

Jerzy Jendrośka

Environmental assessment in Europe genesis, historical development and trends

ELNI Conference

EU Environmental Impact Assessment Directive - challenges and
perspectives in the light of the past experiences and the recent proposal for
amendment

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Roots

- Traditional instruments of environmental policy and need for preventive approach
- US NEPA 1969
 - extensive court review and role of jurisprudence
 - codification of NEPA Process - NEPA Regulations 1976
 - „little NEPAs” – EIR in California and post-project monitoring
- NEPA as a model worldwide
- UNEP Guidelines Goals and Principles of EIA 1987
- Rio Declaration – Principle XVII

NEPA Process - features

- procedural tool to achieve substantive goals of NEPA
- change of decision-making paradigm - new procedure
- broad scope of application (projects, plans, programs, policies, legislation, new products) and concept of tiering
- procedure around development of EIA document (EIS)
 - screening based on criteria and categorical exclusions
 - individual scoping
 - discussion of alternatives as core element of assessment
- responsibility of public agencies
- broad participation and court review
- quality control by US EPA (art.309 of Clean Air Act)

Environmental assessment in international law - general principles

- General principles of international law
 - Trail Smelter case - arbitration tribunal
 - Nagymaros-Gabcikovo case – ICJ
 - Pulp Mill case - ICJ
- Rio Declaration on Environment and Development
 - Integration principle – Principle 4
 - Environmental Assessment – Principle 17
 - Responsibility for transboundary environmental damage - Principle 2
 - Transboundary procedure (Principles 18 and 19)

Genesis of EIA Directive

- Development control systems in Europe
- Early EIA laws in Europe
 - France and Ireland 1976
 - element of existing planning control by local authorities
 - developers responsible for EIS
- II Environmental Action Program 1977 - call for EIA in Europe

EIA Directive 1985

- Assumptions and legislative dilemmas
 - Only a procedural instrument to harmonise approaches in Member States
 - Broad application vs scientific approach
 - New procedure or existing procedures
- Process
 - More than 20 drafts
 - EC proposal 1980
 - Heavy negotiations

Outcome - EIA Directive 1985

- Scope of application
 - Projects only - no plans, programs etc.
- Screening
 - based on list and not on criteria
 - two lists
- „Information to be provided by developer”
- Cautious approach to alternatives („if appropriate”)
- Process
 - no scoping
 - limited public participation, no access to justice
 - no quality control and post-project monitoring

Historical development of environmental assessment

- US NEPA 1969
- EIA Directive 1985
- Habitat Directive 1992
- Espoo Convention 1992
- EIA Directive amendment 1997
- Aarhus Convention 1998
- SEA Directive 2001
- SEA Protocol 2003
- Public Participation Directive 2003
- EIA Directive codified 2011

Legal framework in Europe

- EIA Directive 1985 – impact of projects
- Espoo Convention 1991 – transboundary impact of projects
- Habitat Directive 1992 – impact of plans, programs and projects on protected habitats (Natura 2000 sites)
- SEA Directive 2001 – impact of plans and programs
- Kiev SEA Protocol 2003 - transboundary impact of of plans and programs

EIA Directive development

- Original EIA Directive 85/337
- Amended by
 - Directive 97/11 of 1997
 - Public participation Directive 2003/35
 - Directive 2009/31/EC
- Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)

EIA Directive amendment 1997

- Introduced
 - new categories of activities
 - screening criteria
 - elements of scoping
 - obligation to establish development control for Annex I and II projects
- Improved
 - transboundary procedure (but still doubts as to full compliance with Espoo)
 - alternatives (no „as appropriate” but still not fully mandatory)
 - public participation improved

EIA Directive amendment 2003

- Implementation of Aarhus Convention (but still doubts as to full compliance with Aarhus)
- Improved procedural elements for public participation
- Dramatic change in approach towards „reasonable time-frames”
- Access to justice (art. 9.2 of the Aarhus Convention) introduced

Direct applicability of EIA Directive

- Legal basis
 - Regulation 1083/2006 (Art.47.1) - compliance with EIA and SEA a precondition for EU funding
 - Regulation 1828/2006 setting out rules for the implementation... (of Regulation 1083/2006 and Regulation 1080/2006) - Annex XXI point F (template for requests concerning major projects)
- Applied directly by
 - European Commission
 - Member States:
 - authorities responsible for EU funding
 - courts

Issues of concern

- Ambiguities
- Language versions
- Approach to alternatives
- Scoping
- Content of EIA documentation
- Public information
- Statement of reasons

Ambiguities

- Relation of Article 5.3 to 5.1 and Annex IV
 - „Information to be provided by the developer”
 - meant to mean „ EIA report”
 - **misinterpreted** to cover initial document used for screening or scoping
- Reference to Directive 2003/4
 - in Article 5.4
 - in Article 6.3 c)
 - what about a) and b)?
 - relation to Article 6.6 of Aarhus Convention

Language versions- example of Poland

- Directives 85/337 and 97/11 translated
 - before accession, badly and not subject to language revision
- Examples of mistakes
 - art 1.2 („schemes” translated as „systems” - which results sometimes in understanding that buying a software requires EIA!)
 - art.9.1 („concerns” translated as „worries”)

Approach to alternatives

- Alternatives actually studied by the developer
 - approach historically agreed by Member States
 - pros and cons
 - pros: realistic alternatives examined during EIA
 - cons: possibility of no alternatives examined at all
- Alternatives required to be studied
 - approach commonly employed worldwide and advocated by EC
 - pros and cons
 - pros: examination of alternatives mandatory
 - cons: sometimes artificially elaborated alternatives presented in EIA

Scoping

- Usual content of scoping decision
 - alternatives
 - methods of assessment
 - mitigation measures
- Procedural consequences
 - public participation provided (Aarhus)
 - transboundary procedure (Espoo)
 - no subsequent requirement for further information?

Content of EIA report

- Unclear relation with „habitat assessment” under Habitat Directive
 - different approach to alternatives!
 - no requirement for a clear conclusion
- No clear requirement to examine impact on biodiversity
- No clear requirement to examine impact on socio-economic conditions

Public information

- No clear requirement for the public to be informed in „adequate, timely and effective manner” (Aarhus) - art.6.2
- No clear requirement (Aarhus) for information to be „promptly” made available to the public
 - in art 4.4
 - in art.9.1

Statement of reasons

- No clear requirement in the Directive
- Slightly different interpretation by ECJ
 - always needed when negative screening (C-87/02)
 - needed only if interested persons so require (Mellor – C-75/08)

Trends

- Role of jurisprudence
- Approach to screening – role of criteria
- Procedural details elaborated
- More public participation and access to justice
- Transboundary procedure
- Formal synergy with SEA but no clear synergy in practice

Conclusions

- In cohesion countries EIA Directive applied directly
- Jurisprudence not always consistent
- National courts interpretation varies
- Process of development still not finalised
- Amendment needed but EC proposal does not address all issues sufficiently

Issues to be discussed

- Relation between EIA and SEA under the concept of tiering
- Role of EIA in development control based on multiple permits
- Procedural requirements (scoping, statement of reasons etc)
- Alternatives (specificity of habitat assessment)
- Compliance with Espoo Convention
- EIA procedure for large pan-European projects
- Compliance with Aarhus Convention
 - details of public participation
 - access to justice for screening decisions