and not just that the case is exceptional;
- the exemption might normally be used in a civil emergency, though not all civil emergencies qualify for the exemption;
- there would need to be a pressing reason to justify the exemption, e.g. serious threat to life, health or human welfare; to the environment; to political, administrative or economic stability; or to security;
- the exemption is unlikely to be justified if it is intended to meet a situation that could be both anticipated and prevented;
- when considering the use of Article 2(3), consideration should be given to providing a partial or other form of assessment;
- Member States need to act quickly (before consent is granted) to provide the Commission with reasons justifying the exemption.

## **APPENDIX I - MEMBERS OF THE WORKING GROUP**

Alain Bozet, Directorate General of Natural Resources and Environment, Ministry of the Walloon Region, Belgium

Michel Delcorps, EIA/SEA Unit, Direction of Urbanism, Ministry of the Brussels Capital Region, Belgium

Jeroen Mentens, EIA/SEA Unit, Environment Administration, Region of Flanders, Belgium

Ásdís Hlökk Theodórsdóttir, National Planning Agency, Iceland

Monica Pasca, Ministry for Environment and Land Protection, Italy

Sandra Ruza, Ministry of the Environment, Latvia

Janny Ratelband, Ministry of Housing, Spatial Planning and the Environment, the Netherlands

Roger Gebbels and Phil Weatherby, Office of the Deputy Prime Minister, United Kingdom

David Aspinwall, Thisvi Ekmetzoglou, Antti Maunu and Laura Tabellini, European Commission, Directorate-General Environment

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