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Editorial

In 2002 the European Commission published the "Communication on Impact Assessment (276 final)" and supplemented it in 2005 with the "Impact Assessment Guidelines (SEC(2005) 791)". The latter defines the Regulatory Impact Assessment (RIA) as "a set of logical steps which structure the preparation of policy proposals" (p. 4). The aim of the RIA is paraphrased as "deepening the analysis and formalising the results in an autonomous report." In bold letters the Guidelines add: "Remember: Impact assessment is an aid to political decision-making, not a substitute for it." The aid offered by the RIA is nothing other than a more "rational" foundation[1] of policy proposals, newly apostrophised as "good governance". The underlying assumption therefore is that such an aid is helpful to achieve more rational results in the proposals presented by the Commission to the Council and the European Parliament.

Five years after the Communication, quite a number of Commission proposals[2] have gone through the "logical steps" required by the RIA. But rather than supporting the search for the best solution to a "regulatory choice problem", critical observers may receive the impression that the justification of political agreements that have already been made is the central function of the Impact Assessments undertaken by the Commission.

Beyond this background, two articles in this issue evaluate the results of the RIA approach: The question "A balanced appraisal? Impact Assessment of European Commission proposals" is raised by *Susan Owen* and "Theory and Practice" of the RIA are analyzed by *Ekkehard Hofmann*.

Two other articles deal with another form of Impact Assessment – the "classical" Environmental Impact Assessment (EIA). *Pavel Černý* and *Jerzy Jendrośka* examine the "Transposition and Implementation of EIA Directive in some EU Member States (with special emphasis on transport infrastructure cases)". A methodological approach for an ex-post "Evaluation of the German Act on Environmental Impact Assessment" is presented by *Nils Bedke, Jaqui Dopfer, Simone Kellert* and *Detlef Kober*.

In an article by *Florence Coroner*, an overview is given on the legislative process on a national level. Herein, she observes that in the transposition of the Environmental Liability Directive the "Member States [are] missing the opportunity to implement 'polluter pays' principle".

In the sixth article of this issue, *Uwe Lahl* addresses the REACH Regulation, one of the largest legislative projects on an EC level, which was published in the Official Journal of the EU right at the end of 2006. He presents an "Assessment of the political agreement" reached in the trilogue procedure.

In the final article in this issue, *Gerhard Roller* provides an analysis of the amended Comitology Decision which came into force in the summer of 2006. His message is clear: it "strengthens [the] position of European Parliament".

Last but not least, the "New Books" column presents two recently published anthologies: "Implementing the Precautionary Principle" (edited by *Nicolas de Sadeleer*) and the liber amicorum for *Eckard Rehbinder* (both founder members of elni).

The next issue of the *elni review* will focus on the implementation of the Aarhus Convention. Please send contributions on this topic as well as other interesting articles to the editors by the end of June 2007.

Martin Führ
March 2007

elni forum on Nanotechnology

in memoriam of Betty Gebers
took place at Thursday, 7 December 2006, 6 p.m.,
at the Joint Representation of the States of Hamburg and Schleswig-Holstein,

The lecture given by Stefanie Merenyi, Martin Führ and Andreas Hermann led to a lively discussion. The programme and a few photos of the event can be found on the elni website.

The charts and the complete study (on behalf of the German Environmental Protection Agency - Umweltbundesamt) can be downloaded from the elni-website (www.elni.org).
The study is based on the final version of REACH.

1 The topic "Rational Environmental Policy – Rational Environmental Law" was analyzed by a research group at the Bielefeld "Center for Interdisciplinary Research" in 1998/99, directed by *Gertrude Lübbe-Wolff*; see http://www.uni-bielefeld.de/ZIF/FG/1998Umweltrecht/.

2 See, for example, the study on behalf of the European Parliament: The Proposed Directive on Waste - An assessment of the Impact Assessment and the Implications of the Integration of the Hazardous Waste Directive into the existing Waste Framework Directive www.europarl.europa.eu/comparl/envi/pdf/externalexpertise/proposed_waste_directive_assessment_en.pdf.

Transposition and Implementation of EIA Directive in some EU Member States (with special emphasis on transport infrastructure cases)

Pavel Černý, Jerzy Jendrośka

1 Introduction

One of the main goals of the Directive 85/337/EEC, on the assessment of the effects of certain public and private projects on the environment ("EIA Directive"), expressed in its Preamble, is to ensure that projects that are likely to have significant environmental impact proceed only after prior assessment of their likely effect on the environment, based on appropriate information supplied by the developer and with proper avenues for public participation.[1] [2] The European Court of Justice (ECD) repeatedly narrowed down the (originally large) scope of discretion of the member states in deciding whether a project shall be subject to EIA or not by requiring the environmental impact assessment for any project which is likely to have serious impacts *de facto*.[3]

Following the requirements and achieving the goals of the EIA Directive is particularly important in the area of transport infrastructure. These projects are most likely to have serious environmental impacts, including:

- direct effects of construction, such as lost green space and agricultural land, altered landscape and threat to specially protected areas;
- direct effects of use, mainly increased air pollution and ambient noise along new roads.
- indirect effects of induced traffic, especially the negative influence on human health and the environment arising from increased automobile use.

Traffic-infrastructure cases also raise important issues regarding public participation in environmental decision-making. These projects tend to be politically sensitive, and pressure can be brought to bear on critics, limiting the effectiveness of public participation.

It is important to deal with such cases at an EU level because traffic-infrastructure development in individual states is increasingly influenced and even determined by EC law and EU financial-support programs, mostly with respect to extending the Trans-European Transport Network[4] to new Member States.

J&E member organisations[5] are involved in many cases in which the EIA Directive applies, and they aim to promote its correct implementation. Many of these cases show that the competent authorities are unaware of, or are ignoring, the requirements of the directive and other relevant EC legislation.

For all these reasons, J&E members chose transposition of the EIA Directive and its implementation in transport-infrastructure cases in the respective EU member states (Austria, Czech Republic, Estonia, Hungary, Poland, Slovakia) as one of the focuses of its 2006 project, supported by the DG Environment.

Central to this article is a description of the typical and most important gaps of implementation of the EIA directive, emerging from the specific traffic infrastructure cases. Prior to that, some general remarks on the typical characteristics and problems concerning transposition of the EIA Directive are made.

2 General remarks

The analyses show that although the Member States under examination have chosen different approaches to the transposition of the EIA Directive, there are some common problem areas. The following ones can be considered as the most typical:

2.1 EIA and development-consent procedures

According to Article 2.2 of the EIA Directive, "environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive". In contrast to the majority of the "old" Member States, which have chosen

1 This article is based on the findings of a Justice and Environment (J&E) 2006 project, concerning transposition and implementation of EIA Directive: Case study comparative overview (http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006EITcasestudyoverview.pdf) and comparative legal analyses (http://www.justiceandenvironment.org/wp-content/wp-upload/JE2006EITlegalanalysis.pdf.)

2 See also the Preamble of the Directive 35/2003/EC ("public participation directive"), which amended the EIA Directive. In accordance with the requirements of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention), ratified by the EC in Council Decision 2005/370/EC.

3 See for example ECD cases C-431/92 *Commission v. Germany,* C-131/94 *Commission v. Belgium,* C-72/95 *Kraajiveld*, etc. For more details, see Kramer, L.: EC Environmental Law, 5th edition, London, Sweet&Maxwell, 2003, p. 152; or Jans, J.H.: European Environmental Law, 2nd edition, Groningen, Europa Law Publishing, pp. 323-324.

4 See Decision 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network. More details can be accessed at: http://ec.europa.eu/ten/transport/index_en.htm.

5 For more information about J&E (Justice and Environment network), see the box "J&E - More than just an NGO" or http://www.justiceandenvironment.org.

the first approach and have – thereby or in another way - integrated EIA into existing development consent procedures, EIA is carried out in four of the countries under examination (Czech Republic, Hungary, Slovakia and - since 2005 - Poland) as a stand-alone procedure, separated from the procedures for development consent.[6]

In at least three countries (Czech Republic, Poland and Slovakia), this approach raises serious concerns. In particular, it is questionable whether the outcomes of such separate procedures may be considered as "development consents" in the meaning of Article 1.2 of EIA Directive, since the developer needs to also obtain a construction permit (or another decision) to proceed with the project. It is therefore questionable whether they can be treated as "the principal decision" in the meaning given in Case C-201/02 Delena Wells. This also causes problems concerning the judicial review of such "EIA decisions" in the sense of Art. 10a of the EIA Directive, especially if they are declared as "non-binding" by national legislation.[7]

Moreover, these "EIA decisions" are granted at such an early stage in the development process that often no precise details of the project are known. On the other side, when a detailed construction design is prepared, there is no (further) assessment of its environmental impacts. This does not seem to be in line with the ECJ rulings in cases C-508/03 and C-290/03, which both require the possibility of carrying out another EIA procedure at a later stage of the development consent process - should particular features of the project require such a second EIA procedure.

2.2 Neglecting of some screening criteria

For projects listed in Annex II of the EIA Directive, it is decided upon in the so-called screening procedure whether the project's potential impact demands a "full" EIA. Criteria set out in Annex III of the EIA Directive (e.g. project size and location, characteristics of the potential impact, accumulated impact in conjunction with other projects) are to be considered. All the countries under examination employ a twofold approach to screening: case-by-case examination combined with a so-called categorical approach, e.g. setting thresholds or criteria.[8]

Only in relation to case-by-case examination do the relevant laws clearly require competent authorities to use the selection criteria set out in Annex III. With regard to categorical screening, the laws transposing the EIA Directive rarely make clear that all such criteria should be employed. When authorities use this approach, there is a noticeable tendency to prefer criteria related to project size while neglecting other selection criteria set out in Annex III. This - as the Case C-392/96 Commission v Ireland shows - may be considered as exceeding the limits of the discretion under Articles 2(1) and 4(2) of the Directive[9].

On a positive note, some of the countries investigated (Austria, Poland and Slovakia) have developed institutional instruments for assuring quality control of EIA documentation.

2.3 Opportunity to challenge screening decisions

In most of the investigated countries (four of the six: the exceptions are Estonia and Hungary), NGOs cannot challenge the decisions as to whether a particular project, belonging to categories of projects listed in Annex II to EIA Directive, is likely to have significant effects on the environment and therefore require assessment (so called screening decisions). In most of the countries this also applies to the concerned public at large. The prohibition appears not to be in line with Article 10a of the EIA Directive and with the established case law of the European Court of Justice.[10]

It should be added, however, that whereas most "old" Member States allow for public participation at a relatively late stage (when the environmental report has already been prepared), most of the countries examined (with the notable exception of Poland) provide such opportunities at an early stage of the EIA procedure. In the Czech Republic, Hungary and Slovakia, the public can participate at the screening stage; in most of the countries examined, public participation is granted at the scoping stage, in which the scope of the assessment is determined.

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6 A specific approach has been taken in Austria which has an "EIA-permit" in the form of one consolidated development consent that covers any legal permitting requirements for a certain project. This development consent serves also as general construction permit: if the EIA-permit is final, constructions for a certain project may start immediately. The Austrian legal term for this approach is "Verfahrenskonzentration", consolidated development consent).

7 In the Czech R52 high-speed road case, the lawsuit filed by a local NGO and a property owner against an EIA decision ("final opinion") was refused by the court on the grounds that the EIA final opinion is not a binding decision according to Czech law. This can be seen as a breach of Art. 10a of the EIA Directive, as amended by Directive 35/2003/EC. The latter Directive requires that the public concerned has access to judicial review of any decisions, acts or omissions subject to public participation provisions of the directive.

8 Art. 4.2 of the EIA Directive. For more details see, for example, Jans, J.H.: European Environmental Law, 2nd edition, Groningen, Europa Law Publishing, pp. 323-324.

9 Para 65 of the judgment in Case C-392/96

10 See, for example, Case C-435/97 Bozen (WWF and others).

3 Faulty implementation of the EIA Directive in transport infrastructure cases

The following cases have been selected by J&E members as examples of problems concerning the implementation of the EIA Directive in transport infrastructure cases in their countries.

Case	Country	Description of the project	Timeline
High-speed road R52 Pohořelice – Mikulov (Drasenhofen-AUT)	Czech Republic	Planned Czech section of Brno-Vienna highway corridor, projected through unique landscape areas of south Moravia. Supposed to become a part of TEN-T network.	2003-
Motorway A5 Vienna-Drasenhofen (Mikulov-CZ)	Austria	Planned and partly permitted Austrian section of Brno-Vienna highway corridor. The project has been sliced into six EIA proceedings. The project is open to criticism in terms of alternatives, traffic, figures, salami-slicing, air, noise, climate, effective public participation.	2003-
Port of Saaremaa	Estonia	A port to host cruise and passenger traffic for 3-4 months a year (some documents reflect the possibility of additional purposes of the port).	2003-2005
Bypass road of the Main Road No. 10	Hungary	A bypass road close to Budapest, which would mostly affect rural settlements North-West from Budapest.	2003-
Augustów Bypass through the Rospuda River Valley	Poland	A bypass road around Augustów city, crossing the River Rospuda Valley. The plan includes building a large flyover over the river, which could significantly upset water conditions.	1999-
Expressway R1 Žarnovica – Šášovské Podhradie	Slovakia	A section of an expressway planned to connect the western and eastern part of Slovakia. It would considerably influence living conditions in the Žiar nad Hronom city.	1998-

All presented cases apart from the Estonian one deal with ground communications (motorways, high-speed roads), which form or shall form parts of basic national traffic networks. The Czech and Austrian cases form parts of one cross-border project (Brno – Vienna highway, which, it is planned, shall become a component of the TEN – T network).

The following problems concerning implementation of the EIA directive (and on occasions other EU norms as well) can be viewed as common for all or the majority of the presented cases:

3.1 Failure to carry out environmental impact assessment of the whole project

One of the very typical problems, especially in transport infrastructure cases, concerns the fact that the investors often artificially "cut" the projects into pieces for the purposes of the legal procedures (so called "salami-slicing"). Only short sections of the projects (especially roads) are then assessed and permitted. The parts of the projects that are less questionable from an environmental point of view are mostly "logically" authorised and built first, which in fact predetermines the following route of the project even across an environmentally valuable territory. This is contrary to Article 2.1 of EIA Directive, which requires that "projects" (and not just parts of them) that are likely to have a significant effect on the environment are subject to the assessment.

For example, the Austrian A5 motorway was "sliced" into six different parts and thereby also six separate EIA/permit proceedings (four of the EIA-permits have already been issued[1], two EIA proceedings are still pending).

Similarly, in the Slovak case, the expressway R1 was "sliced" into a few sections, which are then handled as separate proceedings. Although there is a general discussion as to whether to build this expressway or a different (northern) variant of west-east highway connection, in reality both these variants have been already planned and fragments of both of them are already constructed. Thus, citizens can question only small sections of the road, but not the general idea as such.

In the Hungarian case, a specific problem lies in the fact that although the impact area was delineated correctly, the environmental impacts of the project within the entire impact area were not assessed. This was one of the reasons for why the permit was cancelled by court.

The Estonian seaport case represents another aspect of this problem. Only impacts of part of the whole project (in the scope of the water management permit procedure) were officially subject to EIA. The documentation, presented by a developer, did not include clear description of the project.[2] Therefore, the data required to identify and assess the main effects that the project is likely to have on the environment were insufficient.[3]

This approach also inevitably leads to a breaching of the requirements of Art. 3 and 5 of the EIA Directive (see below). This is because the assessment of mere parts of a whole project does not provide for a sufficiently comprehensive evaluation of all direct and indirect impacts of the project and their interactions.[4]

3.2 Failure to assess all effects of the project

Articles 3, 5.1 and 5.3, together with Annex 4 of the EIA Directive basically require that the developer supplies all information necessary for all of the important direct and indirect effects of the projects to be assessed. This was not fulfilled in any of the cases - partly, as already mentioned, due to the "non-correct" determination of the projects. Another general reason was (according to the arguments of the projects opponents) a lack of, or poor quality of, documentation and data supplied by the developer (often omitting indirect effects of the investment).

In the Czech and Hungarian cases, the impacts of the project were not assessed in combination with the impacts of other traffic structures in the region, nor with the effects of induced traffic on human health (air quality, noise stress).[5]

In the Austrian case, allegedly incorrect traffic assumptions and calculations led to downplaying in the

1 There were appeals filed against these permits, but an appellate procedure has no suspensive effect. This means constructions of the four parts might start during the pending appeal proceeding.

2 It was not clear whether the developer wants to build a cruise harbor for summer time or a port for whole-year-round exploitation; it was also unclear what kind of ships will be visiting the port – whether it will be used only for cruise ships and passengers, or also for ro-ro ships or maybe even for cargo shipping.

3 In case C-201/02 (Delena Wells), the European Court of Justice stated that "where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment *must be identified and assessed at the time of the procedure relating to the principal decision*". Therefore, it should have been considered whether the water use permit for the port of Saaremaa could constitute a principal permit in the meaning of ECJ interpretation. According to the national courts, the water use permit could set only the conditions for building three quays in the water, but not the conditions of exploitation of the port, nor the conditions for activities carried out on shore. The principal decision about whether the port is to be built was a decision about the detailed land-use plan. However, this kind of plan did not constitute a „development consent" in the meaning of the EIA Act at the time. It must be concluded that failure to set up a decision-making procedure for these kind of constructions which have great environmental impact, without determining at what stage the principal decision is made, has led to the failure to carry out an EIA for the whole project.

4 See, for example, ECJ judgements C-392/96 of 21 Sept 1999 (Commission vs Ireland) or C-227/01 of 16 Sept 2004 (railtracks Valencia).

5 At present, noise and air pollutants (micro-particles) in the area south to Brno (the 2nd largest city in the Czech Republic) already exceed legal limits. Thousands of people in many villages and Brno city districts would be exposed to even higher traffic volumes as a result of the additional transport structures, including the R 52 high-speed road. Another deficit in terms of the assessment of this project relates to the fact that its trans-boundary impacts were not taken into account.

assessment of air/noise impacts. Furthermore, motorway connections that were also planned in the same corridor were not considered at all in the EIA proceeding; the respective environmental impact was thereby downplayed.[6]

In the Slovak case, beyond the fact that the negative impacts (especially noise and emissions) on the already highly polluted area city were underestimated. There was a more than 3 km long variant which was not assessed at all in the EIA procedure.

In the Polish case, documentation presented by the developer underestimated the number of protected species (birds) which may be affected by the project, did not consider the full range of likely potential impacts on them, did not adequately consider the cumulative impacts of the project on the affected SPA (mainly its integrity[7]) in conjunction with other road projects affecting the same SPA, its impacts on wetland habitats/species, etc.

3.3 Failure to assess real alternatives

Interpretation of the requirement of EIA Directive Article 5.3, according to which information provided by the developer shall also include "an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account environmental effects, is obviously one of the most difficult problems, concerning not only the cases presented here, but also implementation of the EIA Directive in general. The legal requirements in most countries in question are not sufficiently clear to assure mandatory presentation of alternatives (or sometimes - as in Slovakia - even allow the developer to neglect studying the alternatives).[8] The problem must be analyzed differently in general terms and in cases in which "NATURA 2000 sites" are affected.

In all cases under discussion, the project opponents argued that the investors failed to consider and assess alternatives of the project, which (in their opinion) would have been more environmentally favorable. The opponents also argued that both the EIA Directive and domestic law require that such alternatives are taken into consideration.

In the Hungarian case, the consistent standpoint of the project developer was that he is not obliged to assess any other alternatives than the "zero alternative" (which was declared as obviously unsustainable) and the promoted variant of the project. The non-assessed alternatives covered, for example, alternative transportation methods to individual motor vehicles, and significant traffic routes for the bypass. At the court stage, although the plaintiff held that no real alternatives were assessed by the project developer, and thus Article 5.3 of the EIA Directive was breached, the court did not share this view. The court took a conservative standpoint in this matter, explaining that the project developer is not under an obligation to find a systemic solution to the traffic problem, but can concentrate on the lawfulness of its preferred solution.

In the Czech, Austrian, Slovak and Polish cases, the information provided by the developer contained technical alternatives of the same corridors.[9] In the Estonian case as well, the EIA report did not include assessment of alternative locations (in this respect it only referred to earlier studies, preferring, however, conclusions of a feasibility study, which were made mainly on the basis of financial calculations with no environmental considerations).

In all these cases, the authorities accepted this approach and did not ask for further alternatives. This fact raises an important conceptual question as to whether, in light of (solely) Article 5.3 of EIA Directive requirements, a road construction project developer has to study alternatives of individual motor vehicle traffic, such as railway or waterway transportation, or can limit his focus to technological options of building (and maybe some kilometers – long "subvariants") the planned road. The wording of the EIA Directive makes the interpretation, that alternatives must be presented only when the developer himself decided to "study" them, literally possible. The provision was in this sense also transposed into (for example) Hungarian and Czech law. However, this interpretation clearly contravenes the purpose and spirit of the EIA Directive.

The situation is different in cases in which projects could have negative impacts on "NATURA 2000 areas." In these cases, only alternatives with lowest damaging impacts on the protected areas/species can be approved, according to Art. 6.4 of the Habitat Directive and Art. 4.4 of the Bird Directive. This means, that all possible (territorial) alternatives of the projects must be assessed, so that the less damaging one can be chosen. These requirements were not satisfied in the Estonian, Polish and Czech cases.

3.4 Effective and timely public participation

Article 6 of the EIA Directive (together with Articles 8 and 9) should guarantee that the public receives sufficient information about the impacts of the project, that the public concerned has constructive opportuni-

6 Planned S8 Marchfeldschnellstraße from Vienna to Slovak D2 motorway was not considered. S8 would directly affiliate to S1, S2 (southern alignment of A5).

7 See Article 6.3 of the Directive 92/43/EEC (Habitat Directive)

8 A notable positive exception is Poland where the law clearly requires environmental reports to include descriptions of the alternatives studied by the developer; the inclusion of both a 'zero alternative" and a "most environmentally friendly" alternative is mandatory. There is also a clear requirement for indicating the reasons for his choice.

9 For example, in the Polish case, all alternatives proposed by the developer and considered by the authorities assumed crossing the Rospuda Valley within the SPA and, as such, they are almost equally harmful from the perspective of the site conservation objectives. The two most important alternatives were: building the tunnel below the Rospuda River or building a flyover over it (the latter one has been finally chosen by the developer). In the Czech and Slovak cases, the variants considered only some sections of the proposed expressways (less than half of their length).

ties and is given sufficient time to participate in decision-making procedures and that the outcome of public participation is seriously taken into consideration in the development consent procedure. These requirements were not fully respected in any of the cases presented above.[10]

In the Hungarian case, a large part of the public concerned, due to the mistake made regarding the delineation and assessment of the impact area (see above), was deprived of the right to participate in the permitting (development consent) procedure. The fact that both the municipalities and the public had absolutely no chance to comment and influence the decision-making was one of the main reasons why the development consent was cancelled by court.

In the Estonian case, the EIA report and the additional materials were only available at the office of the Ministry of Environment (except for the last version of the EIA which was made available in the local community office as well). The time frames for presenting comments were very short – 5 days for commenting on the EIA program (structure for the EIA report), 13 days for commenting on the EIA report and 16 days for commenting on the supplemented version of EIA report. The Ministry of Environment has approved the EIA report without taking the NGO's comments into account. The possibilities for public participation in subsequent water use permit proceedings were quite limited. The announcement about the procedure was inadequate in terms of the requirements of Article 6.2 of the EIA Directive (there was, for example, no indication of the possibility of presenting comments or questions to the competent authority, nor of the time schedule for these actions). Other permits necessary for the project's realisation were not issued in the course of public proceedings.

In the Slovak case, only an official notice board was used to inform the public about the EIA procedure; none of the available alternative means were used. Moreover, there were no maps or pictures of the proposed road published at all, only brief textual information. The scoping decision was delivered to city officials only and public did not had any chance to see this document and comment it.

In the Austrian case, "slicing" of the project into six different parts and thereby into six separate EIA/permit proceedings (see above) has the side effect that public participation is much more expensive and time-consuming. The documents provided by the developer are very detailed with no "non technical summaries", which makes it difficult for the public to comprehend them. Moreover, a great deal of the technical information presented to date has been out-of-date; technical experts did not have the respective authorization and used incorrect figures and assumptions.

3.5 Failure to meet requirements of transboundary assessment

As mentioned above, the Czech and Austrian cases deal with two parts of one project: the Vienna-Brno highway. It is self-evident that both "national" parts of the project would have significant effects on the environment of both respective EU Member states. Thus, according to Art. 7 of the EIA Directive (and the Espoo Convention)[11], both of these parts should have been subject to a trans-border assessment.

This requirement was not fulfilled. In the Czech case, no assessment according to Art. 7 of EIA Directive and Espoo Convention took place, despite of the fact that in the initial (screening) stage of the EIA procedure, the Austrian ministry indicated that Austria wishes to participate and Austrian administrative bodies, municipalities, and NGOs sent their comments. In the Austrian case, only one of the six EIA/permit proceedings (see above), which deals with the section of the project closest to the border, was officially notified to the Czech Republic according to Art. 7.1 of the EIA Directive. The Czech ministry expressed its wish to participate in this EIA procedure. Subsequently, Austria sent the project's documentation to Czech Republic, but only in German. This led to the situation that, on the last day of the commentary time period in Austria, still no information about the project had been presented in the Czech Republic, as required by Art. 7.3 of the EIA Directive. Further development is not clear at present.[12]

3.6 Confusion of the logical order of EIA and SEA procedures

The Czech and Austrian cases also illustrate insufficient connection between the requirements of EIA Directive and Directive 2001/42/EC, on the assessment of the effects of certain plans and programs on the environment (SEA Directive). The corridor of the Czech part of the Brno – Vienna highway is contained in the proposal of the land use plan, which has not been approved yet. The impacts of this plan were not assessed in a SEA procedure pursuant to the SEA Directive and valid Czech law. The fact that the EIA final opinion was issued prior to the land use plan approval, although not directly breaching the EC law, can be seen as a confusion of the logical order of the

[10] This problem relates to another general aspect of insufficient transposition of the EIA Directive: None of the countries examined here have a clear provision in the law that would clearly require that the public is "informed in an adequate, timely and effective manner" as required by Article 6.2 of the Aarhus Convention. Most countries have provisions that assure "timely" notification, but no country provides legal guarantees that the public is notified in the "effective manner".

[11] Convention on Environmental Impact Assessment in a Transboundary Context.

[12] Another related and more general problem, concerning the insufficient transposition, is that although most countries under discussion have transposed Article 7 of the EIA Directive literally, in those which have a separate EIA procedure, the problem arises that legislation allows affected Member States to participate in the EIA procedure itself, but not in the subsequent decision-making procedures.

SEA and EIA procedures.[13] In Austria, no SEA procedure complying with the SEA Directive, including assessment of economic needs and alternatives to the respective motorway, took place.[14]

Similarly, in the Estonian case, the port establishment procedure was not carried out in accordance with Art 5.1 and Annex I (h) of the SEA Directive (and subsequently with the Habitat Directive) as no site alternatives were identified, described and evaluated during the planning proceedings or at later stages of the process, including EIA proceedings (see above).

4 Conclusions

The cases, assembled in the presented J&E collection, document a whole number of examples of incorrect implementation of the EIA Directive (and other EC norms) in the respective EU Member States. Some of them can be seen as typical for environmental decision-making procedures in these countries in general and in particular concerning the assessment and permission of transport infrastructure projects. This especially concerns:

- failure to carry out environmental impact assessment of the whole project ("salami-slicing" of the roads);
- insufficient assessment of all the impacts of the projects, particularly indirect and synergic effects;
- non-assessment of real alternatives of the projects;
- failure to guarantee effective and timely public participation, especially to present all information in a reasonable form and time frame and to take into account comments made by the public.

It is clear that the competent authorities are not aware of the requirements of the EIA Directive and other EU legislation, or that they are ignoring these requirements for the sake of economic development. Some reasons for the problems may come about on a legislative level.

The cases also show the importance of adherence to the logical sequence of approval of concepts, forming the basis for the execution of projects which have significant impact on the environment and the actual permission of these projects, and the connected SEA and EIA processes. Otherwise, the requirements for selection of environmentally less damaging alternatives to the project are unavoidably breached, particularly in the cases of interference in NATURA 2000 localities.

J&E is convinced that the following actions at both the national and EC levels should be undertaken to improve the enforcement of the EIA Directive and correct the imperfections uncovered in the legal analyses and case studies.

1. National transposition acts should be amended to ensure that

- Screening decisions are subject to judicial review;
- EIA results are taken into consideration in granting development consent;
- all criteria set out by the EIA Directive are given weight in screening procedures;
- the public is provided with all relevant information in an adequate, timely and effective manner;
- special regulations for transport-infrastructure projects, which can impinge on public-participation rights and restrict proper environmental impact assessment, are eliminated.

2. National practices should be changed to ensure that

- entire projects (e.g. the planned highway, not its component sections) are subject to environmental impact assessment;
- all potential project impacts, including indirect, cumulative and synergistic impacts, are properly described and considered;
- investors study and present all alternative courses of development so that options that would do less health and environmental harm can be considered;
- effective and timely public participation is guaranteed: all information is presented in an accessible form within a reasonable time frame, and consent decisions take into account public concerns.

3. The European Commission should focus on the above-mentioned shortcomings when monitoring transposition and implementation of the EIA Directive (including the possibility of infringement procedures) and consider preparing appropriate guidance documents.

4. In the medium or long term, the Commission might consider amending the EIA Directive to make clearer the prohibition on the "salami-slicing" of projects and the obligation to take into account all realistic alternatives to the project. The case studies show the importance of adhering to a logical sequence of concept and plan approval, forming the basis for permitting and executing projects with significant environmental effects and related processes under Directive 2001/42/EC (SEA Directive) and the EIA Directive.

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13 *See The Relationship between the EIA and SEA Directives: Final Report to the European Commission*, Imperial College London Consultants, August 2005 (http://ec.europa.eu/environment/eia/pdf/final_report_0508.pdf) for more comprehensive discussion and recommendations on this topic. Breaching the logical order of SEA and EIA procedures also represents a core reason for the conflict of the investigated projects and procedures with regard to the requirements of the Bird and Habitat Directives (see above). Alternative corridors of the highway should be assessed on the level of land use plan proposal (and related SEA procedure). In the Czech case, however, when preparing the land use plan proposal, the authorities refused to consider any other alternatives since the EIA final opinion already existed. Alternatives were therefore not assessed, either in the SEA or the EIA process.

14 Moreover, there has still been no official agreement between the Czech Republic and Austria about the border connection, which could render all procedures carried out to date useless.

Imprint

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Manuscripts should be submitted as files by email to the Editors using an IBM-compatible word processing system.

The elni Review is the review of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): € 52; private users, students, libraries: € 30. Non-members can order single issues at a fee of € 20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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elni Membership

If you want to join the Environmental Law Network International, please use the membership form on our website: **http://www.elni.org** or send this form to the ***elni* Coordinating Bureau,** c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is € 52 per year for commercial users (consultants, law firms, government administration) and € 21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:
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- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

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  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
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- **Companies and environment**
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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
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- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
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- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

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