

Procedure of assessment (EIA)

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EU ENVIRONMENTAL IMPACT ASSESSMENT REQUIREMENTS
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CONTENT

'environmental impact assessment' means a process consisting of:

- (i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);
- (ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;
- (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;
- (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 referred to in point (iii) and, where appropriate, its own supplementary examination; and
- (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

2014 amendment to the EIA Directive:

- Increased emphasis placed on biodiversity, climate change, landscape and disaster risk
- Implementation of mitigation and offsets imposed with monitoring.
- Greater level of reasoning required in decisions with consequent increase in challenge risk.



At the first stage what is assessed is whether the project must be assessed. This is done on the basis of its size, location and potential impact on the environment.

SCOPING

= not used by the Directive

Article 3

1. The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in points (a) to (d).

2. The effects referred to in paragraph 1 on the factors set out therein shall include the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned.



- This article lists the parts of the environment that should be included in the EIA.
- This does not mean all of them will be included, the scoping will determine which will be included.
- This is also important for public participation and access to justice as well as relevant violations.

SCOPING

= not used by the Directive

Art. 5(1) Minimum content of the EIA report

Art. 5(2)

Where requested by the developer, the competent authority, taking into account the information provided by the developer in particular on the specific characteristics of the project, including its location and technical capacity, and its likely impact on the environment, shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report in accordance with paragraph 1 of this Article. The competent authority shall consult the authorities referred to in Article 6(1) before it gives its opinion.

Member States may also require the competent authorities to give an opinion as referred to in the first subparagraph, irrespective of whether the developer so requests.



- There is a helping hand, the competent authority, which should consult the project prior to the assessment.

SCOPING

The assessment must identify, describe and assess the likely "direct and indirect significant effects" of a project on the environment, such as the nature and magnitude of greenhouse gas emissions.

2001 Commission Guidance on EIA – EIS Review, Guidance on EIA – Scoping:
In favour of assessment of wider (global) climate impacts, where appropriate

Dissappointing results, not much practical experience

2015: German Federal Court BVerwG 4 B 59.14: Before the 2014 EIA Directive amendment, only impacts on micro-climate should be assessed

2017: [Commission Environmental Impact Assessment of Projects Guidance on Screening, Environmental Impact Assessment of Projects Guidance on Scoping, Environmental Impact Assessment of Projects Guidance on the preparation of the Environmental Impact Assessment Report](#)



- This is quite controversial in some MS.
- It is nothing new, these requirements were already there. Climate has just become more prominently featured in the EIA requirements.

SCOPING

[2017 Environmental Impact Assessment of Projects Guidance on Scoping](#)

Description should cover larger scope of climate

Mitigation: this considers the impact the Project will have on climate change, through greenhouse gas emissions primarily

Adaptation: this considers the vulnerability of the Project to future changes in the climate, and its capacity to adapt to the impacts of climate change, which may be uncertain

As an example, the guide gives two groups of projects: transport infrastructure, where the use will result in an increase or even a reduction in the total amount of greenhouse gases emitted, and the construction of shopping centres, where an increased burden can be anticipated due to the necessary transport of customers.

UK Supreme Court

R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and Others), 20 June 2024,

https://supremecourt.uk/uploads/uksc_2022_0064_judgment_c3d44bb244.pdf

The EIA should consider the downstream, indirect greenhouse gas emissions effects of the development in some cases

The development, which would involve the extraction of oil from six wells over 20 years, was challenged by a local resident, acting on behalf of Weald Action Group. The resident argued that the council's decision was unlawful as it did not consider the downstream greenhouse gas emissions that may follow the oil extraction.

It was determined that it was 'inevitable' that the oil extracted would lead to the combustion of the oil and release of greenhouse gases into the atmosphere. Hence, the applicant should provide, in their EIA, an assessment of the greenhouse gas emissions of the development both within the redline boundary footprint of the development, and the end product once the extracted oil is refined and then burned.



The Climate Movement v. Ministry of Transportation (pending)

In October 22, 2021, Klimabevægelsen (the Climate Movement, a Danish NGO) filed a suit against the Danish Ministry of Transportation, challenging the project to construct an artificial peninsula in Copenhagen Harbor.

The claim was filed after the Danish Parliament passed the bill on the construction of the artificial peninsula, also known as 'Lynetteholmen', in June of 2021.

In addition to housing approximately 35.000 people, and adding many jobs, the Ministry argues that the peninsula constitutes an adaptation measure and will contribute to safeguard the city of Copenhagen against climate change-related sea-level rise. The claimants highlight the fact that the project is not in accordance with Danish and European climate neutrality targets, as it does not account for the peninsula's impact on greenhouse gas emissions and the environment in general. The claimants allege that the Ministry of Transportation has (i) not complied with the EIA Directive by failing to conduct an EIA for the collected project and instead splitting it into sub-projects (so-called salami slicing), and (ii) not complied with the SEA Directive by failing to conduct an SEA.



- This case has not been decided.
- There is no guidance on how to measure or balance these contravening considerations.

ASSESSMENT OF ALTERNATIVES

alternatives are not always assessed (it is not mandatory)

Article 5(1)(d) The information to be provided by the developer shall include at least 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;

Preamble (13)

It is appropriate to lay down a procedure in order to enable the developer to obtain an opinion from the competent authorities on the content and extent of the information to be elaborated and supplied for the assessment. Member States, in the framework of this procedure, may require the developer to provide, inter alia, alternatives for the projects for which it intends to submit an application.

Alternatives should reflect the specific characteristics of the project, whereby the project is essentially characterised by its nature, size and location (see e.g. Article 2(1) of the EIA Directive).



ASSESSMENT OF ALTERNATIVES

AG in C-461/17 (An Bord Pleanála)

– *Classification within the scheme and objectives of the EIA Directive*

110. At first sight, it seems unsatisfactory that the examination of alternatives in the environmental impact assessment should be crucially dependent on the developer. However, that rule is — to some extent at least — sufficient for the purposes of the primarily procedural nature of the EIA Directive.

111. Thus, whether and to what extent the *decision* on a project must make reference to the reasons for the choice made in such a way as to take into account the environmental effects is not clarified in the EIA Directive. That directive does not lay down any substantive requirements in respect of granting development consent to a project. (42)

112. Even the fundamental or essential obligation laid down in Article 3 of the EIA Directive not only to identify and describe the direct and indirect effects of a project on certain factors but also to assess them in an appropriate manner in the light of each individual case, (43) as relied on by Mr Holohan and the other applicants in the main proceedings, does not in itself impose any substantive requirements in respect of the project concerned.

113. The developer may accordingly have an obligation under other provisions not only to take account of alternatives, but then also to document them.



ASSESSMENT OF ALTERNATIVES

AG in C-461/17 (An Bord Pleanála)

115. Moreover, the protection of species might also make an assessment of alternatives necessary in the present case. It follows from the order for reference that — presumably because of the presence of bats — there is some debate as to the need for exceptions to the system of strict protection laid down in Article 12 of the Habitats Directive. (44) Such exceptions are permissible under Article 16 only where there is no satisfactory alternative.

116. It may also occur that the authority competent to grant consent requires the developer to provide it with alternatives, as provided for in recital 13 of the EIA Directive. This is likely to be necessary in particular where the authority has to make a discretionary decision on the approval of the project.

117. Finally, the United Kingdom rightly submits that the assessment of alternatives in the context of the strategic environmental assessment of plans and programmes goes at least some way towards offsetting the lack of a compulsory examination of alternatives as part of the environmental impact assessment.



ASSESSMENT OF ALTERNATIVES

EIA guidance - EIA report (2017)

- reasonable alternatives must be relevant to the proposed project and its specific characteristics and resources should only be spent on the assessment of these alternatives.
- the choice of alternatives is limited in terms of feasibility. On the one hand, an alternative should not be eliminated simply because it would cause inconvenience or expense to the Developer. At the same time, if an alternative is very costly or technically or legally difficult, it would not be reasonable to consider it as a feasible alternative.

ASSESSMENT OF ALTERNATIVES

C-461/17, Holohan and Others

- 63 In particular, Article 5(3)(d) of the EIA Directive states that the developer must provide at least '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'.
- 64 It is stated explicitly in the wording of that provision that the developer is obliged to supply to the competent authorities an outline of the main alternatives studied by him and an indication of the main reasons for his choice, taking into account the environmental effects.
- 65 In that regard, first, it must be observed that the EIA Directive contains no definition of the concept of 'main alternatives', as referred to in Article 5(3)(d) of the EIA Directive. The Court must, however, hold, as did the Advocate General in points 94 and 95 of her Opinion, that the decisive factor, in order to identify those alternatives that should be regarded as 'main' alternatives, is whether or not those alternatives influence the environmental effects of the project. In that regard, the time when an alternative is rejected by the developer is of no relevance.
- 66 Further, since, according to Article 5(3)(d) of the EIA Directive, only an outline of those alternatives must be supplied, it must be held that that provision does not require the main alternatives studied to be subject to an impact assessment equivalent to that of the approved project. That said, that provision requires the developer to indicate the reasons for his choice, taking into account at least the environmental effects. One of the aims of imposing on the developer the obligation to outline the main alternatives is that reasons for his choice should be stated.

ASSESSMENT OF ALTERNATIVES

C-461/17, Holohan and Others

- 67 That obligation on the developer ensures that, thereafter, the competent authority is able to carry out a comprehensive environmental impact assessment that catalogues, describes and assesses, in an appropriate manner, the effects of the approved project on the environment, in accordance with Article 3 of the EIA Directive.
- 68 Last, it must be observed that the outline referred to in that provision must be supplied with respect to all the main alternatives that were studied by the developer, whether those were initially envisaged by him or by the competent authority or whether they were recommended by some stakeholders.
- 69 In the light of the foregoing, the answer to the fifth, sixth and seventh questions is that Article 5(3)(d) of the EIA Directive must be interpreted as meaning that the developer must supply information in relation to the environmental impact of both the chosen option and of all the main alternatives studied by the developer, together with the reasons for his choice, taking into account at least the environmental effects, even if such an alternative was rejected at an early stage.

PUBLIC CONSULTATION, OPINIONS OF PUBLIC AUTHORITIES

- Consultation with the public is a key feature of EIA process. To ensure effective public participation, the EIA report and other information must be provided as early as possible.
- Notices of projects must be made available electronically, in addition to more traditional methods
- EIA reports are to be made more understandable for the public, especially as regards assessments of the current state of the environment and alternatives to the project in question.
- minimum time for public consultation during the EIA procedure is at least 30 days

While Article 6(1) and (2) of the EIA Directive require Member States to hold a consultation procedure, in which the authorities likely to be concerned by the project and the public are invited, respectively, to give their opinion, the fact remains that such a procedure is carried out, necessarily, before consent is granted. Such opinions – and further opinions which Member States may stipulate – form part of the consent process and are aimed at assisting the competent body's decision on granting or refusing development consent. They are therefore preparatory in nature and not, generally, subject to appeal. (Commission v Spain, C-332/04, paragraph 54)



PUBLIC CONSULTATION, OPINIONS OF PUBLIC AUTHORITIES

Flausch and Others, C-280/18, paragraphs 26, 31-32, 42, and 44)

...any communication on the matter is not in itself sufficient. The competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure.

[...]

It should be noted that, under Article 6(5) of the EIA Directive, the detailed arrangements for consulting the public concerned are to be determined by the Member States, that provision mentioning only, by way of example, consultation 'by written submissions or by way of a public inquiry'.

[...]

Accordingly, the answer to the first question is that Article 6 of the EIA Directive must be interpreted as precluding a Member State from carrying out the procedures for public participation in decision-making that relate to a project at the level of the headquarters of the competent regional administrative authority, and not at the level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with, a matter which is for the national court to establish.



- The public participation communication can differ. It is expected that in some cases information will be provided.
- Relevant databases have been established. There are differences in terms of user-friendliness. This poses questions regarding public participation.

DEVELOPMENT CONSENT

Authorities have to decide within a reasonable time whether to approve the project or not. They must make available to the public, as well as to environmental, local and regional bodies, the content of a positive decision, including the main reasons for their approval and any environmental or other conditions they attach. If they refuse development consent, they should explain why.

Physical works:

Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen (C-411/17), Friends of the Irish Environment (C-254/19)

Procedure for amending a permit

A new environmental impact assessment is **not required** for the renewal of an existing permit **in the absence of any works** or interventions involving alterations to the physical aspect of the site (**C-275/09, C-121/11**)

Exception from the species protection?

C-463/20 (Namur-Est Environnement)

...decision adopted under Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and which authorises a developer to derogate from the applicable species protection measures in order to carry out a project within the meaning of Article 1(2)(a) of Directive 2011/92 forms part of the development consent procedure



- In many countries the procedure is split.
- The reasoned opinion is a stand-alone decision.
- From the Directive perspective this is not a problem but something must be integrated into the development consent.

DEVELOPMENT CONSENT

In addition, where national law provides that the consent procedure is to be carried out in **several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment** (see Case C-201/02 Wells [2004] ECR I-723, paragraph 53). Thus, where one of those stages involves a **principal decision** and the other involves an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. **It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of the latter procedure** (Wells, paragraph 52).

(Abraham and Others, C-2/07, paragraph 26; Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, C-411/17, paragraph 85)



DEVELOPMENT CONSENT - CONTENT

Article 8a introduced by Directive 2014/52/EU

1. The decision to grant development consent shall incorporate at least the following information:

(a) the reasoned conclusion referred to in Article 1(2)(g)(iv);

(b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures.

2. The decision to refuse development consent shall state the main reasons for the refusal.

3. In the event Member States make use of the procedures referred to in Article 2(2) other than the procedures for development consent, the requirements of paragraphs 1 and 2 of this Article, as appropriate, shall be deemed to be fulfilled when any decision issued in the context of those procedures contains the information referred to in those paragraphs and there are mechanisms in place which enable the fulfilment of the requirements of paragraph 6 of this Article.

4. In accordance with the requirements referred to in paragraph 1(b), Member States shall ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and shall determine the procedures regarding the monitoring of significant adverse effects on the environment.

The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

Existing monitoring arrangements resulting from Union legislation other than this Directive and from national legislation may be used if appropriate, with a view to avoiding duplication of monitoring.

5. Member States shall ensure that the competent authority takes any of the decisions referred to in paragraphs 1 to 3 within a reasonable period of time.

6. The competent authority shall be satisfied that the reasoned conclusion referred to in Article 1(2)(g)(iv), or any of the decisions referred to in paragraph 3 of this Article, is still up to date when taking a decision to grant development consent. To that effect, Member States may set time-frames for the validity of the reasoned conclusion referred to in Article 1(2)(g)(iv) or any of the decisions referred to in paragraph 3 of this Article.



MONITORING

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MONITORING

- If projects do entail significant adverse effects on the environment, developers will be obliged to take necessary measures to avoid, prevent, or reduce such effects.
- These projects will need to be monitored using procedures determined by the Member States. Existing monitoring arrangements may be used to avoid duplication and unnecessary costs

ANNEX IV

INFORMATION REFERRED TO IN ARTICLE 5(1)

(INFORMATION FOR THE ENVIRONMENTAL IMPACT ASSESSMENT REPORT)

The description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project.

6. A description of the forecasting methods or evidence, used to identify and assess the significant effects on the environment, including details of difficulties (for example technical deficiencies or lack of knowledge) encountered compiling the required information and the main uncertainties involved.
7. A description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment and, where appropriate, of any proposed monitoring arrangements (for example the preparation of a post-project analysis). That description should explain the extent, to which significant adverse effects on the environment are avoided, prevented, reduced or offset, and should cover both the construction and operational phases.



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