

Definition of project in the context of the EIA Directive

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Scope of the presentation

- Definition of project in the current Directive
- Main interpretation problems:
 - what are „other interventions in the natural surroundings and landscape”
 - change or extension of projects
 - continuation of the previous activity subject to a new authorisation (renewal of authorisation)
 - Annex II.13.(a) „Any change or extension of projects (...) which may have **significant adverse** effects on the environment”
- The ECJ approach
- Proposed amendment

Definition of the project (1)

- Definition of „project” – crucial for determining the Directive’s scope
- Only the next step is to check whether it is an Annex I or Annex II project or not

Definition of the project (2)

- Art. 1.2.(a) of the EIA Directive:
- „project” means:
 - the execution of construction works or of other installations or schemes,
 - **other interventions in the natural surroundings and landscape** including those involving the extraction of mineral resources

Interpretation of the concept of project by ECJ – general aspects

- Broad interpretation of a scope and purpose of the EIA Directive (i.a. C-72/95, Kraaijeveld, paras 31,39; C-2/07, Abraham and Others, para 32; C-275/09, Brussels Hoofdstedelijk Gewest, para 29)
- Includes broad interpretation of the definition of „project”
- However – „a purposive interpretation of the Directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union” (C-275/09, Brussels Hoofdstedelijk Gewest, para 29)
- Where is the borderline?

Change or extension of a project (1)

Broad interpretation – at least when „construction works” are concerned:

- Refurbishment of a road, without its widening, should be treated as a construction project if equivalent, by its size and the manner in which it is carried out, to construction (C-142/07, CODA, par. 36)

Change or extension of a project (2)

- Annex I, item re construction of airports encompasses also „works to modify the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself” (C-2/07, Abraham, para 40)
- Canalization and flood-relief works in Annex II is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its replacement by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works (C-72/95, Kraaijeveld, par. 42)

Renewal of authorisation (1)

- Continuation of the activity in case the national law requires renewal of authorisation
- Verdict in the Waddenzee case vs. verdicts in case re the Brussels airport and the Pro-Braine case

Renewal of authorisation (2)

- An activity such as mechanical cockle fishing is within the concept of project as defined in Art. 1(2) of the EIA Directive. The fact that the activity has been carried on periodically **for several years** on the site concerned and that **a licence has to be obtained for it every year**, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, **does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct project (...)** (C-127/02, Waddenzee, paras 25-28)

Renewal of authorisation (3)

- The renewal of an existing permit to operate an airport **cannot**, in the absence of any works or interventions involving alterations to the physical aspect of the site, **be classified as a ‘project’** (C-275/09, Brussels Hoofdstedelijk Gewest, para 24)
- Referring to the verdict in the Waadenzee case, the Court stated (following the AG’s opinion) that cockle fishing shall be treated differently as it was comparable with the extraction of mineral resources, an activity which is specifically referred to in Art. 1(2) of the Directive and moreover entails genuine physical changes to the sea bed – since was carried out by scraping several centimetres from the seabed (C-275/09, para 23)

Renewal of authorisation (4)

- The mere renewal of an existing permit to operate a landfill site cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a ‘project’ within the meaning of Article 1(2) of Directive (C-121/11, Pro-Braine, para 32)

What makes an activity a „project”? (1)

- Are „alterations to the physical aspect of the site” the key aspect to classifying an activity as a „project” (to classify it as an „intervention in the natural surroundings and landscape”)?

What makes an activity a „project”? (2)

What are alterations to the physical aspect of the site:

- Construction works – yes (but they are specifically mentioned in the definition)
- Extraction of mineral resources – yes (also specifically mentioned in the definition)
- Cockle fishing – similar to extraction of mineral resources – yes
- Extraction of groundwater – similar to extraction of mineral resources – yes
- **Emissions into the air or water? – is it „intervention in the environment”?**

Problems (1)

- Increasing of the number of animals on a pig farm without any construction works
 - undoubtedly „extension” of a project but no „alterations to the physical aspect of the site” (only increased emissions)
- Installations for the disposal of waste – increasing of the quantity of waste disposed (daily, yearly) or change of their types - without any construction works
 - „change” of a project but again no „alterations to the physical aspect of the site”

Problems (2)

- The renewal of authorisation in the changing environmental conditions

Wording of Annexes I and II (1)

- Is the wording used in Annex I and II decisive?
 - „**construction**” (e.g. airports in Annex I or roads in Annex I or II) vs. „**installation**” (e.g. for the disposal of waste in Annex II)
 - For „installations” each permit renewal would need an EIA/screening while for „construction” not?

Wording of Annexes I and II (2)

- Was the formulation of the categories' names indeed meant to establish any logical difference?
- E.g. Annex I.7.(a): „Construction of lines for long-distance railway traffic” vs. Annex I.8.(b): „Trading ports...”
- The wording used seems to be random..

Annex II.13.(a)

- 13.(a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, **which may have significant adverse effects** on the environment (change or extension not included in Annex I);
- The wording assumes that it is already established that the effects may be **significant and adverse**
- For the Annex II projects such possibility is to be established only during the screening phase (and even then it's not necessary to find the possible effects „adverse”)
- The inclusion of a category of projects into Annex II means that screening is obligatory but should not determine its outcome!

Proposed amendment

- The amendment proposed by the draft of the proposal consists in including directly „demolition works” into the definition;
- The first intent shall read: „the execution of construction **or demolition works**, or of other installations or schemes”
- The amendment incorporates the idea expressed by the ECJ in the judgement C-50/09 (Commission v. Ireland, para 97-101)

Demolition works in the ECJ judgement (1)

- ... the definition of the word „project” in Article 1(2) of the EIA directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. **Such works can, indeed, be described as ‘other interventions in the natural surroundings and landscape’.**
- If demolition works were excluded from the scope of that directive, the references to ‘the cultural heritage’ in Art. 3 thereof, to ‘landscapes of historical, cultural or archaeological significance’ in point 2(h) of Annex III to that directive and to ‘the architectural and archaeological heritage’ in point 3 of Annex IV would have no purpose.

Demolition works in the ECJ judgement (2)

- It is true that, under Art. 4 of the EIA Directive, for a project to require an EIA it must come within one of the categories in Annexes I and II to that directive. However they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I. However, it must be borne in mind that **those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for.** As an illustration it may be noted that ‘urban development projects’ often involve the demolition of existing structures.

Amendment proposal vs. identified problems

- The proposal does not give any additional hints to resolve the doubts
- Thus, the above questions remain open and, at the same time, the interpretation of „project” as given by ECJ in the cited verdicts remains relevant
- Perhaps the more precise formulation of the Annexes would help to address the problems

Thank you for your attention

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