WORKSHOP ON EU LEGISLATION
ENVIRONMENTAL IMPACT ASSESSMENT

Introduction to EIA and SEA Directives

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2012 – European Commission
Presentation outline

Objective: provide an introductory overview of the EIA and SEA Directives and on the interpretation of the provisions of these Directives by the ECJ

- EIA Directive
  - Definition and legislative framework
  - General scope of application
  - Key definitions
  - Key stages of EIA procedure

- Overview of SEA Directive

2012 – European Commission
What is an EIA?

- The Council Directive 85/337/EEC of 27 June 1985, as amended, requires the “assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment” (Art.1)

- EIA entails the systematic collection and analysis of information about the environmental effects of a project by the developer in order to enable the competent authority to decide if and how the project should be carried out.
Quote once the full title of the Directive “on the assessment of the effects of certain public and private projects on the environment”

- Shortly explain what the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) or 'Espoo (EIA) Convention' is

- Shortly explain the Aarhus Convention and remind that there will be specific sessions on the subject

- Important: insist on the fact that widening of the scope is the key logic of the amendments in order to increase protection of environment which is one of the objectives laid out in the Treaty!
In the introduction present the overall logic of “general scope of application”: the idea is to examine:
- Which effects are to be assessed?
- Effects of which projects?

General scope of application: which effects on environment? (1)

- Art. 2 (1) : “projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location”

- Art. 3 : The EIA shall identify, describe and assess the direct and indirect effects of a project on:
  - human beings, fauna and flora;
  - soil, water, air, climate and landscape;
  - material assets and cultural heritage;
  - Interaction between the above listed.
In the introduction present the overall logic of “general scope of application”: the idea is to examine:

- Which effects are to be assessed?
- Effects of which projects?
- Who is involved?
Interpretation of the ECJ

- Ruling of the ECJ (3 March 2011, C-50/09) regarding Article 3:

In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project’s direct and indirect effects on certain factors, but **must also assess** them in an appropriate manner, in the light of each individual case.

That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the **substantial obligation** laid down in Article 3.

(par 36-38)
Give also few examples of projects for both annexes and remind that there will be a specific session on screening
Firstly, summarise the facts of the case and the legal questions arising from the preliminary reference (extract from judgement):

11 Bruxelles-National Airport, situated in the Flemish Region, has three take-off and landing runways over 2100 metres in length. It has existed for decades but its operation has been subject to the grant of an environmental permit only since 1999.

12 The first environmental permit was granted on 1 February 2000 for a period of five years. That permit, which laid down, inter alia, noise emission standards, was amended on three occasions with a view to a greater reduction in overall noise load. The Raad van State states that it does not appear from the documents submitted to it that an environmental impact assessment was carried out in connection with that permit or the subsequent amendments to it.

13 On 5 January 2004, The Brussels Airport Company NV submitted an environmental permit application for the continued operation of and alterations to the airport, involving the addition of parcels of land.

14 On 8 July 2004, the Permanent Delegation of the Provincial Council of Vlaams-Brabant granted the permit sought as regards the continued operation of the airport but rejected the application to extend it. The Permanent Delegation considered that an environmental impact assessment was unnecessary.
An administrative appeal was lodged against that decision. The applicants submitted inter alia that an environmental impact assessment report should have been annexed to the environmental permit application.

On 30 December 2004, the Flemish Minister for Public Works, Energy, the Environment and Nature confirmed the decision of the Permanent Delegation of the Provincial Council of Vlaams-Brabant. He considered that an environmental impact assessment was unnecessary under both Flemish legislation and Directive 85/337.

The Brussels Hoofdstedelijk Gewest and several other applicants brought an action before the Raad van State against that confirmatory decision. They submit that the decision is vitiated by an irregularity because the grant of the environmental permit was conditional upon an environmental impact assessment being carried out and that requirement was not met.

It was in those circumstances that the Raad van State decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term ‘construction’, referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?

(2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?

(3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?’

Secondly, It should be emphasised that paragraph 20 is confirming the previously mentioned C-2/07 Abraham case.
General scope of application: what is a project?

Interpretation of the ECJ

- C-275/09 regarding definition of project and multiple stage authorisation (2/2):

Para 27-30: however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted."

See previous slide.

Underline how the EU interprets the notion of ‘project’ while it remains the role of the national judge to determine if under national legislation and facts of the case the permit is a multi-stage development consent.

Make the link, if applicable, to the presentation “Screening Stage under the EIA Directive” and in particular regarding slides 4&5 regarding C-2/2007
Underline the fact that such exemption is limiting the scope of the directive: therefore it has to be interpreted restrictively and satisfy certain conditions. Those conditions are to be checked by the national judge.
“the details of the project have to be adopted by a legislative act” excludes projects adopted in the absence of the members of the legislative body for example and a legislative act which does no more than simply ‘ratify’ a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process which enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337.

It is up to the national judge to determine both!
Note that article 10a is now art 11 in the codified version.

The judicial control should be viewed here as a limitation to the exemption despite the general principles of EU law of procedural autonomy and effectiveness.
Key definitions according to the Directive (1)

Article 1

- **Developer**: the applicant for authorisation for a private project or the public authority which initiates a project

- **Competent authority**: is designated by the MS as responsible for performing the duties arising from the EIA directive

"Development consent": the decision of the competent authority which entitles the developer to proceed with the project (Art 1(2))
Key definitions according to the Directive

Article 1

- **Environmental authorities**: those which have specific environmental responsibilities – they are consulted by the competent authorities

- **The public**: one or more natural or legal persons and their associations, organisations or groups

- **The public concerned**: the public affected or likely to be affected by or having an interest in the environmental decision-making procedures (ex: NGOs for environmental protection)
The case-law here should be presented as from the point of view of the national judge: he has to apply the binding effect of the directive and ensure the right of a national to rely on the directive. The national judge’s role is to be the “first EU judge” and to always conform with the spirit and objectives of the Directive

Development consent: mention the possibility of a decision comprising two or more stages
Remember to point out here that the Court considers not only the binding effect of the Directive but also the obligation of sincere cooperation of art 4(3) of TEU (or art 10 EC at the time)

Transition to the next slide: up until now we have seen key definitions and concepts let’s move on to a more dynamic approach: who does what and when?
Mention that prior to screening the competent authority is first informed of the project (application by developer)
Screening only applies to Annex II projects (otherwise shorter procedure)
Scoping is upon request of the developer
Summarise who does what:
Screening = competent authority
Scoping = upon request by developer, can be done by CA or developer
Report = developer
Info and consultation: public
Decision: CA
Scoping (Art. 5(2))

- Scoping is the answer (opinion) by the CA to the developer’s question: “What should be covered by the EIA?”
- Interaction between CA and developer
- Giving its opinion does not preclude the CA to subsequently require further information from the developer
The content of the EIA Report

- Art. 5(3) sets the **minimum** information to be included in the EIA Report:
  - Project description (site, design, size)
  - Likely significant adverse effects on environment and measures envisaged to avoid/reduce them
  - Main alternatives studied by the developer and justification of choice
  - Non-technical summary
Information and consultation

- Consultation with environmental authorities and public concerned
- Taking into account other MS affected by the project: transboundary consultation
- After final decision, public is to be informed of:
  - Content of and reasons for the decision
  - Mitigation measures
  - Public participation process
## EIA/SEA: Overview of main differences

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<th>EIA</th>
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What is an SEA?

- Directive 2001/42/EC of 27 June 2001 covers the assessment of a wide range of public plans and programmes which are likely to have significant effects on environment.

- SEA Directive follows the general approach of the SEA Protocol to the UN ECE Convention on EIA.
Remind that these objectives are also referred to in the Treaty in general terms of “high level of protection of the environment” – art 191 TFEU

SEA is a response to the challenge of integrating environmental concerns into strategic decision-making. The intended output is more sustainable plans, programmes.
General scope of application: mandatory SEA

- Are considered as plans and programmes those which:
  - Are subject to preparation and/or adoption by an authority (national, local, regional), AND
  - Are required by legislative, regulatory or administrative provisions.

- Are considered as plans and programmes **always requiring** an SEA those which (Art.3(2)):
  - Are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste/water management, telecommunications, tourism, town & country planning or land use AND which set the framework for future development consent of projects listed in the EIA directive, OR
  - Have been determined to require an assessment under the Habitats Directive.
After summarising the case, point out that the main preliminary question raised is whether the condition set out in Article 2(a) of Directive 2001/42 that the plans and programmes envisaged in that provision are those ‘which are required by legislative, regulatory or administrative provisions’ appearing in Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, must be interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings.

The view of the CJEU is NOT to interpret restrictively the requirements of Article 2(a)

And consequently the Court rules:

Article 2(a) of Directive 2001/42 must be interpreted as meaning that a procedure for the total or partial repeal of a land use plan, such as the procedure laid down in Articles 58 to 63 of the Brussels Town and Country Planning Code, as amended by the Order of 14 May 2009, falls in principle within the scope of that directive, so that it is subject to the rules relating to the assessment of effects on the environment that are laid down by the directive.
General scope of application: discretionary SEA and exemptions

- For plans and programmes not included under the Art.3(2) list, MS have to carry out a screening procedure based on criteria of Annex II of the SEA Directive

- Art. 3(9) exempts from SEA plans and programmes:
  - whose sole purpose is related to national defence or civil emergency;
  - which are financial or budget plans/programmes
Focus on differences with EIA procedure: ask the participants to identify them
### EIA/SEA: Overview of main differences

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These last slides concern the role of the national judge in cases of action of annulment of plans/programmes on grounds of lack of environmental assessment.

Summarise the facts of the case and the arguments of the parties: Inter-Environnement Wallonie & Terre wallone seek annulment of a governmental order regarding sustainable management of nitrogen in agriculture.

Consequently, point to the obligations deriving from the ‘Nitrates’ Directive, in particular:

Set-up of mandatory action programmes for designated vulnerable zones (or the entire territory) – Article 5
These last slides concern the role of the national judge in cases of action of annulment of plans/programmes on grounds of lack of environmental assessment.

Summarise the facts of the case and the arguments of the parties: Inter-Environnement Wallonie & Terre wallone seek annulment of a governmental order regarding sustainable management of nitrogen in agriculture (because no environmental assessment was conducted)

Consequently, point to the obligations deriving from the ‘Nitrates' Directive, in particular:

Set-up of mandatory action programmes for designated vulnerable zones (or the entire territory) – Article 5
C-41/11 answer of the Court (2/2), under certain conditions:

- that national measure is a measure which **correctly transposes the Nitrates Directive**;
- the adoption and entry into force of the new national measure containing the action programme within the meaning of Article 5 of that directive **do not enable the adverse effects on the environment** resulting from the annulment of the contested measure to be avoided;
- annulment of the contested measure would result in a legal vacuum in relation to the transposition of Directive 91/676 which would be more harmful to the environment, in the sense that the annulment would result in a lower level of protection of waters against pollution caused by nitrates from agricultural sources and would thereby run **specifically counter to the fundamental objective of that directive**; and
- the effects of such a measure are exceptionally maintained **only for the period of time which is strictly necessary** to adopt the measures enabling the irregularity which has been established to be remedied.

Self-explanatory