

EU Environmental Impact Assessment Law

Introduction to the EU Environmental Law – Focus on the role of
national judges and prosecutors(29 & 30 October)



Christoph Sobotta

Chambers of Advocate General Juliane
Kokott, CJEU

Please feel free to interrupt!

Work in Progress, licence: CC-BY-SA 3.0 Germany

On the Advocate General

- Member of the Court
- Advises the Court by **independently** preparing Opinions
- Does not participate in deliberations
- Opinion is not a Judgment
- Only the Judgment has the authority of the Court
- Opinions can illuminate the background
- Presentation is my personal view!

This slide aims to illuminate the background of the author and original presenter of this presentation

Article 252 TFEU

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so require, it shall be the duty of the Advocate-General, acting with complete impartiality and independence, to present to the Court his conclusions on the cases brought before it.

Remarks:

The Council has decided to increase the number of AGs to eleven.

The AG is not assigned to any particular chamber of the court. She does not participate in the deliberations.

Outline

- Historical Development & Context
 - EIA Directive, SEA Directive, Aarhus Convention, Espoo Convention, IE Directive, Habitats Directive
 - Distinctions, Consequences
- Scope of EIA
 - Permits
 - Projects
 - Impacts
 - Alternatives
- Public Participation
- Access to Justice / Consequences of breaches
- SEA Directive

Outline of the presentation

Environmental Assessments

How did we get here?

Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment

Amended by Directive 97/11/EC (Espoo, Habitats & Birds, IPPC)

Amended by Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (Aarhus)

Consolidated by Directive 2011/92/EU

Recently amended by by Directive 2014/52/EU

This is a timeline of the development of the EIA Directive and the instruments that influenced it.

Environmental Assessments

1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention)

- Applies to specific listed activities
- Environmental impact assessment of activity that is likely to cause a significant adverse **transboundary** impact
- Transboundary public participation
- Procedural requirement and **obligation** to take all appropriate and effective measures to **prevent, reduce and control** significant adverse transboundary environmental impact from proposed activities
- Direct effect? Certainly: Interpretation in Conformity

The Espoo Convention is the first underpinning of the EU law obligations with regard to environment

The Court has not yet decided whether it has direct effect, but such effect appears unlikely. What is

Environmental Assessments

Art 6 (3) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora

- Applies to plans and projects likely to have significant effects on **protected sites** under the Habitats or Birds Directive
- Appropriate assessment of its implications for the site in view of the **site's conservation objectives**
- Public participation (obligatory in combination with Art 6(1)(b) of the Aarhus Convention - [Lesoochránárske zoskupenie VLK](#) (C-243/15, EU:C:2016:838))
- Procedural and substantive requirement

The EIA directive is linked to the appropriate assessment required under the Habitats directive. In c

Environmental Assessments

Directive 96/61/EC on integrated pollution prevention and control >> Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control)

- Applies to certain listed activities
- Information on certain environmental impacts of the installation
- Public participation
- Procedural requirement
- IE Directive also sets out substantial requirements (eg. appropriate preventive measures, best available techniques, no significant pollution)

Public participation requirements are also laid down in legislation on industrial installations. This is

Environmental Assessments

Art 6 of the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention - 1998)

- Applies to specific listed activities, but also to other activities which may have a significant effect on the environment
- Public participation
- Description of the significant effects on the environment
- Procedural requirement, but no substantive limitations to plans and programmes
- Specific provision on access to justice (Art 9 (2)), in particular for NGOs
- No direct effect as such, but in combination with EU Environmental law and Art. 47 of the Charter of Fundamental Rights - [Protect Natur](#) (C-664/15, EU:C:2017:987) + Interpretation in Conformity

The Aarhus Convention provides that projects and other activities are subject to informed public pa

Environmental Assessments

Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)

- Applies to **plans and programmes** setting the framework to projects under the EIA Directive or subject to an assessment under the Habitats Directive
- Comprehensive assessment of **significant** environmental impacts
- Public participation
- Procedural requirement, but no substantive limitations to plans and programmes

The SEA directive complements the EIA directive and requires the environmental assessment of g

Environmental Assessments

- In general, a combination of assessments is possible
 - no superfluous assessments required (Art 2(2)&(3) EIA Directive) >> correct label not necessary
- BUT: the requirements of each assessment must be met
 - eg. formal requirements of the EIA, such as the non-technical summary
 - eg. specific assessment of conservation objectives under Art 6(3) Habitats Directive
- In particular, substantive requirements linked to specific assessments must be respected, eg. an EIA is not sufficient under Art 6(3) of the Habitats Directive, if the conditions on the authorisation of the activity are not met

It is important to be aware that compliance with all requirements of the applicable legislation is ne

Environmental Impact Assessment Overview

Today: Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU

- Applies to specific listed projects
- Comprehensive assessment of **significant** environmental impacts
- Public participation
- Procedural requirement, but no substantive limitations to permits
- Specific provisions on access to justice

This is an overview on the essential contents of the EIA Directive.

Environmental Impact Assessment

Art 1(2)(a): '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;

Renewal of operating consent:

- Airport ([Brussels Hoofdstedelijk Gewest and Others](#) (C-275/09, EU:C:2011:154)) or landfill site for waste ([Pro-Braine and Others](#) (C-121/11, EU:C:2012:225)) without construction – no
- Nuclear power station, combined with substantial works – yes ([Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen](#) (C-411/17, EU:C:2019:622)).

The first delimitation of the scope lies in the concept of project. Not all permits allow projects. In p
Conversely, in the case of the nuclear power station, the renewal was combined with substantial wo

Environmental Impact Assessment

Art 2(1): MS shall ... ensure that, *before* ([Land Nordrhein-Westfalen](#) (C-535/18, EU:C:2020:391, at 77 and 78)) development consent is given, projects *likely to have significant* effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for *development consent* and an *assessment* with regard to their effects on the environment. Those projects are defined in Art 4.

Art 2(4) and (5) as well as Art 1(3) allow for exemptions – within strict limits (cf [Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen](#) (C-411/17, EU:C:2019:622)).

The EIA needs to be conducted before the permit is issued unless one of the exemptions applies. Ho

Environmental Impact Assessment

Art 4(1): ... projects listed in Annex I shall be made subject to an assessment ..., eg.

- No 2(b): Nuclear power stations and other nuclear reactors including the dismantling or decommissioning ...
- No 4(a): Integrated works for the initial smelting of cast iron and steel
- No 7(a): Construction ... of airports ... with a basic runway length of 2 100 m or more
- No 7(c): Construction of a new road of four or more lanes, ..., where such new road ... would be 10 km or more in a continuous length

Article 4 provides for two categories of projects that come within the scope of the EIA Directive. P

Environmental Impact Assessment

Art 4(2): ...for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment ... Member States shall make that determination through:

- (a) a case-by-case examination; or
- (b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

Eg No 10(d): Construction of airfields (projects not included in Annex I)

No 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

Article 4 paragraph 2 and Annex II list smaller projects. Member States are obliged to define the co

Environmental Impact Assessment

Art 4(3) – (6) – specifics on case-by-case examination

- Criteria set out in Annex III
- MS can set thresholds excluding or requiring a case-by-case examination
- Developer submits information on project (Art 4(4))
- Authority decides and informs the public (Art 4(5)), provides reasons (going beyond [Mellor](#) (C-75/08, EU:C:2009:279))
- Decision to be made within 90 days unless the time-limit is extended for a difficult case (art 4(6))

These paragraphs and Annex III specify the case-by-case examination whether an EIA is necessary.

Environmental Impact Assessment

POLL: An existing airport is developed, inter alia by extending the runway from 1000 m to 1800 m. Aircraft movements are projected to increase by 9000 per year, many of them larger than now. Under MS rules changes to an existing airport require an EIA if they are likely to increase the number of aircraft movements by at least 10000 per year.

EIA necessary?

A - Yes or B - No

This is a question to be posed to the audience. It shows that the interpretation of the EIA Directive c

Environmental Impact Assessment

POLL: An existing airport is developed, inter alia by extending the runway from 1000 m to 1800 m. Aircraft movements are projected to increase by 9000 per year, many of them larger than now. Under MS rules changes to an existing airport require an EIA if they are likely to increase the number of aircraft movements by at least 10000 per year. EIA necessary? Yes or No?

- Art 4(2)(b) allows thresholds and gives MS the choice
- BUT: discretion is limited by the obligation set out in Article 2(1) to make projects likely... to have significant effects on the environment subject to an impact assessment
- CJEU considered a threshold of 20 000 inadmissible - [Salzburger Flughafen](#) (C-244/12, EU:C:2013:203)

The Court has found that MS discretion is limited by the objective of the EIA and therefore require

Environmental Impact Assessment

Art 3: The EIA 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 population and human health; biodiversity; land, soil, water, air and climate; material assets, cultural heritage and the landscape; the interaction between the factors.

Art 5: Form and content of the environmental impact assessment report, including a description of the reasonable alternatives **studied by the developer**: No obligation to study alternatives, but if alternatives were studied specific information needs to be provided (Cf [Holohan](#) (C-461/17, EU:C:2018:883)).

Art 5(3): report is prepared by the developer, employing competent experts; authority also needs expertise

Annex IV provides further specification

This describes the content of the EIA. Significant effects on all environmental media need be described.

The study of alternatives is particularly sensitive. In principle alternatives would be helpful to appreciate the impact of the project.

Environmental Impact Assessment

Effects to be covered – broad interpretation ([Commission v Spain](#) (Alto Sil) (C-404/09, EU:C:2011:768, at 79)), but only main effects (= significant effects, [Holohan](#) (C-461/17, EU:C:2018:883, at 58):

- cumulative environmental effects (Alto Sil, at 80)
- specific protected species known to be present in the vicinity of the site, eg. capercaillie and brown bear (Alto Sil, at 89)
- more general: all issues, necessary to appreciate compliance with environmental law, eg. the water framework directive 2000/60 ([Land Nordrhein-Westfalen](#) (C-535/18, EU:C:2020:391, at 81 et seq)

The description of effects should allow the assessment whether relevant environmental law is respo

Environmental Impact Assessment

Public Participation – Art 6 and 7

- Details to be set by MS (Art 6(5)), subject to the principles of effectiveness and equivalence, [Flausch](#) (C-280/18, EU:C:2019:928, at 27)
- Announcement of project and EIA (Art 6(2)) – notice at an administrative centre probably insufficient for a remote project (Flausch, at 34)
- Information made available (Art 6(3)) – availability at an administrative centre possibly insufficient for a remote project (Flausch, at 38 et seq), subject to proportionality
- Early and effective public participation (6(4))
- Art 7 sets special rules for participation of members of the affected public in another MS, see also the Espoo Convention and [Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen](#) (C-411/17, EU:C:2019:622)

Public participation is the second limb of the EIA. The directive has some general requirements, but
A transboundary EIA may pose additional challenges, such as communicating with the public in an

Environmental Impact Assessment

Consequences of the EIA – Art 8, 8a and 9

- duly taken into account in the development consent procedure (Art 8), minimum: identified conflicts with or requirements of environmental law must be dealt with appropriately, eg. by adapting the project
- decision on development consent incorporates outcomes of the EIA (Art 8a)
- public is effectively informed of the decision on development consent, this information can trigger a time-limit for legal challenges, unless the information was not provided respecting the principle of effectiveness ([Flausch](#) (C-280/18, EU:C:2019:928, at 58 and 59): inappropriate information about the project (Art 6) can affect information under Art 9)

The environmental study and outcomes of public participation need to be published and taken into

Environmental Impact Assessment

Consequences of failing to do an (appropriate) EIA

- Consent (and implementation) must be suspended or annulled ([Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen](#) (C-411/17, EU:C:2019:622, at 172))
- But a complaint can be rejected if it can be demonstrated that the decision would not have been different without the procedural defect ([Gemeinde Altrip and Others](#) (C-72/12, EU:C:2013:712))
- If the project has been implemented without an appropriate EIA, exceptionally this procedural defect can ([Comune di Corridonia and Others](#) (C-196/16 and C-197/16, EU:C:2017:589)) and must ([Commission v Ireland \(Derrybrien Wind Farm\)](#) (C-261/18, EU:C:2019:955)) be “healed” or regularised by conducting the EIA subsequently

The failure to do an EIA meeting the requirement of the Directive should result in the annulment of

Environmental Impact Assessment

Access to Justice – Art 11

- EIA Directive is one of the few instruments providing for specific rules on access to justice >> transposition of Aarhus
- Distinction recognised eNGO v other parties
 - other parties can be restricted to claim the impairment of individual public-law rights
 - eNGO can claim infringement of all provisions of EU environmental law ([Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen \(Trianel\)](#) (C-115/09, EU:C:2011:289, at 45 and 46))
- MS enjoy discretion to define impairment of rights limited by objective of ensuring wide access to justice for the public concerned ([Gruber](#) (C-570/13, EU:C:2015:231, 38 and 39))
- Can rights be created by EU environmental law? Directly concerned individuals can invoke the infringement of directly effective EU environmental law ([Wasserleitungsverband Nördliches Burgenland](#) (C-197/18, EU:C:2019:824))

As a consequence of the Aarhus convention the EIA Directive provides for access to courts. eNGOs

Strategic Environmental Assessment Directive 2001/42 (SEA Directive)

- Objectives
- Plans and Programmes
- Framework for Future Development
- Major Difference to the EIA

Outline of this part of the presentation

Strategic Environmental Assessment Objective

- High Level of Protection for the Environment
- Contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development
- EIA often arrives too late because impacts are determined by Plans or Programmes
- Therefore significant impacts resulting from Plans and Programmes should already be assessed at this level of

Self-explanatory

Strategic Environmental Assessment Plans and Programmes

- Article 2(a)
 - they are subject to preparation and/or adoption by an authority at national, regional or local level or are prepared by an authority for adoption, through a *legislative* procedure by parliament or government,
 - they are *required* by legislative, regulatory or administrative provisions.
- Distinction between genuine legislation and plans or programmes? “[A] measure ... [is] ‘required’ where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not compulsory” ([A and Others \(Wind turbines at Aalter and Nevele\)](#) (C 24/19, EU:C:2020:503, paras 35 et seq)).

The definition of plans and programmes is very broad and includes legislation. Based on the words

Strategic Environmental Assessment Framework

- Article 3(2)(a): an environmental assessment is to be carried out for all plans and programmes that are prepared for certain sectors and *set the framework* for future development consent of projects listed in Annexes I and II to the EIA Dir.
- Framework: “[A] significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment” ([A and Others \(Wind turbines at Aalter and Nevele\)](#) (C 24/19, EU:C:2020:503, paras 67 et seq)).

Not all P&P are subject to the SEA, only those that set the framework projects, in particular project

„Significant body“ is not quantitative in nature. It does not mean that you need to have a particular

Strategic Environmental Assessment Framework

An environmental assessment is to be carried out for all plans and programmes

- that, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43 (Article 3(2)(b)) and
- other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects (Article 3(4)).

These are the other two categories of measures that require an SEA. The first ensures coherence wi

Strategic Environmental Assessment

Important Differences to the EIA

- Assessment includes reasonable alternatives (Article 5(1))
- No rules on Access to Justice, but directly concerned claimants should be able to invoke provisions with direct effect.
- Often the question is raised whether a Plan or Programme can be maintained in force until a possible defect in the SEA is healed
 - Annulment of measure could be harmful for the environment and create another infringement of EU law
 - Only as long as necessary and possibly requiring a reference to the ECJ

([A and Others \(Wind turbines at Aalter and Nevele\)](#) (C 24/19, EU:C:2020:503, paras 80 et seq))

These are the major differences to the EIA Directive.

What is not very clear is if it is necessary to ask for the authorization of the Court of Justice to the r

Thank you for your attention!
Questions?

