Transposition of the requirements of the Espoo Convention and the EU EIA Directive into the national legislation: European experience and good practice examples

Start-up workshop for the development of a new law on EIA and SEA in Georgia
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Content

• Origins and concept of environmental assessment
• Development of international/EU legal framework
• EIA and co-related legal instruments
• EIA Directive and Espoo Convention
• National legal frameworks for EIA
• Scope of application
• Key procedural steps
Origins and development of environmental assessment

• US National Environmental Policy Act of 1969
  – covers: plans, programs, policies, legislative proposals, concrete projects
  – key role of discussing alternatives
  – concept of tiering

• Currently in all developed environmental national frameworks

• International and supra-national (EU) framework in Europe
  – Harmonization of national procedures
  – Transboundary procedure
Concept of environmental assessment

• Preventive tool related to planned activities which may have significant impact on the environment

• Scope
  – Environmental impact assessment (EIA):
    • individual projects
  – Strategic environmental assessment (SEA):
    • plans and programs
    • policies
    • Legislation
  – Habitat/biodiversity assessment
    • EIA and SEA limited to impact on habitat
Role of environmental assessment

• collection of information
• consideration of alternatives
• integration of environmental concerns with economic, social etc concerns
• avoidance of irreversible effects
• procedural tool
  – advisory vs decisive role
  – specific situation in case of significant adverse effect on integrity of Natura 2000 site
Alternatives

• For the activity
  – For example: highways or railroads

• Within the activity
  – Locational (northern or southern bypass)
  – Technological (concrete or asphalt)
  – Mitigation measures (speed limit or noise ecran)

• Wariant „0”

• Wariant „the most ecological”
Concept of „tiering”

- Transport policy (SEA)
  - highways or railroads
- National highway program (SEA)
  - locational alternatives
- Regional/local land use plan (SEA)
  - locational alternatives
- Stretches (EIA)
  - technological and mitigation alternatives
EIA and SEA

- Procedural similarities
- Scope of assessment
  - Physical impact in EIA vs achievement of environmental objectives in SEA
  - Larger scale and less precise data
- Role in the procedure: developers in EIA vs planning agencies in SEA (see General Guidance..)
- Legal framework
  - One law with separate schemes for EIA and SEA – **YES**
  - One scheme for EIA and SEA – **NO**
Procedural steps

- Screening and informing about its results

- Stages
  - scoping
  - submitting assessment documentation
  - taking into account information gathered
  - informing about the decision together with reasons

- Obligatory elements (at various stages)
  - consultation with environmental authorities
  - public participation

- Transboundary consultation (if applicable)
Environmental assessment documentation

- Different names (report, statement, study)
- Obligatory elements
  - Description of activity
  - Description of environment to be affected
  - Alternatives
  - Description of impact
  - Mitigation measures
  - Gaps in knowledge
  - Non-technical summary
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)
Development of 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 plans and programs
Environmental assessment and EU funding

• Introduced gradually into EU funding scheme since 1994
• For 2007-2013 programming period – under Regulations 1083/2006 and 1828/2006 evidence needed for:
  – EIA/Sea /habitat assessments and public participation
• Rigorous application by European Commission
• Control
  – Before approving funding
  – Post project control
• Sanctions
Environmental assessment and EU funding – current legal basis


  – Article 101 Information necessary for the approval of a major project
  – Before a major project is approved, the managing authority shall ensure that the following information is available:
    • (f) an analysis of the environmental impact, taking into account climate change adaptation and mitigation needs, and disaster resilience;

  – Appendix II – point 6
EIA and co-related legal instruments

• EIA and SEA
  – UNECE SEA Protocol
  – EU SEA Directive

• EIA and Habitat Assessment
  – EU Habitat Directive

• EIA and Industrial Accidents
  – UNECE Convention on the Transboundary Effects of Industrial Accidents
  – EU Seveso III Directive
Habitat assessment – scope of application

• Any project or plan/program likely to have a significant effect on Natura 2000 site
  – either individually or in combination with other plans/programs or projects
  – not directly connected with or necessary to the management of the site
• For plans/programs – part of SEA
• For projects
  – Anex I and II projet – usually part of EIA
  – For any other project – usually separate habitat assessment
EIA/SEA and habitat assessment

• Any project or plan/program – no list!
• Assessment limited to impact on the integrity of the Natura 2000
• Substantive effect!
• Different approach to alternatives
Habitat assessment – substantive effect

• Project/plan/program which will adversely affect the integrity of the Natura 2000 site – can be approved only
  – for imperative reasons of overriding public interest
  – no alternatives exist
  – compensation measures adopted

• In case of priority natural habitat/species – opinion of EC
Habitat assessment - experience in Member States

- Broad range of activities and decisions covered – including IPPC permits, water pollution permits or even license for mechanical cockle fishing (C-127/02 – Waddenzee)
- Objective criteria decides - C-209/02 – EC vs Austria
- Assessment and protection needed also in case of sites not yet designated
  - C-117/03 (Draggagi) vs C-244/05 (Bund Naturschutz Bayern)
UNECE Espoo Convention and EU EIA Directive

• Both regulate the project level
  – 1 list of activities (projects) in Espoo
  – 2 lists of projects in EIA Directive

• Espoo Convention focused on transboundary procedure (EIA national procedure only in Art.2)

• EIA Directive focused on national EIA procedures (transboundary procedure only in Art.7)
EIA Directive

- 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)
  - amended by Directive 2014/52/EU
- Main EU legal instrument to implement
  - Espoo Convention
  - art.6 and 9.2 of the Aarhus Convention
EIA Directive – definitions (art. 1)

• Definition of environmental impact assessment (added by 2014 amendment)

• Key definitions determining the scope
  – project
  – development consent
  – developer
  – competent authority

• Definitions added in 2003 following the Aarhus Convention
  – Public
  – Public concerned
Environmental impact assessment – art. 1.2 (g)

• “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.
Project - art. 1.2.(a)

• Definition (art. 1.2.(a):
  - 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

• Broad definition of „construction”
  – modernisation of existing road (C-142/07 CODA)
  – demolition works (C-50/09, Commission v. Ireland,)

• Other interventions - for example: afforestation or defforestation, storage of scrap iron, intensive fish farming

• Project = „proposed activity” under Aarhus and Espoo Conventions
Developer and competent authority - art. 1.2 (b) and ((f))

• (b) „developer”
  – the applicant for authorisation for a private project or the public authority which initiates a project

• (f) "competent authority„ - authority or authorities
  • which the Member States designate as responsible for performing the duties arising from this Directive (EIA Directive)
  • entrusted by a Party with decision-making powers regarding a proposed activity (Espoo Convention)
  • Usually: local or regional authorities with general competence for urban development/construction, sometimes: specialised authorities for energy, resource use, occasionally specialised environmental authorities
Development consent - art. 1.2 (c)

- Definition - development consent’ means
  - the decision of the competent authority or authorities which entitles the developer to proceed with the project

- Development consent =
  - „final decision” (Espoo)
  - „decision on whether to permit proposed activities”

- Must be:
  - Binding (Case 96/81 Commission v. Netherlands)
  - No tacit agreement -C-360/87 and C-230/00 (EC vs Belgium)
Public and public concerned - art. 1.2 (d) and (e)

• (d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;
• (e) "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;
• Both definitions from Aarhus Convention
Basic requirements art.2

• Projects likely to have significant effects on the environment are subject to
  – development consent
  – EIA procedure **before** development consent is granted
    • EIA can not be after consent! - C-215/06 (EC vs Ireland)

• EIA procedure is followed strictly
  – need for EIA to be interpreted broadly and strictly - C-72/95 (Kraaijeveld)

• EC Guidance materials
EIA and development control procedures (art. 2.2)

• EIA may be integrated into
  – the existing procedures for development consent to projects in the Member States, or
  – other procedures, or
  – procedures to be established to comply with the aims of this Directive
EIA and development control procedures (art. 2.2)- typical examples

• Integration into existing development consent procedures
  – Zoning/siting decisions and building/construction permits
  – Examples: Britain, Germany, Poland (before 2009)

• Special procedures
  – Environmental (EIA) decisions
  – Examples: Bulgaria, Czech Republic, Hungary, Romania, Slovakia, Lithuania, Poland (since 2009)
Development control procedures for projects - typical structure in EU

- EIA decision
- Siting decision/planning permission
- Construction/building permit
- Pollution control (IPPC) permit and/or resource use decisions (e.g. water permit, mining license, nuclear permit)

Cases
- multiple decision-making (C-416/10, Križan)
- main and implementing decision - C-201/02 (Delena Wells)
- need for repeating EIA - Crystal Palace/White City (C-508/03), Barker (C-290/03)
Development control – coordinated procedures and exemptions

• Coordinated and joint procedures
  – for EIA and biodiversity/habitat assessment
  – For EIA and assessment under other directives

• Exemptions
  – Art. 3.4 – specific project
  – Art. 3.5 – specific act of Parliament
  – but the objectives of the Directive must be met
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.
Projects subject to assessment – art.4

• Environmental assessment is required for projects likely to have significant effects on the environment
• Projects subject to EIA Directive are listed in Annex I and Annex II
  – Projects listed in Annex I – by definition are likely to have significant effects on the environment and therefore always require assessment
  – Projects listed in Annex II – Member States must determine (using screening methods and criteria listed in Annex III) if a project belonging to a category of projects listed in Annex II is likely to have significant effects on the environment and therefore assessment is needed
EIA Directive - procedural steps

• Screening for projects in Annex II – art.4.2 and Annex III
• Scoping – art.5.2
• Preparation of EIA documentation – art.5.3 and Annex IV
• Consultation with environmental authorities – art.6.1
• Public participation – art.6.2- 6.6
• Transboundary procedure – art.7
• Decision and informing thereof – art. 8 -9a
• Post-project monitoring – art.8a.4
• Access to justice – art.11
Screening of Annex II projects

• Screening methods
  – Case-by case
  – Tresholds/criteria
  – mixed

• Screening criteria (Annex III)
  – Characteristics of projects
  – Location of projects
  – Characteristics of impact

• Screening determination (‘screening decision’)
  – Based on information provided by developer – Annex IIa
  – Determination – up to 90 days
Scoping

• In EIA Directive –
  – necessary only if the developer so requests (art.5.2)
  – environmental authorities must be consulted
• In many Member States – mandatory element of EIA procedure
• For Annex II projects often combined with screening
• Procedural consequences
  – public participation provided (Aarhus)
  – transboundary procedure (Espoo)
  – TOR for EIA consultants
EIA documentation – art. 5 and Annex IV

• EIA report (misleading name before 20014–“information to be provided by the developer”)

• Quality control – art. 5.3

• Details in art.5.3 and Annex IV
  – a description of the project (site, design and size of the project);
  – a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
  – the data required to identify and assess the main effects which the project is likely to have on the environment;
  – 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
  – a non-technical summary
Consultations – art.6 and 7

• With environmental authorities
• With the public (concerned)- public participation
• Transboundary procedure
  – Notification
  – Provision of information and possibility to comment (including for the foreign public)
  – Consultations
Consultation with environmental authorities – art.6.1

• Authorities likely to be concerned by reason of their specific environmental responsibilities or local and regional competences

• „are given an opportunity to express their opinion„ - thus not necessarily do have to express such an opinion

• Opinion on both
  – The project
  – EIA documentation

• Detailed arrangements to be made by Member States, including reasonable time-frames
Public participation – art.6.2-6.6, art.8 and art.9.1

• Meant to implement art.6 of the Aarhus Convention
• Relation with transboundary procedure in the context of non-discrimination clause in the Aarhus Convention (art.3.9)
• Elements of the procedure
  – Informing (notifying) the public– art. 6.2 and 6.5
  – Making available relevant information – art. 6.3
  – Possibility to submit comments and opinions– art. 6.4 and 6.5
  – Taking into consideration the results of public participation – art. 8
  – Informing the public on the decision and its availability (together with the reasons and considerations on which the decision is based) – art. 9.1
Informing the public

• Form
  – public notices or by other appropriate means such as electronic media where available,
  – bill posting within a certain radius
  – publication in local newspapers

• Detailed content of the notification

• Relation to art. 6 Aarhus Convention
  – public vs public concerned
  – timely, effective and adequate manner of informing
General principles – early participation and reasonable timeframes

• Early participation –
  – when all options are open
  – before decision is taken

• Reasonable timeframes - change of approach
  – (original Directive) „appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period”
  – (current version after Aarhus) „Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.”

• Different phases
Transboundary procedure – art.7

• Espoo Convention approach and methodology applies

• Stage I initiation of the procedure
  • Notification
  • Confirmation from affected country

Stage II – full procedure
  • Provision of information and documentation
  • Possibility for commenting (authorities and public)
  • Consultation
  • Final decision and Information about the decision
  • Under Espoo also post-project analysis (if applicable)

• Practical arrangements needed to be establish
  – Ad hoc
  – In bilateral agreements
Decision – art.8 – 9a

• Reasoned conclusion (validity- art.8a.6.)
• Due account taken of the
  – EIA report
  – Consultation with environmental authorities
  – Transboundary consultation
  – Public participation
• Need for statement of reasons
• Need to inform and make decision available to
  – the public and authorities concerned
  – affected Parties
Access to justice

• Added in 2003 to implement art.9.2 of the Aarhus Convention
• Possibility to challenge substantive or procedural legality of decisions, acts or omissions
• For those
  – Having a sufficient interest, or
  – Maintaining impairment of rights
• Including NGOs
• Problematic issues
  – Screening
  – Standing for NGOs
  – Standing and scope of review in countries with system based on protection of subjective rights
EIA Directive - practice

• Full EIAs yearly – appr 20 000-25 000
• Screening of Annex II projects
  – Appr 27 000-33 000 yearly (positive 1400-3500)
• Average duration – 11,6 months
• Average costs – 1% of project costs (41 000 Euro per EIA average)