



**Comparative Legal Analysis for EIA
and Transport Infrastructure**
Legal Analysis Collection
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Introduction – Aims and Context of the Analysis

Justice & Environment (J&E) is a network of public interest environmental law organisations based in the EU member states. J&E aims to use law to protect people, the environment and nature. Its primary goal is to ensure the implementation and enforcement of the EU legislation through the use of European law and exchange of information.

Having started its work as informal network already on year 2003, the first full-year workplan was developed by J&E only for 2006. The EIA Directive (85/337/EEC) has been chosen by J&E members as one of three first legal areas to be worked on. In 2006, all six J&E members have been involved with this topic: Estonian Fund for Nature (Estonia), Environmental Law Centre (Poland) Environmental Law Service (Czech Republic), Oekobuero (Austria), Environmental Management and Law Association (Hungary) and Via Iuris (Slovakia).

Within the works on EIA Directive there have been two kinds of activities carried out – legal analysis of its transposition into the national legal systems and a collection of case studies, illustrating the gaps in implementation of its provisions articles in the respective EU Member States.

The legal analysis concerning transposition of the EIA Directive was not meant to provide a comprehensive conformity checking. Instead it has been focused on selected provisions of the Directive, transposition of which - according to experience of J&E members and in the light of relevant judgments of the European Court of Justice - seems to have created most problems in national legislations. On the other hand - the legal analysis is not limited to mere transposition but includes also, to certain extent, a reference to application of the transposing provisions in practice (i.e. on the **implementation** of the directive) as coming from legal practice or literature etc.

The comparative legal analysis has been composed on the basis of six national reports presenting legal analyses from six different EU Member States – Austria, Czech Republic, Estonia, Hungary, Poland and Slovakia. The national reports, as already mentioned, have been focused on checking transposition in relation to selected issues only and neither present a comprehensive overview of the transposition of EIA Directive into national legal systems nor a comprehensive overview of the EIA schemes in the countries involved. Also the comparative analysis concentrates on presenting only certain common trends, in particular problems, identified in the national analyses, and by far less attention is given to describing various national provisions, which albeit different - have been found to correctly transpose the respective provisions of the Directive.

Comparative Legal Analysis

1. General information on the transposition of EIA directive

All the countries subject to the analysis have formally concluded transposition of Directives 85/337/EEC, 97/11/EC and 2003/35/WE.

In most countries the transposition has been finished on time. Only the Slovak report noted delays in transposition of all the three Directives, while the Austrian one mentions delay in transposition of the Directive 2003/35.

Directive 2003/35/EC was not transposed into the Czech law within the deadline set by the directive (25th June 2005) at all. As late as on 27th April 2006, an amendment to the EIA Act (Act no. 163/2006 Coll.) entered into force, transposing, however, only some of the requirements of the 2003/35/EC directive. The non-conformity concerning art. 10a of the EIA directive, as amended by the 2003/35/EC directive (access to justice), in particular, has not been rectified. Therefore, the Commission has started an infringement procedure with the Czech Republic (a letter of formal notice was sent on August).

2. Overall framework of EIA scheme

Article 2.2 of the EIA Directive allows that “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”.

While many “old” Member States have chosen the first approach and have integrated this way or another EIA into the existing procedures for consent to projects, only Estonia (out of six countries involved) has followed this approach. The four other countries (Czech Republic, Hungary, Slovakia - and since 2005 also Poland) have established EIA as a stand-alone decision-making procedure, separated this way or another from the existing procedures for development consent. Such procedures are meant to serve as “development consent” and meet all the requirements under EIA Directive. They have to be obtained before an application for some other “traditional” development consents (usually for a construction permit) is made. They have different names and legal status, some are binding and some non-binding.

In at least three cases (Czech Republic, Poland and Slovakia) the above framework raises serious doubts. In particular it is questionable if such decisions may be considered as “development consent” in the meaning of Article 1.2 of EIA Directive i.e if indeed they “entitle the developer to proceed with the project”? The point is that in itself the EIA decision alone does not entitle the developer to proceed with the project, since the developer needs to obtain also a construction permit (or other decision). Thus there are doubts if they can be treated as “the principal decision” in the meaning given in Case C- 201/02 Delena Wells, in particular those which are not binding?

The EIA decision is granted at such early stage of the development process that often no precise details of the project are known already. Such details are usually known only when a detailed construction design is prepared for the purpose of obtaining the construction permit. And at this stage there is no EIA, since in some countries (Poland) the law states clearly that EIA may be required only once for a given project. This seems to be not in line with the ECJ rulings in cases C-508/03 and C-290/03 which both require possibility to carry out another EIA procedure also at the later stage of the development consent process - should particular features of the project require such second EIA procedure.

A specific approach has been taken in Austria which has an “EIA-permit” in form of one consolidated development consent that covers any legal permitting requirements for a certain project. This development consent is also 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). UVP-G’s consolidated development consent approach has proved to be very successful and is widely accepted by stakeholders. The main advantage for EIA-applicants is that they have all respective project permits after the EIA-permit was issued. In other permit proceedings than EIA’s an applicant would have to proceed (several) different sectoral permit procedures. Thus EIA proceeding shortens duration of projects permit proceedings and is hence favoured also by many investors.

Common to most countries investigated (except for Estonia and Hungary) is the fact that NGOs (and - in some of them - also other public concerned) have no possibility to challenge the decisions 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).

Lack of such possibility seems to be not in line with Article 10a of EIA Directive and with the established case law of the European Court of Justice.

In most of the investigated countries, the law - this way or another - tends to provide a special approach to transport projects, in particular to the construction of roads. This special approach in many occasions means providing less rigorous environmental control, sometimes not in conformity with the requirements of EIA Directive.

Some of the countries investigated have elaborated institutional instruments for assuring quality control of EIA documentation (Austria, Poland and Slovakia). In Austria it is Umweltsenat. In Poland it exists from 1989 the EIA Commission (now in form of both national EIA Commission and regional EIA commissions). In Slovakia it is the institution of so called Technical Appraisal. In Czech Republic there is a requirement for EIA report to be prepared by an accredited EIA expert and then reviewed by another accredited EIA expert.

3. Particular issues of concern

3.1. Requirement for EIA and development consent

The Directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also “made subject to a requirement for development consent”.

The particular question is if modernisation of existing roads does require a development consent and thus is subject to EIA?

It seems that in the majority countries subject to the analysis the requirement of Art. 2.1 of the Directive is transposed properly. Only in Poland some doubts arise whether there is a proper requirement for development consent in case of conversion into another type of land use, storage of scrap iron, afforestation, and intensive livestock rearing.

3.2. Approach to transposition of annexes

EIA directive requires that that all projects likely to have significant effects on the environment are subjects to assessment. For projects listed in Annex II of EIA Directive, the question whether they have significant effects or not must be decided in so called screening procedure. In this

procedure, criteria set out in Annex III (e.g. size of the project, cumulating with other projects, location of projects, characteristics of the potential impact) shall be taken into account. All the investigated countries employ combined approach to screening (case-by case examination combined with so called categorical approach that is setting thresholds or criteria).

3.3. Use of thresholds and selection criteria

As it was indicated above, only in relation to case-by-case examination the relevant laws clearly require competent authorities to use the selection criteria set out in Annex III, while in relation to categorical screening the relevant laws transposing the EIA Directive rarely make clear that all such criteria should be employed. Therefore, when using thresholds or criteria for selecting those projects which require assessment, there is a noticeable tendency in practice to prefer criteria related to the size of the projects 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 Directive¹.

3.4. Measures taken to avoid “salami slicing” and assure assessment of cumulative effects

All the countries subject to the analysis adopted certain legislative measures in order to avoid salami slicing.

The Czech analysis indicates however, that in practice the developers often artificially “cut” the projects into pieces for the purposes of the legal procedures, so that only short sections of the projects (especially roads) are than assessed and permitted.

3.5. Information to be supplied by the developer

In all countries the requirements for EIA report seem to be basically in conformity with the requirements of the EIA Directive, although not always literally and precisely enough. This in particular relates to alternatives, whereby the legal requirements in most countries are not sufficiently clear to assure mandatory presentation of alternatives (or sometimes - like in Slovakia - even allow the developer to neglect studying the alternatives).

Notable positive exception is Poland where the law clearly requires environmental report to include description of the alternatives studied by the developer, including mandatory both ‘zero’ alternative and “most environmentally friendly” alternative. There is also a clear requirement for indicating the reasons for his choice.

In all countries there are problems reported with addressing alternatives in practice. The alternatives are very often not assessed or not seriously assessed, common solution is also to describe only ‘zero-alternative’ besides the planned activity, whereas developer declares that he sees no other actual alternative to activities, proposed by him.

The law of all countries requires clearly a non-technical summary to be always included in the report. Most reports indicate problems in practice: this requirement is either treated in purely formalistic way which results in very short and absolutely un-informative couple of sentences or alternatively it is very technical and detailed, which does not help the public to understand the main impacts of the project.

¹ Para 65 of the judgment in Case C-392/96

3.6. Public participation

As opposed to majority of the “old” member states, where possibilities for the public to participate are provided at a relatively late stage of the procedure (when the environmental report is already prepared), most of the countries investigated (with the notable exception of Poland) provides possibilities for public participation at relatively early stage of the EIA procedure. In some countries (Hungary and Slovakia) the public can participate already at the screening stage, while possibility for the public to participate at the scoping stage, where the scope of the assessment is being decided, is granted in most countries investigated (Estonia, Czech Republic and again Hungary and Slovakia).

Neither of the investigated countries 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”.

Some of the countries (in particular Hungary and Slovakia) provide very detailed and precise time-frames for the different phases of the public participation procedure. Some other countries (in particular Poland) does not provide clear time-frames for the different phases of the procedure except for the period for submitting comments in relation to the application for the development consent and the relevant environmental report.

One also can have doubts if the deadlines for submitting the comments in some countries are “reasonable” (for example the fixed period of 21 days for commenting the EIA report in Poland).

3.7. Assuring that results of EIA are taken into account in the final decision whether to approve the project

There are requirements that the results of EIA procedure are taken into account in the decision. However, in case of the countries having a separate EIA decision it is not always so clear that they are taken into account in the final decision which entitles the developer to proceed with the project (i.e usually in the construction permit).

3.8. Transboundary assessment

Although most countries investigated has transposed the Article 7 of the Directive literally, in those of them that have a separate EIA procedure the problem is that legislation allows affected Member States to participate in the EIA procedure itself, but not in the subsequent decision-making procedures.

Moreover, in practice the transboundary assessment rarely takes place even if the environment of a neighbouring state is seriously affected.²

4. Conclusions

1. There is a visible trend in most investigated countries to establish EIA as a stand-alone separate procedure preceding other decision-making procedures which finally “entitle the developer to proceed with the project”. In countries which associate all the requirements of EIA Directive only with this procedure and not with subsequent decision-making procedures (in

² See the R 52 (Czech) and A5 (Austrian) case studies as examples.

particular in Czech Republic and Poland) this approach seems to result in serious non-conformity.

2. Except for the above fundamental problem there is also a number of other transposition problems relating to particular provisions of the EIA Directive. They relate to: screening, public participation and access to justice.

3. Sometimes literally correct transposition is not sufficiently precise to assure proper implementation. Most common implementation problems relate to alternatives, non-technical summary, using screening criteria and transboundary procedure.

4. There is a number of positive examples in investigated countries that may be worth promoting: attempts to assure quality control, setting precise time-frames for different stages of public participation procedure and putting precise requirements for alternatives to be addressed.

National Reports

AUSTRIA



1. General information on the transposition of EIA directive, in particular:

whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive):

Directive 85/337/EEC

Directive 97/11/EC

Directive 2003/35/EC

names of national act(s) transposing the directive,

any other information on transposition you consider necessary

A) UVP-G: Federal Act on Environment Impact Assessment

In Austria there is only one (federal) EIA-act **Federal Act on Environment Impact Assessment (EIA Act 2000)**. The German name of EIA Act 2000 is “*Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000)*“. The act was published in BGBl³ 1996/773, BGBl I 2000/89. The official German abbreviation for EIA Act 2000 is UVP-G 2000. For the purpose of this study we use the abbreviation UVP-G.

B) Transposition on time

UVP-G transposes EC EIA-Directive⁴ and regulates all procedural and material aspects related to Environmental Impact Assessment (EIA) in Austria for both the federal and regional level (Bundesländer)⁵. EIA Directive and its amendments were transposed on time. Directive 2003/35/EC was transposed by an amendment⁶ of UVP-G that basically entered into force in June 2005.

C) EIA as consolidated development consent procedure

UVP-G rules that EIA-procedure is by the same time permitting procedure for the respective project (**development consent**).⁷ Any acts that are a condition for a project's permit have to be applied and decided in the respective EIA-proceeding (**consolidated development consent procedure, Article 3/3 UVP-G**).⁸ This means that at the end of the EIA procedure there is only one **consolidated development consent** issued that covers any legal permitting requirements for a certain project. This development consent is also 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**). UVP-G's **consolidated development consent approach** has proved to

³ BGBl means Bundesgesetzblatt (official federal journal)

⁴ Directive 85/337/EEC

⁵ Austria is a federal state with nine Bundesländer (regions). In Austria Bundesländer have legislative as well as administrative power.

⁶ Amendment of UVP-G as to Directive 2003/35/EC was published in BGBl I. 2004/153

⁷ See Raschauer in Raschauer/Wessely, Handbuch Umweltrecht (2006), page 294 (308)

⁸ Like for example waste, water, nature protection.

Article 2 paragraph 3 first sentence reads as follows:

„**Article 2.** (3) “Development consent” shall mean the acts or omissions of the authorities, as required by individual administrative provisions for the authorisation of a project's implementation, such as in particular, permits, approvals or declarations.”

Article 17 paragraph 1 first sentence reads as follows:

„**Article 17.** (1) When taking its decision on the application for development consent, the authority shall apply the development consent requirements contained in the relevant administrative provisions and in paragraphs 2 to 6“.

be very successful and is widely accepted by stakeholders. The main advantage for EIA-applicants is that they have all respective project permits after the EIA-permit was issued. In other permit proceedings than EIA's an applicant would have to proceed (several) different sectoral permit procedures. Thus EIA proceeding shortens duration of projects permit proceedings and is hence favoured also by many investors.

Given the fact that any **Austrian and European environmental law** has to be applied in UVP-G's consolidated permit proceeding UVP-G can be seen as a very positive example with particular importance for Austrian EC environmental law implementation.

Please note that the legal position is different for federal motorways and railroad projects.⁹

D) Competent authorities may be involved in conflicts of interests

Regional governments (Landesregierung) are **competent authorities** for all EIA-proceedings that are not federal transport projects (please read below for details).¹⁰ OEKOBUERO noted that problems often occur in EIA proceedings where regional governments (Landesregierung) have an interest that a certain project will be realized. Such cases can more often be observed in the field of infrastructure projects like regional roads or waste incineration plants but also if certain big investors are expected to bring economic development into a region.¹¹

Similar problems appear to occur in **federal transport** cases where Ministry of Transport (**BMVIT**, www.bmvit.gv.at) is responsible for planning, constructing and maintaining federal motorways/railroads and is concurrently the only competent permitting authority (with a very limited appeals procedure for parties).¹²

E) Umweltsenat (Environmental Senate) as exemplary appeal body

Umweltsenat (<http://www.umweltsenat.at/>) is the **appeal body for EIA proceedings** for all EIA-proceedings that are not federal transport¹³ projects (§ 5 USG).¹⁴ The court **guarantees effective procedural as well as substantive legal redress**.

The appeal body Umweltsenat comprises of ten judges and additional 32 legal experts (§ 1 USG). Umweltsenat has been established only for the purpose of EIA appeals to tackle the **technical and legal complexity of consolidated EIA permit proceedings**¹⁵. Its members are selected and designated for six years by the federal government and regional governments (§ 2 USG).

Umweltsenat is known and acknowledged **for concise and well elaborated decisions** with accurate legal and technical expertise. Umweltsenat frequently overrules and amends respective EIA-permits and stipulates additional permitting requirements. Consequently respective EIA permits prove to have **particular high legal standards** as the decision could

⁹ Please read below

¹⁰ § 39 UVP-G

¹¹ *Spielberg case*, Umweltsenat decision US 5B/2004/11-18, 3. Dezember 2004

¹² Please read below for details.

¹³ With transport projects we mean federal motorways and highspeed railroads. Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details.

¹⁴ Competences of Umweltsenat are ruled in Umweltsenatsgesetz (USG; Environmental Senate Act)

¹⁵ Any acts that are a condition for a project's permit have to be applied and decided in the respective EIA-proceeding (**consolidated development consent procedure, Article 3/3 UVP-G**). . Please read OEKOBUERO legal analysis on EIA-infrastructure of J&E Workplan 2006 for details.

otherwise be overruled by Umweltsenat.¹⁶ Therefore it can be concluded that Umweltsenat is one of Austria's core instruments for proper implementation and enforcement of EC and Austrian environmental law.

F) Structural shortcomings as to EIA provisions on federal transport projects

As mentioned above the legal position for EIA-proceedings is slightly different for EIA-proceeding on federal motorways and high speed railroads. Such projects are regulated in the third section of UVP-G, whereas all other projects fall into the second section. **The third section** is characterized by many deficiencies as compared to the **second section** of UVP-G, in particular on Public Participation and Access to Justice, interest conflict of permitting authority, uncertain consideration of EIA in subsequent permitting proceedings. Please read chapter II of this analysis for details.

G) Austrian case by case screening provisions as the main flaw of EIA and PP-Directive transposition

In J&E Workplan 2006 legal analysis on the Aarhus Convention in Austria we stated as follows.

The provisions on EIA- case by case screening procedure (Article 3/7 UVP-G; Article 24/5 UVP-G for federal transport projects)¹⁷ can be seen as the core problem of Austrian EIA-Directive and Aarhus Convention implementation from our understanding.

The reason for this assumption is that there are **no public participation** and/or **Access to Justice** provisions with regard to the screening decision. Public concerned **must not legally challenge screening** decision and **must not refer to EIA-Directive**, in any following permitting procedure and even though they had no possibility to participate screening and neither had any respective Access to Justice before.

Austrian EIA-case by case screening procedure is obligatory to assess whether an EIA proceeding is necessary in particular for **activities** with lower threshold values (compared to

¹⁶ In the case a party appeals. Neighbors have standing when they are affected. Their rights are limited to protect themselves but not to protect environment. NGOs have full standing since June 2005. Citizen's groups have full standing only in certain EIA procedures. Please read OEKOBUERO Aarhus case study for J&E Workplan 2006 as for details.

¹⁷ Article 3/7 UVP-G read as follows:

“**Article 3.** (7) Upon request by the project applicant, by a co-operating authority or by the ombudsman for the environment, the authority shall state whether an environmental impact assessment for a project needs to be performed pursuant to this Federal Act and which criterion of Annex 1 or Article 3a (1) to (3) applies to the project. This statement may also be made ex officio. The decision shall be taken in the first and second instances by administrative order within six weeks each. The project applicant, the co-operating authorities, the ombudsman for the environment and the host municipality shall have locus standi. Before the decision is taken, the water management planning body shall be heard. The essential substance of the decisions, including the main reasons for them, shall be published or made accessible to the public in a suitable way by the authority. The host municipality may file a complaint against the decision taken with the Administrative Court. The ombudsman for the environment and the co-operating authorities are exempted from the obligation to reimburse cash expenses.”

Annex I), (and) in **sensitive areas** (Article 4.3 and **Annex III** EIA Directive), for **extensions** and **amendments** of existing installations, to assess **cumulative effects** of different projects (to assess potential “**salami-slicing**”).

The main problem with regard to the Austrian EIA-case by case screening procedure is that (estimated) 80 % of screening proceedings end with the result that no EIA is necessary.¹⁸ **The public may neither participate (or even have standing) in this screening proceeding nor appeal against the screening decision.**

From a legal point of view the particular problem is that the question that an **EIA** would be necessary for a project **must not be brought up in any stage** of any following project development consent proceedings. The **screening decision is binding** for all following proceedings.

This legal position is **heavily criticized** by the vast majority of legal experts in Austria as an infringement of EIA-Directive, ECJ-case law,¹⁹ Austrian constitutional and administrative law²⁰ as well as the Aarhus Convention. The Aarhus **Convention does not provide for such a limitation on Access to Justice**. This legal position is, from our understanding, in contrast to **Article 6 and 9/2** of the Aarhus Convention that provides for Public Participation and Access to Justice for activities listed in Annex I of the Aarhus Convention. In addition this legal position is in contrast to **Article 9/3** of the Aarhus Convention that provides for Access to Justice to acts of public authorities in environmental matters.

In addition, the Austrian EIA-screening provisions infringe European law. The Austrian legal position on screening proceedings **precludes any reference on EIA-directive** in a project's permitting procedure. This is in contrast to ECJ²¹ case law whereas **concerned subjects have the right to directly refer to EIA-directive** (if they did not have the chance to do in another stage of a proceeding).

In a **recent judgement** (ECJ 4. May 2006, C-290/03 Diane Barker) the ECJ ruled that “Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the **second stage, that the project is likely to have significant effects** on the environment by virtue inter alia of its nature, size or location” and “*that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, Commission v United Kingdom, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.*”

¹⁸ There is no official available statistic. The 80 % rate was researched by OEKOBUERO by individual interviews and calculations. The figure is mentioned by civil servants in official talks.

¹⁹ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01, *Commission vs Spain*, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

²⁰ Read *Raschauer/Ennöckel* § 3 Rz 41 for details

²¹ ECJ 7.1.2004, C-210/02, *Delena Wells*; ECJ 16.9.1999, C-435/97, *World Wildlife Fund (WWF) u.a.*; ECJ 24.10.1996, C-72/95, *Kraaijeveld u.a.*; ECJ 7.9.2004, C-127/02, *Niederländisches Waddenmeer*, ECJ 19.9.2000, C-287/98, *Linster*, ECJ 16.9.2004, C-227/01, *Commission vs Spain*, ECJ 2.2.1998, C-321/95, *Greenpeace vs Commission*

Thus Austria would have to directly **apply**²² **EIA-Directive and Aarhus Convention** as the Austrian legislation is in contrast to EC Environmental law with regard to de Berre judgement (C-213/03, C-239/03)²³ and the above mentioned ECJ decisions.

In spring 2006 the **European Commission** stated in an official press release that the Commission – after having received many similar individual complaints from Austria - may have observed a **potential structural flaw** in Austrian EIA-legislation as to the combination of high threshold values and **weak case by case screening** proceedings.²⁴

2. Overall framework of EIA scheme (up to 1 page), in particular:

relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relation, which is “principal” and which “implementing” decision (see- Case C- 201/02 Delena Wells)

As mentioned above the Austrian EIA-procedure is by the same time permitting procedure for the respective project not only as to substantive UVP-G provisions but also to all other applicable environmental legislation (**consolidated development consent procedure**). This means, if the consolidated development consent procedure issues a permit this is the development consent for the respective project. With other words: There can be no EIA decision without legally permitting the project. Hence the relationship between EIA and development consent is fine.

Please not that the situation is different for federal transport projects (**consolidated development consent procedure** for projects that started since June 2005; no consolidated permit before).²⁵

Whether there are special procedures/arrangements made for transport projects

A) Regional and municipal roads

Austrian roads are either Federal, Regional (=Bundeslaender) or Municipal roads. The construction of Municipal roads normally doesn't require an EIA, as the construction most of the time does not exceed the respective threshold (XX km minimum length). For regional roads the regular EIA procedure (second section of UVP-G) is applicable.

B) Federal motorways and high speed railroads

²² C-213/03. “A provision in an agreement concluded by the Community with a non member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.”

C-239/03 paragraph 25: “In accordance with case-law, mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence (see, to that effect, Case 12/86 Demirel [1987] ECR 3719, paragraph 9, and Case C-13/00 Commission v Ireland [2002] ECR I-2943, paragraph 14).

C-239/03 paragraph 26: From this the Court has inferred that, in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Demirel, cited above, paragraph 11, and Commission v Ireland, cited above, paragraph 15).

²³ ECJ C-213/03 (15 July 2004), Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v

Électricité de France (EDF); ECJ C-239/03 (7 October 2004), *Commission vs France*

²⁴ Inringment procedure Tauernbahn, siehe newflash juli 2006 für nachweis

²⁵ Please read below for details.

As mentioned above EIA for federal transport projects is regulated in a special section of UVP-G (third section of UVP-G).²⁶ We already indicated above that many of the UVP-G's positive aspects do not count for EIA proceedings on federal motorways and high speed railroads. This is astonishing as exactly these two categories of EIA-projects are the most common and problematic ones. They lead to heaviest conflicts due to that projects nature of heaving potentially serious environmental impacts as wells large number of affected people.

EIA-provision shortcomings in federal transport projects:

a) Ministry of transport is planning, construction and permitting authority

Ministry of transport (BMVIT, www.bmvit.gv.at) is politically responsible for federal motorway and railroad constructions (planning, construction, control) and by the same time the only (EIA) permitting authority for the same projects. With other words: BMVIT permits projects it plans before. The situation is worsened by the fact that Access to Justice is very limited in federal transport proceedings (please read below)

b) Limited and ineffective Access to Justice²⁷

Access to Justice and participation rights are **limited** as compared to UVP-G's second section, basically because **Umweltsenat** is not competent appeal body and Ministry of Transport might be biased as it is planning and by the same time EIA permitting authority.

The only legal redress bodies for federal transport EIA-permits are the

- **highest Constitutional²⁸ (VfGH²⁹) and**
- **Administrative³⁰ Courts (VwGH³¹).**

Administrative Court is established to assess legality of administrative decisions. As this court is the highest Austrian administrative court it basically focus' on "**significant**" **procedural and material problems**, but can **not** go into **substantive details** by its nature.

The same counts for the **Constitutional Court**. The role of the court to address (signifant) constitutional faults of administrative decisions as well as **legality of general regulations** and parliamentary acts.

In **contrast to Umweltsenat** highest Constitutional and Administrative Courts may

- only cancel an EIA decision (**courts of cassation**), but **must not overrule** or amend a decision.
- In contrast to Umweltsenat, that amends decisions frequently, it has been an exemption if Constitutional Court cancel's an EIA decision.
- This happens only if there are serious and "significant" shortcomings in EIA- permitting procedure.

²⁶ The third section of UVP-G distinguishes between **federal motorways** and **high speed railroads**.

²⁷ Please read OEKOBUERO legal analysis on Aarhus implementation in Austria of J&E Workplan 2006 for details

²⁸ For motorway EIA that started before June 2005. Please read OEKOBUERO legal analysis on EIA- infrastructure of J&E Workplan 2006 for details

²⁹ Verfassungsgerichtshof (Constitutional Court) www.vfgh.gv.at

³⁰ For highspeed rail tracks; for motorway EIA that started before June 2005. Please read OEKOBUERO legal analysis on EIA- infrastructure of J&E Workplan 2006 for details.

³¹ Verwaltungsgerichtshof (Administrative Court) www.vwgh.gv.at

- Until now Umweltsenat only rejected three EIA-decisions, but amended 100s of decisions. The latter is not possible for the highest courts.

Though both court's case law is profound and brilliant it has to be stressed that they **have not been established to focus on substantive details** of complex proceedings like federal transport EIAs.

In addition we have to state that the average³² appeal proceeding duration is

- **22 months** at the Administrative Court
- **8,5 months** at Constitutional Court

Highest court appeals do usually not allow **interim relief** (suspensive effect). In theory it would be possible, but its an extraordinary exemption interim relief is granted. As result motorways might be constructed or even opened for traffic before highest courts decide. This legal position is in **contrast to Art 9/4** of the Aarhus Convention.

Hence Access to Justice provisions for **federal transport projects are ineffective substantive and procedural legal redress** with regard to Article 9/2 of the Aarhus Convention as well as PP-Directive³³.

c) Lack of consolidated development consent procedure/infringement of EC-law

For federal transport projects there is **no consolidated development consent** procedure. This means that after the EIA-permit was issued the applicant has to run through additional permitting procedures for sectoral acts like waste, water, nature protection. Since the 2005 amendment³⁴ of UVP-G the legal position has slightly improved in the way that "some groups" of proceedings are "concentrated" and "coordinated" ("**partly consolidated development**

³² Official report to parliament on VfGH and VwGH: BKA, III-163 der Beilagen, 22GP

³³ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

³⁴ BGBl I. 2004/153

consent procedure“),³⁵ although there has been not much experience yet how this approach would work in practice.

UVP-G's provisions on EIA for federal motorway projects infringed **EC EIA Directive** for all proceedings that started before June 2005. That was ruled by the Austrian highest Administrative Court (VwGH) in the year 2003.³⁶ The reason for that is that respective EIA-permits are issued in the legal **form of a regulation** and not as required by **ECJ** (European Court of Justice) with a single decision.³⁷ The main legal problem is that regulations can not legally ensure that EIA requirements are considered in the concrete project.³⁸ The legal position has changed since the 2005 amendment of UVP-G. But it is still unclear if EIA is sufficiently considered in the permitting proceedings the follow a transport EIA.³⁹

For proceedings that started since June 2005 the legal position has improved⁴⁰ with UVP-G amendment 2005.⁴¹ But no relevant EIA has been carried out under the new procedure.

relation to SEA

³⁵ Article 24 paragraph 1 to 5 read as follows:

“Procedures, authority

Article 24.

(1) *If a project has to be submitted to an environmental impact assessment pursuant to Article 23a or Article 23b, the Federal Minister of Transport, Innovation and Technology shall implement the environmental impact assessment and a partly consolidated development consent procedure. In this development consent procedure, the Federal Minister of Transport, Innovation and Technology shall apply all approval provisions that are required for the project's implementation under federal administrative law and otherwise would have to be applied by himself/herself or another federal minister. The Land governor may be entrusted with the performance of the environmental impact assessment procedure and, with regard to high-speed railroads, also the partly consolidated development consent procedure in full or in part if this is in the interest of expediency, speed, simplicity and cost savings.*

(2) *The Federal Minister of Transport, Innovation and Technology shall also be the competent authority in the declaratory procedure pursuant to paragraph 5. The administrative district authority shall be responsible for implementing the penal provisions.*

(3) *The Land governor shall perform a partly consolidated development consent procedure in which he/she shall apply the rest of the approval provisions required for the project's implementation under federal administrative law, also to the extent that they fall in the domain of the municipalities. The administrative district authority may be entrusted with the performance of the partly consolidated development consent procedure in full or in part if this is in the interest of expediency, speed, simplicity and cost savings.*

(4) *The Laender shall retain their competence for implementing the approval provisions under administrative law.*

(5) *The authority pursuant to paragraph 2 shall inform the co-operating authorities, the ombudsman for the environment and the host municipality about planned projects in accordance with Articles 23a and 23b and shall provide them with adequate documentation for the identification of the project and for the assessment of its impact according to Article 23a (2) and (3) or Article 23b (2). Within six weeks of receipt, they may request a declaration stating whether an environmental impact assessment needs to be performed for the project, and they shall have locus standi with the rights according to the second sentence of Article 19 (3). The project applicant shall also have locus standi and the right to submit requests. A decision on this request shall be taken by way of administrative order within eight weeks. The essential substance of the decision and the main reasons for it shall be published or made accessible to the public in a suitable way. This paragraph shall not apply if an environmental impact assessment will be performed for the project at any rate.”*

³⁶ VwGH 21.10.2003, 2003/06/0078; see *Ennöckl/Raschauer*, § 23a, Rz 2 for details and additional references

³⁷ ECJ C-435/97 of 16. Sept 2006, *WWF/Bolzano airport and others*

³⁸ Please read *Ennöckl/Raschauer*, § 23a Rz 2 for details and references

³⁹ See *Ennöckl/Raschauer*, § 24h Rz 7 for details

⁴⁰ But did not solve the problem of full consideration of EIA in following development consents. Please read below.

⁴¹ BGBl I. 2004/153. Please read below for details.

Different to the transposition of EIA-Directive SEA Directive has been transposed fragmentary in up to 50 different regional and federal acts.⁴² Transport projects on regional and local level are to be transposed by the respective Bundesländer (Regions). The transposition approaches differ widely.⁴³

As for **federal motorways, high speed railroads** and **inland waterways** a specific **Federal Act on Strategic Assessment of Transport (SP-V- Strategische Prüfung Verkehr; BGBl I 2005/96)** was enacted in August 2005.⁴⁴ It is remarkable that the word “environment” does not appear on the official name of the act although this act primary serves as transposition of EC SEA Directive. A strategic assessment as to SP-V has to be carried out before EIA proceeding starts.

Next to the fact that the act was transposed only one year after SEA Directive was to be transposed SP-V is characterized by **serious shortcomings** and is an example of particular bad (or/and respectively not) EC law transposition:

- **Important aspects of SEA Directive are missing.**⁴⁵
- For example there is a **lack of provisions** on the core⁴⁶ element of SEA-Directive, the **Environmental Report** (Article 5, Annex I).
- SP-V **avoids any modal split assessment** of different means of transport (for example motorway vs railroad/waterway) and respectively makes that impossible.
- Public participation is foreseen only after the assessment.
- It appears that SP-V approaches to “**keep anything as it was before**”.

The **practice** is even **worse**. SP-V is making an SEA only for a concrete project, but not on the strategic level.⁴⁷ Alternatives are not seriously considered. This assumption was proved by those SP-V proceedings that took place until now:

- Plans which have undergone this procedure have not been modified at all.
- The documents presented are of bad quality. Comments of the public were not considered and had no impact.
- The legal and political decisions on a certain road track are made before SEA starts. Hence SP-V can not be seen as SEA with regard to the SEA Directive.
- SP-V did not lead to any change in planning federal transport projects.

It's obvious that SP-V is supposed to be nothing more than a “formal exercise” to transpose SEA Directive; however, an exercise that failed.

3. Particular issues

Overview on Austrian EIA-proceeding:

- **Application:**
 - Project applicant initiates EIA-proceeding by conveying env. impact statement and project materials to the competent authority.

⁴² See *Alge/Kroiss* in *Raschauer/Wessely*, Handbuch Umweltrecht (2006), page 263 (277). Not all acts have implemented SEA Directive until now.

⁴³ See *Alge/Kroiss* in, Handbuch Umweltrecht (2006), page 276 for details

⁴⁴ See *Alge/Kroiss* in, Handbuch Umweltrecht (2006), page 280

⁴⁵ *Alge/Kroiss* in, Handbuch Umweltrecht (2006), page 280

⁴⁶ EC Guidance Document: Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment

⁴⁷ *Alge/Kroiss* in, Handbuch Umweltrecht (2006), page 280

- **Public inspection:**
 - Competent authority makes copy of the application, and project documents available for public inspection (Art 9)
- **Public participation:**
 - Public concerned has to send comments or written complaints during the period for public inspection in order to get standing and Access to Justice.
- **Environmental impact expertise:**
 - Environmental impact expertise is prepared by the authority. This expertise serves as base for subsequent decision.
- **Public hearing/oral proceeding**
- **Decision** (consolidated development consent)

Competent authority is responsible for respective steps. The applicant has to provide information that is usable for all subsequent procedural steps.

1) Requirement for EIA and development consent - Art 2.1 and Case C- 201/02 Delena Wells.

The Directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also “made subject to a requirement for development consent”.

The particular question is if modernisation of existing roads does require a development consent and thus is subject to EIA?

UVP-G’s approach on modernisation and extension covers respective requirement of EC EIA Directive from our understanding. Rules for modernisation and extension are set up in Article 3a of UVP-G for all projects that are not federal transport projects⁴⁸ and for the latter in

⁴⁸ Modifications

“Article 3a. (1) Modifications of projects

1. that amount to a capacity increase of at least 100% of the threshold value indicated in Column 1 or 2 of Annex 1, if such a threshold value is specified, shall be submitted to an environmental impact assessment; this shall not apply to threshold values for modifications pursuant to no. 2;

2. for which a modification criterion is defined in Annex 1 shall be submitted to an environmental impact assessment provided that this criterion is met and the authority determines on a case-by-case basis that significant harmful, disturbing or adverse effects on the environment as defined in Article 1 (1) no. 1 are to be expected due to the modification.

(2) An environmental impact assessment shall be performed for modifications of other projects listed in Column 1 of Annex 1

1. if the threshold value of Column 1 is already reached by the existing installation or will be reached upon implementation of the modification, and if the modification results in a capacity increase amounting to at least 50% of this threshold value, or

2. if the capacity is increased by at least 50% of the previously approved capacity of the project in case no threshold value is indicated in Column 1 of Annex 1, and if the authority determines for the case in question that significant harmful, disturbing or adverse effects on the environment as defined in Article 1 (1) no. 1 are to be expected due to the modification.

(3) A simplified environmental impact assessment shall be performed for modifications of other projects listed in Column 2 or 3 of Annex 1

1. if the threshold value of Column 2 or 3 is already reached by the existing installation or will be reached upon implementation of the modification, and if the modification results in a capacity increase amounting to at least 50% of this threshold value, or

2. if the capacity is increased by at least 50% of the previously approved capacity of the project in case no threshold value is indicated in Column 2 or 3 of Annex 3, and if the authority determines for the case in question that significant harmful, disturbing or adverse effects on the environment as defined in Article 1 (1) no. 1 are to be expected due to the modification.

Article 23a and 23b.⁴⁹ Respective provisions were adapted and improved when implementing Directive 2003/35/EC and recent ECJ-judgements (UVP-G amendment 2004)⁵⁰.

However, the provisions are quite complicated to read. UVP-G distinguishes as to modernisation among others between different columns of UVP-G Annex I.⁵¹ Partly UVP-G Annex I (and Article 23a and 23b UVP-G for federal transport projects) sets up threshold values not only for certain categories of projects but also for modernisation and extension of such projects. When no such amendment threshold values is available UVP-G provides that a 50 % extension of an existing EIA-permitted installation requires a modernisation development EIA consent – only after a case by case screening (Article 3/7 UVP-G; Article 24/5 UVP-G) - as general rule. Though, there are exemptions.

(4) When taking the decision on a case-by-case basis according to paragraph 1 no. 2 as well as paragraphs 2 and 3, the authority shall take into consideration the criteria identified in Article 3 (4) no. 1 to 3. Article 3 (7) shall apply.

(5) Unless Annex 1 provides otherwise, the applicability of an environmental impact assessment to modifications according to paragraph 1 no. 2 as well as paragraphs 2 and 3 shall be assessed on the basis of the sum total of the capacities approved in the past five years, including the capacity increase applied for, provided that the modification applied for results in a capacity increase amounting to at least 25% of the threshold value or, if no threshold value is specified, of the previously approved capacity.

(6) If modifications of projects under Annex 1 that fall below the threshold values of paragraphs 1 to 5 or do not fulfil the criteria defined therein are spatially related to other projects and, together with them, reach the relevant threshold value or fulfil the criterion of Annex 1, the authority shall examine on a case-by-case basis whether significant harmful, disturbing or adverse effects on the environment are to be expected due to a cumulation of effects and whether, as a result, an environmental impact assessment shall be performed for the modification planned. A case-by-case examination shall not be carried out if the capacity of the project submitted is less than 25% of the threshold value. When taking a decision on a specific case, the criteria of Article 3 (4) no. 1 to 3 shall be taken into consideration, and Article 3 (7) shall be applied. The environmental impact assessment shall be performed as a simplified procedure.

(7) The development consent to the modification shall also cover the project already approved to the extent necessary due to the modification for protecting the interests indicated in Article 17 (1) to (5).

(8) An environmental impact assessment shall not be performed for measures that are the object of an adaptation or rehabilitation procedure under administrative law. Paragraphs 1 to 6 shall apply analogously to measures exceeding that scope.”

⁴⁹The respective threshold values are: “Scope for federal roads **Article 23a**.

(1) An environmental impact assessment (Article 1) shall be performed for the following federal road projects in accordance with this section:

1. construction of new federal roads or their subsections, except for additional interchanges,
2. extension of an existing federal road from two lanes to four or more lanes over a continuous length of 10 km or more,
3. construction of a second carriageway over a continuous length of 10 km or more.

(2) An environmental impact assessment (Article 1) shall be performed in the form of a simplified procedure for the following federal road projects in accordance with this section: 1 4

1. construction of additional interchanges if an average daily traffic volume of 8,000 motorised vehicles or more is expected to be reached on all ramps taken together within a forecasting period of five years;
2. projects according to paragraph 1 no. 2 or 3 with a length of less than 10 km, if they reach a length of 10 km or more together with directly adjacent subsections that have not yet been opened or were opened to traffic within the past 10 years.
3. extension measures of any other type for federal roads, if they border on a protected area of Category A, B, C, D or E according to Annex 2 and if, taking into consideration the extent and sustained effects of the environmental impact, significant adverse effects are to be expected for the protected habitat (Category B of Annex 2) or the protection purpose for which the protected area has been established (Categories A, C, D and E of Annex 2) in any specific case; excepted are cases in which protected areas are only bordered on by protective structures for eliminating danger zones or in which existing roads are moved due to disasters or the construction of new bridges, the construction of additional car parks for less than 750 motorised vehicles, the construction of additional

In general, but not always, it can be said that an EIA is only necessary if a case by case screening leads to the result that an EIA is necessary. Since UVP-G amendment 2004⁵² an EIA without case by case screening is obligatory when modernization reaches 100 % of an UVP-G Annex I threshold value.

The main flaw of this approach is from our understanding, once again, the case by case screening (Article 3/7 UVP-G; Article 24/5 UVP-G) to assess whether modernisation development consent EIA is necessary or not for a (see above, exclusion of public and appeals). In practise it's quite common to apply for an EIA-permit with low capacities approved and extend the installation or road slightly year by year. Article 3a paragraph 5 (similar for federal motorways Art 23a, 23b) is supposed to tackle that issue:

establishments pursuant to Article 27 Bundesstrassengesetz 1971 (Federal Road Act) with an area of less than 5 ha, the addition of crawler lanes, the shifting of ramps, the construction of additional individual ramps for existing junctions or interchanges or changes of the road's centre line or level by less than 5 m, installations for road operation and environmental protection measures. When taking a decision on a specific case, Article 24 (5) shall apply." "Scope for high-speed railroads

Article 23b.

(1) For the following high-speed railroad projects that go beyond extension measures for existing railroads, an environmental impact assessment (Article 1) shall be performed in accordance with this section:

1. construction of new lines for long-distance railway traffic or their subsections, construction of other new railway lines or their subsections over a continuous length of 10 km or more,
2. modification of railway lines or their subsections over a continuous length of 10 km or more, if the distance between the middle of the outermost track of the modified route and the middle of the outermost track of the existing route exceeds 100 m.

(2) An environmental impact assessment (Article 1) shall be performed in the form of a simplified procedure for the following high-speed railroad projects in accordance with this section:

1. a) construction of new railway lines or their subsections, if they border on a protected area of Category A, B, C or E according to Annex 2, b) modification of railway lines or their subsections, if the distance between the middle of the outermost track of the modified route and the middle of the outermost track of the existing route exceeds 100 m and if they border on a protected area of Category A, B, C or E according to Annex 2, c) modification of railway lines by the addition of a track over a continuous length of 2.5 km or more if they border on a protected area of Category A, B or C according to Annex 2, or d) modification of railway lines or their subsections having a traffic volume of 60,000 trains/year (before or after the capacity increase) raising the train capacity by 25% or more if they border on a protected area of Category E according to Annex 2, if, taking into consideration the extent and sustained effects of the environmental impact, significant adverse effects are to be expected for the protected habitat (Category B of Annex 2) or the protection purpose for which the protected area has been established (Categories A, C and E of Annex 2) in any specific case; excepted are cases in which protected areas are only bordered on by protective structures for eliminating danger zones or in which existing routes are moved due to disasters;
2. projects according to paragraph 1 no. 2 or 3 with a length of less than 10 km, if they reach a continuous length of at least 10 km together with directly adjacent subsections that have not yet been opened or were opened to traffic within the past 10 years and if on the basis of the criteria defined in Article 3 (4) no. 1 to 3, significant harmful, disturbing or adverse effects on the environment are to be expected due to a cumulation of the subsections' effects in a specific case and, therefore, the project shall be submitted to an environmental impact assessment. When taking a decision on a specific case, Article 24 (5) shall apply.

(3) If an environmental impact assessment is to be performed for the construction of a high-speed railroad according to this section and if this project entails an accompanying measure listed in Annex 1 which is spatially and functionally related to this project, the environmental impact assessment shall be performed for the entire project (high-speed railroad and accompanying measure) in accordance with the provisions of this section. If the 15 simplified procedure is stipulated for the high-speed railroad and the accompanying measure, this procedure shall be applied. For all the subsequent development consent procedures, a new environmental impact assessment need not be performed.

(4) If the construction of a high-speed railroad that need not be submitted to an environmental impact assessment pursuant to paragraph 1 or 2 entails an accompanying measure listed in Annex 1 which is spatially and functionally related to this project, an environmental impact assessment shall be performed for the entire project (high-speed railroad and accompanying measure) in accordance with the provisions of this section. If the simplified procedure is

“(5) Unless Annex 1 provides otherwise, the applicability of an environmental impact assessment to modifications according to paragraph 1 no. 2 as well as paragraphs 2 and 3 shall be assessed on the basis of the sum total of the capacities approved in the past five years, including the capacity increase applied for, provided that the modification applied for results in a capacity increase amounting to at least 25% of the threshold value or, if no threshold value is specified, of the previously approved capacity.”

The problem is once more that a case by case screening (Article 3/7 UVP-G; Article 24/5 UVP-G) is necessary to assess Article 3a paragraph 5 additive provisions.

2) approach to transposition of annexes (in particular Annex I point 7 and Annex II point 10)

*Art.4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v Belgium
screening method*

case-by-case

categorical

combined

in case-by-case screening is the screening decision required to be accompanied by justification (Case C-87/02 Commission v Italy) in practice: are the justifications credible?

With regard to screening for EIA Directive Annex I point 7 and Annex II point 10 (Art.4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v Belgium) UVP-G refers to its Annex (not only for transport projects but for all projects) and respectively for federal transport cases to Articles § 23a and 23b. In the Annex of UVP-G and in Articles § 23a and 23b threshold values for projects are set up.

UVP-G follows a **combined screening approach**. UVP-G provides for an **obligatory EIA** without - obligatory⁵³ case by case screening - **Annex I column 1 and 2** projects (similar for federal transport Artc 23a/23b). For Annex I column 3 projects a positive case by case screening procedure (Article 3/7, Article 25/5 UVP-G for transport projects) is a pre-condition for an EIA. Please read above as for modernisation procedure provisions.

Case by case screening decision has to be justified. As mentioned above the problem is that there is no legal control for that decision. In practice many such decisions have weak justification but nobody from public concerned (neither NGOs, neighbours, citizen's groups or any other potential representative of public concerned) may appeal. Please read chapter I on that issue.

3) use of thresholds and selection criteria

*art. 4.3 and Annex III, and Case C-392/96 Commission v Ireland
in case-by-case screening are the criteria of Annex III required to be followed?*

stipulated for the accompanying measure, this procedure shall be applied. For all the subsequent development consent procedures, a new environmental impact assessment need not be performed.”

⁵⁰ BGBl I. 2004/153

⁵¹ See Ennöckl/Raschauer, § 3a; OEKOBUERO Information-Text on UVP-G (2005), page 16

⁵² BGBl I. 2004/153

⁵³ Voluntary case by case screening is always possible to assess what threshold value of UVP-G Annex is fulfilled. Article 3 paragraph 7 sentence 1 reads as follows:

“Article 3. (7) Upon request by the project applicant, by a co-operating authority or by the ombudsman for the environment, the authority shall state whether an environmental impact assessment for a project needs to be performed pursuant to this Federal Act and which criterion of Annex 1 or Article 3a (1) to (3) applies to the project.”

are they followed in practice?

in categorical screening are the criteria of Annex III required to be followed?

are they followed in practice?

The provisions are basically transposed in Article 3 paragraph 4⁵⁴ of UVP-G and in Annex 2⁵⁵ of UVP-G. In addition UVP-G Annex I threshold values consider Article 4.3 and Annex III (as well as Case C-392/96 Commission v Ireland) provisions. The provisions are quite similar for federal transport projects. Respective EIA Directive provisions are either part of categorical screening or art to be applied in case by case screening procedure (Article 3/7, Article 25/5 UVP-G).

Thus in can be concluded that Annex III of EIA-Directive has been transposed properly. The provisions are usually followed in practise. Most problems occur in weak case by case

⁵⁴ Article 3 paragraph 4 read as follows:

“Article 3. (4) In case of projects for which a threshold value is defined for certain protected areas in Column 3 of Annex 1 and, if this criterion is fulfilled, the authority shall decide on a case-by-case basis, taking into consideration the extent and lasting effects of the environmental impact, whether significant adverse effects are to be expected for the protected habitat (Category B of Annex 2) or the protection purpose for which the protected area has been established (Categories A, C, D and E of Annex 2). In this examination, protected areas of Category A, C, D or E of Annex 2 shall only be considered if they have already been designated or included in the list of sites of Community importance (Category A of Annex 2) on the day when the procedure is initiated. If such adverse effects are to be expected, an environmental impact assessment shall be performed. Paragraph 7 (Declaratory procedure) shall be applied. When taking the decision on a specific case, the authority shall take into consideration the following criteria:

1. Characteristics of the project (size of the project, cumulation with other projects, use of natural resources, production of waste, environmental pollution and nuisances, risk of accidents),
2. Location of the project (environmental sensitivity taking into account existing land use, abundance, quality and regenerative capacity of natural resources in the area, absorption capacity of the natural environment),
3. Characteristics of the potential impact of the project on the environment (extent of the impact, transboundary nature of the impact, magnitude and complexity of the impact, probability of the impact, duration, frequency and reversibility of the impact) as well as the change in the environmental impact resulting from the implementation of the project as compared with the situation without the implementation of the project. In case of projects falling under Column 3 of Annex 1, the changed impact shall be assessed with regard to the protected area.”

⁵⁵ Annex 2 read as follows:

“ANNEX 2

Categories of protected areas:

Category Protected area Scope

A Special protection area

Pursuant to Council Directive 79/409/EEC on the conservation of wild birds (Birds Directive), OJ No. L 103/1, as last amended by Council Directive 94/24/EC of 8 June 1994, OJ No. L 164/9, as well as pursuant to Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitat Directive), OJ No. L 206/7; protection areas included in the list of sites of Community importance pursuant to Article 4 (2) of this Directive; forest reservations pursuant to Article 27 Forstgesetz); Specific areas designated national parks¹) under Land law, precisely delineated areas designated for nature conservation purposes by administrative act, similar small-scale protection areas designated by ordinance or designated unique natural phenomena.

B Alpine zone The lower boundary of the alpine zone is the line of closed tree cover, i.e. The beginning of the area with isolated, stunted trees and low shrubs (see Article 2 Forstgesetz 1975).

C Water protection and conservation area Water protection and conservation areas according to Articles 34, 35 and 37 WRG 1959.

D Area subject to air pollution Areas defined according to Article 3 (8).

E Settlement area In or near settlement areas. The vicinity of a settlement area shall mean a zone within a radius of 300 m around the project site where land is defined or designated as follows:

1. Construction land where residential buildings may be constructed (excluding areas used exclusively for business, commercial or industrial purposes, single farm or other buildings),
2. Land for child-care facilities, playgrounds, schools or similar facilities, hospitals, medical institutions, residential homes for the elderly, cemeteries, churches and equivalent premises of recognised religious communities, parks, camp sites and outdoor swimming pools, gardens and allotments.”

screenings (Article 3/7 UVP-G; Article 24/5 UVP-G) as respective decisions must not be appealed by the public.

4) measures taken to avoid “salami slicing” and assure assessment of cumulative effects

Case C-392/96 Commission v Ireland (with respect to changes made by Directive 35/2003, concerning assessment of changes or extensions of existing projects - Annex I, point 22 and Annex II, point 13 of consolidated version of EIA Directive - there is relation to the problem of modernisation of existing roads - see point 1) above).

As mentioned above UVP-G has provisions against salami-slicing and to assess cumulative effects. The provisions improved notably after UVP-G amendment 2004. The main provisions are the following:

Article 3a paragraph 5

*“(5) Unless Annex 1 provides otherwise, the applicability of an environmental impact assessment to modifications according to paragraph 1 no. 2 as well as paragraphs 2 and 3 shall be assessed on the basis of **the sum total of the capacities approved in the past five years**, including the capacity increase applied for, provided that the modification applied for results in a capacity increase amounting to at least 25% of the threshold value or, if no threshold value is specified, of the previously approved capacity.”*

Article 23a paragraph 2 lit 2:

*2. projects according to paragraph 1 no. 2 or 3 with a length of less than 10 km, if **they reach a length of 10 km or more together with directly adjacent subsections that** have not yet been opened or were opened to traffic within the **past 10 years**.*
(provisions for highspeed railroads are similar)

Article 3 paragraph 2

*“(2) If projects under Annex 1 that fall below the threshold values or do not fulfil the criteria defined therein are spatially related to other projects and, together with them, reach the relevant threshold value or fulfil the criterion, the authority shall examine **on a case-by-case basis** whether significant harmful, disturbing or adverse effects on the environment are to be expected due to a **cumulation** of effects and whether, as a result, an environmental impact assessment shall be performed for the project planned. A case-by-case examination shall not be carried out if the capacity of the project submitted is less than 25% of the threshold value. When taking a decision on a specific case, the criteria of paragraph 4 no.1 to 3 shall be taken into consideration, and paragraph 7 shall be applied. The environmental impact assessment shall be performed as a simplified procedure.*

The provisions make circumventions more difficult, especially since UVP-G amendment 2004. The flaw of this approach is once again that respective provisions have to be assessed in a case-by-case-screening (3/7 UVP-G; Article 24/5 UVP-G) without locus-standi for the public concerned (please read Chapter I of the analysis for details).

In addition “salami-slicing” provisions do not cover the case that for example a 50km motorway is sliced into 6 different EIA’s using different technical experts, traffic and base figures, calculations and assessment approaches so that the overall assessment of environmental impact of this 50km motorway is not possible (please read J&E Workplan 2006 case study EIA/transport, Austria for details).

5) information to be supplied by the developer

Art.5 and Annex IV, in particular approach to alternatives and non technical summary

The provisions are transposed in a proper way.

In practise alternatives are very often not assessed or not seriously assessed, especially not in federal transport projects.

Non technical summary is not always available, in particular in federal transport projects. Though The situation has improved in very recent transport EIA's.

The general provisions read as follows (Article 6 paragraph 1 UVP-G; similar provisions for federal transport):

Environmental impact statement

“Article 6. (1) *The environmental impact statement shall contain the following information:*

1. *A description of the project comprising information on the site, design and size of the project and in particular:*
 - a) *a description of the physical characteristics of the whole project, including the land-use requirements during the construction and operational phases;*
 - b) *a description of the main characteristics of the production or processing procedures, in particular with regard to the nature and quantity of the materials used;*
 - c) *data, by type and quantity, of residues and emissions to be expected (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the implementation and operation of the project;*
 - d) *the increase in the concentration of pollutants in the ambient environment resulting from the project;*
 - e) *energy consumption, broken down by energy sources;*
 - f) *duration of the project's existence and follow-up measures as well as any measures to secure evidence and ensure concomitant control.*
2. *An outline of the main alternatives studied by the project applicant and an indication of the main reasons for this choice, taking into account the environmental effects; in case of Article 1 (1) no. 4, the alternative sites or routes examined by the project applicant.*
3. *A description of the aspects of the environment likely to be significantly affected by the project, including, in particular, human beings, fauna, flora and their habitats, soil, water, air, climate, landscape, material assets, including the cultural heritage, and the inter-relationship between the above factors.*
4. *A description of the likely significant effects of the proposed project on the environment resulting from:*
 - a) *the existence of the project,*
 - b) *the use of natural resources,*
 - c) *the emission of pollutants, the creation of nuisances and the nature, quantity and elimination of waste, as well as information on the methods used to forecast the effects on the environment.*
5. *A description of the measures envisaged to prevent, reduce or, where possible, offset any significant adverse effects of the project on the environment.*
6. *A **non-technical summary** of the information mentioned in numbers 1 to 5.*
7. *An indication of any difficulties (in particular, technical deficiencies or lack of data) encountered by the project applicant in compiling the required information.”*

6) public participation, in particular:

EIA Directive requires public to be informed “early in the environmental decision-making” about the procedure:

- does the law envisage clearly such requirement?
- is this a rule in practice?

EIA Directive requires ‘detailed arrangements for informing the public...shall be determined’ are they determined sufficiently clear?

is the public informed in an adequate, timely and effective manner” as required by article 6.2 of the Aarhus Convention?

EIA Directive requires “reasonable time-frames for the different phases shall be provided allowing

- sufficient time for informing the public
- does the law envisage reasonable time-frames?
- are they observed in practice?

The public is informed pretty late, in a stage where all planning and detailed decisions are finished. The public is informed in the way that the environmental impact statement (EIS) is available at certain authorities for six weeks and that anyone may make comments on the EIS in this time (**public inspection**).

The provisions are as follows (Article 9 UVP-G, similar provisions for federal transport)

Public inspection

“**Article 9.** (1) The authority shall communicate to the host municipality one copy of the application, of the documents identified in Article 5 (1) and of the environmental impact statement. These shall be available for public inspection at the authority and in the municipality **for at least six weeks**. The second and third sentences of Article 44b (2) AVG shall apply.

(2) If projects extend to at least five host communities, the documentation identified in paragraph 1 may be made available only at the authority, at the administrative district authority and at one host municipality per district affected by the project selected by the authority.

(3) The authority shall announce the project in accordance with Article 44a (3) AVG. The announcement shall always state:

1. the application’s object and a description of the project,
2. the fact that the project is subject to an environmental impact assessment, the competent authority responsible for taking the decision, information on the nature of possible decisions and, if applicable, the likelihood of a **transboundary EIA** procedure pursuant to Article 10,
3. place and time of possible inspection, and
4. an indication of the fact that anybody may submit comments according to paragraph 5 and **that citizens’ groups have locus standi** or the right to participate according to Article 19.

The date of the public hearing (Article 16) may be announced together with the project itself.

(4) In addition to the announcement according to paragraph 3, the authority shall also announce the project on the Internet. At any rate, a brief description of the project and the summary of the environmental impact statement pursuant to Article 6 (1) no. 6 shall be attached to the announcement.

(5) **Anybody may submit written comments** on the project and on the environmental impact statement to the authority within the public inspection period according to paragraph 1.”

The provisions are followed in practise. Faults would make EIA-proceeding invalid.

The six weeks period is too short, at least for federal transport projects. The reason is that such projects have tremendous amounts of documents (ten thousands of pages) and its not easy to go through these documents in six weeks. Next to that citizens groups have to organise themselves in this period to get locus standi.

7) assuring that results of EIA are taken into account in the final decision whether to approve the project - Art.8

In consolidated development consent EIA proceedings the EIA-results are considered in the project approval by its nature (please read chapter I). The situation is different in federal transport projects (please read chapter II).

8) transboundary assessment - Article 7 of EIA Directive

*does the law correctly transpose the requirements concerning transboundary consultations?
are they carried out in practice?*

The provisions were adapted to Espoo Convention and Directive 2003/35/EC with UVP-G amendment 2005.⁵⁶ The provisions (Article 10) are fine are generally followed in practise.

⁵⁶ "Transboundary environmental impact

Article 10.

(1) If the project might have significant effects on the environment in a foreign state or if a state that could be affected by the project's impact submits a request to that effect, the authority shall:

1. notify this state of the project as early as possible and, if appropriate for the consideration of transboundary effects, already during the preliminary procedure, but no later than the public, and shall attach to this notification a description of the project, any available information on its possible transboundary impact and, where applicable, the draft of the environmental impact statement,
2. inform this state about the course of the EIA procedure and the nature of the decision which may be taken, and set an appropriate deadline for communicating whether it wishes to participate in the EIA procedure or not.

(2) If this state informs the authority that it wishes to participate in the EIA procedure,

1. it shall be provided with the application for development consent, the environmental impact statement and any other documents relevant to decision-making that are available to the authority at the time of the announcement pursuant to Article 9,
2. it shall be given the opportunity for submitting comments within a reasonable period of time that shall be long enough that the state will also be able to make the application documents accessible to the public and give them the opportunity to submit comments, and
3. it shall be provided with the environmental impact expertise or the summary evaluation.

(3) On the basis of the documents provided and the results of the environmental impact expertise or the summary evaluation, consultations shall be held, if necessary, on potential transboundary effects and any measures necessary to avoid or reduce adverse transboundary effects on the environment. These consultations shall, if possible, take place via bodies already established by bilateral agreements within the framework of their competence, in particular the transboundary waters commissions. An appropriate time frame shall be agreed on for the duration of the consultation phase.

(4) The decision on the development consent application and the main reasons for it, information on the public participation process, and a description of the main measures to avoid or reduce or offset major harmful, disturbing or adverse effects on the environment shall be communicated to the state concerned.

(5) With regard to the provisions of paragraphs 1 to 4, the principle of reciprocity shall apply to states not parties to the Agreement on the European Economic Area.

(6) To the extent required for implementing the transboundary EIA procedure, the project applicant shall submit, upon request, translations of the documents he/she filed in the language of the state concerned.

(7) If, within the framework of an EIA procedure carried out in a foreign state, documents are received on the environmental impact of a foreign project that might have significant environmental effects in Austria and if the

4. Conclusions

The Austrian EIA-Act (UVP-G) is a **very positive example** for transposition of EC environmental law. UVP-G provisions lead to a particular higher level of EC-law implementation in Austria. UVP-G's **consolidated permit proceeding approach** (not for federal transport projects) has proved to be very successful and is widely accepted by stakeholders.

The EIA-appeal body Umweltsenat (not competent for federal transport projects) is known and acknowledged for **concise and well elaborated decisions** with accurate legal and technical expertise. Umweltsenat frequently amends respective EIA-permits, stipulates additional permitting requirements and can be seen as an effective and fair legal redress body.

EIA **application** and **transposition flaws** can be observed with regard to **federal transport** projects, the practise of EIA-avoidance, by EIA case-by-case screening proceedings and very limited public participation and Access to Justice rights that can not be seen as effective and fair legal redress with regard to the Aarhus Convention. Please not that respective appeal proceedings do not provide for interim relief, but last as long as 22 months. Projects might be accomplished already at the time the courts decide. In addition competent courts are reluctant to go into case details and basically focus on formal issues. Hence respective provisions are in contrast to ECJ case law, EIA-Directive and the Aarhus Convention.

OEKOBUERO noted that problems often occur in EIA proceedings where regional governments (Landesregierung) as **competent authorities** have an **interest** that a certain project will be realized. Such cases can more often be observed in the field of **infrastructure projects** like regional roads or waste incineration plants but also if certain important investors are expected to bring economic development into a region.

Similar problems occur in **federal transport** cases where **Ministry of Transport, Innovation and Technology (BMVIT, www.bmvit.gv.at)** is responsible for planning, constructing and maintaining federal motorways/railroads and is concurrently the only competent permitting authority with, in addition, a very limited appeals procedure for parties.

From our understanding the **most significant shortcoming** of UVP-G is the absolute exclusion of the public concerned (neither public participation nor Access to Justice) from **EIA-case by case screening** procedures.

Case by case screening is to be done not only for new projects but also to assess cumulative effects, salami-slicing or modernisation.

Estimated 80 % of such EIA-screening proceedings end with the result that no EIA is necessary.

The public concerned may neither participate this screening proceeding nor appeal against the decision.

public has to be involved due to commitments under international law, the Land government shall proceed according to Article 9 with regard to documents corresponding to the documents specified in paragraph 2 no. 1, and the duration of public inspection shall be governed by the provisions of the country where the project is to be implemented. Other authorities with relevant environmental tasks shall be given the opportunity for submitting comments. The Land government shall forward comments received and, upon request of the foreign state, also provide information on the environment potentially affected to the state where the project is to be implemented. If other documents, such as expert opinions and decisions, are supplied during the procedure, these shall be made available to the public in an appropriate manner.

(8) Specific arrangements in the framework of state treaties shall remain unaffected."

The issue that an EIA would be necessary for a project must not be referred to in any stage of all subsequent project development consent proceedings.

Respective provisions and actual application is in contrast to the Aarhus Convention and EC Environmental law (recently ECJ 4. May 2006, C-290/03 *Diane Barker*)

Abbreviations

BGBI	Bundesgesetzblatt, (official federal journal), http://ris1.bka.gv.at/authentic/index.aspx
BMVIT	Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry of Transport, Innovation and Technology) www.bmvit.gv.at
B-VG	Bundes-Verfassungsgesetz (federal constitution act)
UVP-G	Federal EIA-Act
UIG	Federal Environmental Information Act
EIA	Environmental Impact Assessment
ECJ	European Court of Justice
PP Directive	Directive 2003/35 EC (read below for details)
SP-V,	Federal Act on Strategic Assessment of Transport, (read below for details)
USG	Bundesgesetz über den Umweltsenat (Umweltsenatsgesetz: Environmental Senate Act, BGBl I 114/2000)
UVP	Umweltverträglichkeitsprüfung (EIA)
UVP-G	Federal Act on Environment Impact Assessment (EIA Act 2000, read below for details)
Umweltsenat	Environmental Senate (EIA appeal body)
VfGH	Verfassungsgerichtshof (Constitutional Court) www.vfgh.gv.at
VwGH	Verwaltungsgerichtshof (Administrative Court) www.vwgh.gv.at

References

Alge/Kroiss: Strategische Umweltprüfung – SUP, in: Raschauer/Wessely (editors): Handbuch Umweltrecht, Wien (2006), S. 263-293

Altenburger/Wojnar, Umweltverträglichkeitsprüfungsgesetz, UVP-G 200 idF BGBl I 2005/14, Praxiskommentar, Wien, 2005

Eberhartinger-Tafill/Merl, UVP-G 2000, Umweltverträglichkeitsprüfungsgesetz, Kommentar, Stand 1. Juni 2005, Wien, 2005

Ennöckl/Raschauer: Kommentar zum UVP-G, Umweltverträglichkeitsprüfungsgesetz, Wien/New York (20062)

ECJ C-72/95 (24 October 1996), *Kraaijeveld* u.a.

ECJ C-127/02 (7 September 2004) *Niederländisches Waddenmeer*

ECJ C-210/02 (7 January 2004), *Delena Wells*

ECJ C-213/03 (15 July 2004), *Syndicat professionnel coordination des pêcheurs de l'étang de Berre and de la région v Électricité de France (EDF)*;

ECJ C-227/01 (16 September 2004), Commission vs Spain

ECJ C-239/03 (7 October 2004), Commission vs France

ECJ C-287/98 (19 September 2000), Linster

ECJ C-321/95 (2. February 1998), Greenpeace vs Commission

ECJ C-435/97 (16 September 1999) World Wildlife Fund (WWF) u.a.

ECJ 4. May 2006, C-290/03 Diane Barke

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

EIA-Directive: Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) (OJ L 175, 5.7.1985, p. 40)

EC Guidance Document: Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment

Raschauer/Wessely (editors): Handbuch Umweltrecht, Wien (2006)

Raschauer: Umweltverträglichkeitsprüfung (UVP), in: *Raschauer/Wessely* (editors): Handbuch Umweltrecht, Wien (2006), S. 294-352

UVP-G: Bundesgesetz über die Prüfung der Umweltverträglichkeit (Umweltverträglichkeitsprüfungsgesetz 2000), published in BGBl I 1996/773, BGBl I 2000/89. UVP-G amendment 2004, amendment of UVP-G as to implementation of Directive 2003/35/EC, BGBl I 2004/153 ,BGBl. I 2006/149 (Federal Ct on Environment Impact Assessment, EIA Act 2000)

UVP-G Novelle 2004: BGBl. I Nr. 153/2004 (implemenation of Directive 2003/35/EC)

Umweltsenat decision US 5B/2004/11-18, 3. Dezember 2004 (Spielberg case)

CZECH REPUBLIC



I. General information on the transposition of EIA directive, in particular:

- *whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive); names of national act(s) transposing the directive*

Directive 85/337/EEC and Directive 97/11/EC have been transposed into Czech law mainly by Act No. 100/2001 Coll., environmental impact assessment (hereinafter referred to as the “EIA Act”). This transposition was formally finished on time, i.e. at the date of Czech Republic Entry into the EU – 1st April 2004 (the EIA Act entered into force as soon as 1st January 2002).

However, it must be added that due to the fact that the EIA Directive refers not only to the environmental impact assessment of projects alone, but also development consent procedures, and at the same time, the Czech EIA Act regulates only the assessment procedure, finished by a non-binding opinion, other acts regulating the subsequent administrative processes must also be considered as transposing the requirements of the EIA Directive. Currently, these are the main important ones:

- Act no. 114/1992 Coll., on Nature and Landscape Protection
- Act no. 50/1976 Coll., on Land Use Planning and Building Regulations (Building Act; on 1st January 2007, the new Building Act no. 183/2006 Coll. enters into force)
- Act no. 44/1988 Coll., on Protection and Exploitation of Mineral Resources (Mining Act)
- Act no. 500/2004 Coll., Administrative Procedure Code
- Act no. 150/2002 Coll., Code of Administrative Justice

Directive 2003/35/EC was not transposed into the Czech law within the deadline set by the directive (25th June 2005) at all. As late as on 27th April 2006, an amendment to the EIA Act (Act no. 163/2006 Coll.) entered into force, transposing, however, only some of the requirements of the 2003/35/EC directive. The non-conformity concerning art. 10a of the EIA directive, as amended by the 2003/35/EC directive (access to justice), in particular, has not been rectified. Therefore, the Commission has started an infringement procedure with the Czech Republic (a letter of formal notice was sent on August).⁵⁷

- *any other information on transposition you consider necessary*

The Czech concept of an “EIA final opinion” issued at the end of the (relatively separate) assessment procedure as non-binding information, underlying the subsequent administrative procedure does not, in itself, contradict the requirements of the Directive. However, the requirements of the Directive in such a case would have to be met in these procedures, regulated by other laws. This is not fulfilled in many aspects, especially concerning requirements on publishing information and public participation (another general problem consists of the fact that the Czech EIA Act or any other relevant legal regulation fails to define the expression “public concerned” – see below). It is therefore questionable whether the general concept of transposition of the EIA directive into Czech law is suitable, in other words, if it does not inevitably lead to these kinds of problems and non-conformities. There are long-term discussions about possible complete changes to this concept, the main characteristic of which would be integration of the assessment into the development consent procedure. So far,

⁵⁷ Details at

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/905&format=HTML&aged=0&language=EN&guiLanguage=en>

no consensus has been reached on that point, except partial integration of the final part of the EIA procedure into some development permits procedures according to the new Building Act.

2. Overall framework of the EIA scheme (up to 1 page)

The main stages of EIA procedure under Czech law can be shortly summarized as follows:

- a developer submits an “announcement” which describes the main characteristics of the project, to the responsible authority (Ministry of Environment or regional office – hereinafter “the EIA authority”)
- the EIA authority publishes the announcement on the web and sends it to the affected municipalities, who are responsible for informing the local public on the official notice board and by at least one more “locally typical” way
- the public can send written comments to the EIA authority within 20 days
- the first part of the EIA procedure follows, combining both “scoping” and “screening” of the project.
- this first part is finished by a “conclusion” issued by the “EIA authority”. For “Annex II projects, the EIA procedure can end at this stage, if the authority decides so (in that case, the “conclusion” plays a role of “screening decision”.
- in other cases, the developer must send detailed documentation, prepared by the authorised person⁵⁸ hired by the developer, to the EIA authority
- the EIA authority and affected municipalities inform the public about the documentation (the same way as in the “announcement stage”
- public can send written comments within 30 days
- the EIA authority hires another authorised person, who evaluates the quality of the documentation and provides an expert report about it
- the EIA authority and affected municipalities inform the public about an expert report (the same way as in previous stages
- public can send written comments to within 30 days
- if there were “negative comments” to the documentation and/or the expert report (it is not always clear, what does it mean), a public hearing must take place no later than 35 days from the date when the expert report was published
- the EIA authority issues the “final opinion”

No subsequent administrative decision or measure necessary for realization of the project (development consent) can be issued, if there is no final EIA opinion (or, in the case of Annex II projects which were not further assessed, the conclusion completing the screening part).⁵⁹

This includes mainly

- location (land use) decisions
- construction permits
- mining concessions
- water permits (for constructing water facilities, underground abstraction, etc.)

⁵⁸ These persons are theoretically independent, certified by the Ministry of Environment. In reality, their incomes depends on the fact that the investors hire them (what means that they cannot dare to be “too strict”. The greatest problem is that also the persons writing the “expert reports” (see next points) are from the same group.

⁵⁹ § 10 para. 4 of EIA Act.

- exceptions and preliminary consents of agencies responsible for air, water, nature, forest, agriculture land, public health protection, etc.⁶⁰

Therefore, only after the “final opinion” is issued, the investor should ask for any of these development consents. If it is discovered during the course of a development consent procedure, that the project requires EIA and this was not performed, the procedure must be suspended until the EIA is finished.

- *relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relationship, which is the “principal” and which the “implementing” decision (see- Case C- 201/02 Delena Wells)*

As already mentioned, according to current legislation, EIA is a separate procedure, concluded by a non-binding “final opinion” (underlying the subsequent administrative procedure) according to Czech law.

It is therefore clear that the “EIA opinion” cannot be considered a “principal decision.”⁶¹ Due to the fact that any project often requires a number of administrative permits, it is not always clear which of them should be considered “preliminary”, which “principal” and which “implementing”. However the EIA opinion must always be issued prior to each of them. In most cases, the land-use permit according to the Building Act would set the most important parameters for the project.⁶²

- *whether there are special procedures/arrangements made for transport projects*

There are no special provisions concerning the transport project in the EIA act, i.e. no differences in the assessment procedure stage. In the Building Act, there are some individual special provisions for development consent procedures on transport projects, concerning requirements on the project documentation and the possibility of placing the documents on public notice boards. Parts of the transport infrastructure are universally considered to be so-called “public works”, which can be executed even against the will of the owner of the land (or more precisely land or property can be dispossessed for these). The fact that Czech legislation determines more benevolent (higher) permissible noise limits than for other sources indirectly affects assessment of the influences of transportation works .⁶³

However 3 individual acts on specific traffic projects were adopted by the Parliament⁶⁴, with the intention of making permitting them easier by shortening limits for issuing the permits, limiting rights of affected persons, etc. One of these acts (concerning canalizing the Elbe river) was declared unconstitutional by the Constitutional Court (the main reason was breach of the principle of division of powers). The other two acts have not been used in practice so far. A

⁶⁰ From 1st January 2007, most of these consent will not be issued in the form of separate decision, like it is now. however, according to § 10 of EIA Act, the EIA final opinion should still exist before any of them will be issued.

⁶¹ Case C- 201/02 Delena Wells

⁶² According to the new Building Act, it will be possible to substitute the land use permit with a detailed land use plan under some conditions; in this case, the plan will be subject to EIA (instead of SEA) and will have to be considered a “principal decision”.

⁶³ While the basic limit for the average noise burden is 50 dB during the day and 40 dB at night, for transportation works the limits are 10 dB and for so-called old burdens (the busiest roads) 20 dB higher in general.

⁶⁴ This concerned the Pilsen motorway by-pass works, the new landing runway at the Prague – Ruzyň airport and the Elbe River canalization projects.

proposal for a similar act concerning more than 20 individual traffic projects was proposed, but finally not passed.

- *relation to SEA*

Since 1st May 2004, the SEA procedure is regulated by a specific part of EIA Act (amendment no. 94/2004 Coll. transposed Directive 42/2001/EC – SEA Directive). The basic relation between the two procedures follows the logic of art. 3.2 a) of SEA directive – plans and programs, which set the framework for future development of projects listed in Annex I of the EIA Act (i.e. in Annex I and II of EIA directive) are subject to SEA.

There are similar criteria for assessment projects and plans, some similarities in the procedure (the screening and scoping procedure is compulsory for all plans), for some of them (when only the area of one municipality is affected) the assessment can finish at the screening stage, there must be a non-binding opinion issued by the “SEA authority” before adoption of the plan or programs. SEA for land use plans is integrated into the procedure for adopting the plans.

There is, however, not enough cohesion between the requirements on the two procedures (the reason for this situation lies in the insufficient relationship between the EIA and SEA directives). On one hand, SEA and EIA procedures assess similar impacts repeatedly in some cases. On the other hand, there are cases in which the EIA opinion for a project was issued prior approval of a plan (mostly land use plans), setting the framework for that project and prior to when the related SEA procedure was finished (see R52 case study).

3. Particular issues

1) requirement for EIA and development consent

Art 2.1 and Case C- 201/02 Delena Wells. In Article 2.1 the Directive requires that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also “made subject to a requirement for development consent”. The particular question is if modernisation of existing roads does require development consent is it thus subject to EIA?

Generally, according to current legislation, all projects likely to have a significant effect on the environment (including modernisation of existing roads) are subject to some kind of development consent procedure. For most projects a land use permit is required and can be considered a principal decision (see above). For mining projects, there is special principal permit according to the Mining Act.

However, the requirement of art. 2.1 of the EIA directive, that all projects likely to have significant effects on the environment should also be made subject to assessment before development consent is issued (i.e., according to Czech law, subject to the special – separate EIA procedure according to the EIA Act) is not being met in all cases. Before the amendment of the EIA Act valid from April 2006 entered into force, it was clearly caused by insufficient transposition of art. 4.2 and Annex II of the Directive (by means of categorical screening, excluding some projects from the EIA procedure only taking into account their size – see below). The current wording of the Act is generally consistent with art. 2.1 of the EIA directive. However there is a broad opportunity for the “EIA authority” to exclude the Annex II projects from further assessment after the screening procedure without sufficient justification.

All modernizations of existing roads were considered “Annex II” projects before amendment of the EIA Act as of April 2006 (and thus subject to “full” EIA only if the EIA authority decided

so in the screening procedure) or, if the road as such did not meet a “size” criteria, were completely excluded from the assessment procedure.⁶⁵ This was clearly not in compliance with art. 2.1 and Annex I point 22 of the EIA directive (see below). According to the current wording of the EIA Act, all modernizations meeting criteria according to point 7 of Annex I of the EIA directive are obligatorily subject to EIA, the others if the EIA authority decides so in the screening procedure.

2) the approach to transposition of annexes

(in particular Annex I point 7 and Annex II point 10) - Art.4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v Belgium

- screening method
 - case-by-case
 - categorical
 - combined

The EIA act uses a combined screening method. The “categorical” method is represented by the threshold criteria connected in the Czech EIA Act with both “Annex I” and “Annex II” projects. The “case-by case” approach should be asserted in the screening procedure.

Before the April 2006 amendment, the categorical approach excluded projects not meeting size criteria from assessment (“below limit projects” could only have been assessed in protected areas), which was clearly not in compliance with the Directive.⁶⁶ According to current wording of the EIA Act, “Annex II projects” not meeting the size criteria (which still remain in the Amendment of the EIA Act) are also subject to case – by case screening (in which the criteria of location, nature etc. shall also be taken into account). The difference between “Annex II projects” meeting and the projects not meeting the size criteria according to the EIA Act is that for the latter, a simplified screening procedure can be applied.

As for transport projects, Annex I point 7 of the EIA directive is currently transposed correctly into the Czech EIA Act (see above). Annex II point 10 concerning the transport projects is also transposed; however, industrial estate development projects and Urban development projects” (Annex II point 10 letters a) and - b) are not transposed into the Czech legislation.⁶⁷

- in case-by-case screening
 - is the screening decision required to be accompanied by justification (Case C-87/02 Commission v Italy)
 - in practice: is the reasoning credible?

⁶⁵ In addition, before the amendment made in April 2006, the Czech transposing measure had quite different wording to point 7, c of Annex I of EIA directive. The wording might had been interpreted as not applying to existing roads of two lanes or less.

⁶⁶ As ECJ declared in the C-133/94 Commission v Belgium case, the criteria and/or the thresholds are not designed to exempt certain whole classes of projects listed in Annex II from the obligation of an an assessment in advance, but only to facilitate examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to that obligation. See also cases C-72/95 Kraaijeveldt, C-392/96 Commission v Ireland, C-474/99 Commission v Spain, C-87/02 Commission v Italy, etc.

⁶⁷ Many other cases of incorrect transposition of individual categories of annexes I and II of the EIA directive were adjusted by the April 2006 amendment. Other remaining non-conformities are e.g. Annex II. point 6 (b) - Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides, point 11 (h) - Installations for the recovery or destruction of explosive substances and (i) - Knackers' yards (all of them not transposed at all).

The “screening decision” (“conclusion of the screening procedure”) according to Section 7 of the EIA Act) does not have the form of a decision in the sense of the Czech Administrative Code.⁶⁸ It must be accompanied by a justification according to Section 7 para 3 of the EIA Act, but the Act does not provide any details concerning it. The authority must only generally (not directly in the justification) take into account the nature, size and location of the project, the threshold criteria and the comments of affected authorities and public.

In practice, the conclusions (especially when stating that the EIA will not continue for Annex II projects) are often poorly (formally) justified, without making clear the reasons why the project cannot have a significant effect on the environment.⁶⁹

In the view of the Czech courts, the EIA opinion cannot be reviewed at court as it is not binding (see above). There has probably never been a case brought against the conclusion of a screening procedure (screening decision). It is almost certain that if this were to happen, the lawsuit would likewise be rejected for the same reasons as the EIA opinion. We see this approach as contravening the requirements of art. 10a of the EIA directive, because the conclusion of the screening procedure is surely “an act which is covered by the provisions of the EIA Act on public participation”. The obligation of EC member states to allow a judicial review of a screening procedure for Annex II projects (if the EIA procedure is completed by it) has been repeatedly confirmed by the European court of justice, even before the directive on public participation had been approved.⁷⁰ It should be added that, according to the Czech Act, if an EIA process ends with a screening procedure it does not, on the basis of the EIA Act, qualify NGOs as parties to subsequent administrative procedures (see below).

3) use of thresholds and selection criteria

art. 4.3 and Annex III, and Case C-392/96 Commission v Ireland

- *in case-by-case screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

Annex III of EIA directive is transposed by Annex II of the EIA Act. Despite using different wording occasionally, the transposition is done properly with 2 exceptions, concerning point 2, indent 3. of Annex II (stating that the capacity of the natural environment must be considered, paying particular attention to, e.g., (a) wetlands and (c) mountain and forest areas. These provisions have not been transposed into Czech legislation.

In practice, the criteria of cumulation with other projects particularly, is not taken into account, most often concerning the traffic projects. In many cases, the current intensity of the traffic in an area with e.g. new motorways, already exceeds the noise and ash particle air pollution limits. In spite of that, the impacts of other projects (already realized or prepared) are not being taken into consideration.⁷¹

Generally, it frequently happens that the assessment is based on faulty, incomplete, or otherwise deficient information. Thus, the assessment often fails to consider appropriate

⁶⁸ Act no. 500/2004 Coll (valid since 1st January 2006). On the other hand, with regard to the complicated definition of the extent of scope of the Administrative Code and the frequent opportunities for “appropriate” use of provisions regarding administrative decisions to other types of activities by administrative authorities it is possible to apply the requirements of an administrative procedure also to the conclusion of the screening procedure. The matter has not yet been discussed by courts with regard to their general refusal to concern themselves with outputs from the “non-binding” EIA process.

⁶⁹ See Case C-87/02 Commission v Italy

⁷⁰ See, for example, Case C-435/97 Bozen (WWF and others).

⁷¹ See the Czech EIA case study (R 52 high speed road) as an example

information and fails to be conducted in an appropriate manner, which contradicts the Directive.

- *in categorical screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

As already mentioned above, the categorical approach is reflected in the threshold criteria for Annex II projects, set up by the Czech EIA Act. In the screening procedure, the fact whether the project meets these criteria or not shall be taken into account together with the criteria of Annex III of the EIA directive (as transposed into EIA Act – see above).

It can be said that the legislator who decided on categorical screening has taken into account the Annex III criteria when creating the list. The criteria are however explicitly expressed in Annex II of EIA Act only for the case by case screening purposes.

4) measures taken to avoid “salami slicing” and assure assessment of cumulative effects

Case C-392/96 Commission v Ireland (with respect to changes made by Directive 35/2003, concerning assessment of changes or extensions of existing projects - Annex I, point 22 and Annex II, point 13 of the consolidated version of the EIA Directive - there is a relation to the problem of modernisation of existing roads - see point 1) above).

The EIA act requires assessment of the cumulative impacts of the project (also taking into account impacts of other projects – both existing and under preparation). Pursuant to Section 5 para 2, the individual stages of long-time projects shall be assessed separately and within the context of the environmental impacts of the plan as a whole.

This is, however, often not fulfilled in practice (see above). One of specific problems at this point is “salami slicing” of transport infrastructure projects (namely new highways). Only short sections of the projects (especially roads) are than assessed and permitted. The environmentally less questionable parts of projects are mostly “logically” authorised and built first, which in fact predetermines the following route of the project even across an environmentally valuable territory.⁷²

Prior to April 2006 changes and extensions to the projects were considered “Annex II” projects, if not completely excluded by the size criteria (moreover, changes which increased the capacity or extent of the project by less than 25 % and at the same time “did not significantly change its technology, operation management or type of use” were also excluded). This was contrary to art. 2.1, as well as Annex I point 22 and Annex II point 13 of EIA directive. Following the amendment, the assessment of Annex I project changes or extensions (point. 10 of Annex I of EIA directive) is transposed correctly. Concerning changes or extensions of Annex II projects, the Czech transposing provision is still different (more specific) than the relevant provision of the EIA Directive (point 13. of Annex II), as it refers to “changes to the projects which significantly increase its capacity or extent or significantly change its technology, operation management or type of use, if the may have a significant effect on the environment.” It is then questionable if they fully comply with the directive.

⁷²The assessment, permitting and Construction of D8 highway can be used as an example: The most controversial section of this highway crossing the České Středohoří SPA was not assessed before the developer started with the construction of another section between Ústí nad Labem city and the edge of the SPA. In the meantime, another section was authorised, which led the highway up to the edge of the SPA from the other side. Consequently, there was no other choice but to lead the motorway across the SPA (for which purpose the Ministry of Environment granted an exemption from the SPA protection).

5) information to be supplied by the developer

Art. 5 and Annex IV, in particular the approach to alternatives and the non-technical summary

There are two problems directly concerning the transposition of article 5 of EIA directive.

Firstly, in respect to the alternatives of the project. The Czech EIA Act (Section 7 Para 5) entitles the competent authority to ask the developer to supply information on the main alternatives to the project. However, alternatives that deviate from the approved land planning documentation can be required only exceptionally and when justification is supplied". This means that the land planning documentation pre-determines, to a certain extent, the scope of information and also the results of the assessment. It seems that the criterion of land planning documentation is thus put before the scoping criteria listed in Art. 5 Para 1 (a) which is contrary to the Directive.

Generally, there is a problem with interpretation of the term "main alternatives studied by the developer" both on the national level and in EIA directive itself. No real (territorial) alternatives are often assessed in the EIA process. The authorities accept this approach and do not ask for further alternatives. This raises an important conceptual question whether art. 5.3 of EIA Directive requires that the developer has to study all realistic alternatives of the project. The wording of EIA Directive (and subsequently the EIA Act) makes the interpretation that alternatives must be presented only when the developer himself decides to "study" them, literally possible. However in our opinion this interpretation contravenes the purpose and spirit of the EIA Directive.⁷³

Secondly, art. 5.3 requires that the information provided by the developer must include a description of the measures foreseen in order to avoid, reduce and, **if possible**, remedy significant adverse effects (which means that it is obligatory to describe the compensatory measures when it is (objectively) possible, while according to the EIA act, it is facultative to include measures to remedy adverse effects.

Next to this, a whole number of requirements by Annex IV of the EIA directive is not transposed correctly, including for example:

point 1, 1. indent - description of the project, including in particular a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases (the EIA Act transposing measure does not refer to "land-use requirements during the construction and operational phases")

point 4. - a description of the likely significant effects of the proposed project... The relevant provision of EIA Act does not transpose the indents, i.e.

- the existence of the project,
- the use of natural resources,
- the emission of pollutants, the creation of nuisances and the elimination of waste,

Besides that it does not cover the description of the forecasting methods used to assess the effects on the environment.

⁷³The situation is different in cases when the projects can have negative impacts on "NATURA 2000 areas." In these cases, according to art. 6.4 of the Habitat Directive and art. 4.4 of the Bird directive, only alternatives with the least damaging impacts on the protected areas/species can be approved. This means, that all possible (territorial) alternatives to the projects must be assessed, so that the least damaging one can be chosen.

point 5. – a description of the measures foreseen to prevent, reduce and where possible offset any significant adverse effects on the environment. According to the Czech legislation it is the choice of the developer to include measures to offset significant adverse effects on the environment. In other words: it seems to be contrary to the point 5. of Annex IV of the directive, which clearly asks that investor provides “a description of the measures foreseen to prevent, reduce and where possible offset any significant adverse effects on the environment”, that the relevant provision of Czech EIA Acts says “a description of the measures to prevent, reduce and eventually offset any significant adverse effects on the environment” (while the Directive asks that where the offset measures exist, they must be described, the Czech Act not (clearly)).

point 7. - an indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information. The words “technical deficiencies” have not been transposed into the Czech legislation.

The character and quality of non-technical summaries is diverse. Sometimes important information is missing in them. In other cases, the summary is very technical and detailed, which does not help the public to understand the main impacts of the project.

6) public participation,

in particular:

- *The EIA Directive requires the public to be informed “early in the environmental decision-making” about the procedure:*
 - *does the law envisage such requirement clearly?*
 - *is this a rule in practice?*

In principle Czech legislation provides for a good level of public participation in the EIA process itself (with some specific objections as described below). However, it causes substantial problems in the development consent and judicial review phases.

With regard to provision of information on the EIA process as such, it is the duty of the appropriate authorities to provide information on all its phases on official notice boards, on the Internet and by at least one other “method usual in the affected area” (for example the local press, radio, etc.) From the aspect of public awareness of the project as such this can be considered as information provided in a timely manner, because the EIA process must precede any related decision-making (see above). However because the EIA process is relatively separate from the development consent proceedings, information about the EIA process as such cannot be considered sufficient in relation to environmental decision-making.

With regards to information concerning the request for development consent (Article 6 para 2 of EIA directive) it was not transposed before April 2006 (only a limited number of parties to the decision-making procedures had access to such information). The amendment to the EIA Act partly eliminated this discrepancy. However, some of the information required by the Directive (e.g. the nature of possible (consequent) decisions) and competent authorities, the course of the procedures, details concerning the manner of public involvement) is still not required by EIA Act.

The requirement to make the contents of the development consent available to the public (Article 9 para 1 of EIA directive) is regulated by the 123/1998 Coll. “Right to Environmental Information Act”. However, maybe due to this not very systematic legislative approach, it is not fulfilled in practice in most cases. Moreover, if interpreted literally (which is the method

used most frequently in fact), the relevant provision does not include cases (projects) where the procedure was closed in the screening stage.

- *The EIA Directive requires that ‘detailed arrangements for informing the public...shall be determined’*
 - *are they determined sufficiently clearly?*
 - *is the public informed in an adequate, timely and effective manner” as required by article 6.2 of the Aarhus Convention?*

The regulation of access to information on the EIA procedure as such process is relatively detailed and sufficiently clear. As described above, EIA authority publishes the outcomes of the EIA procedure (announcement, documentation and expert report, as well as the final opinion on the web and sends it to the affected municipalities, who are responsible for informing the local public on the official notice board and by at least one more “locally typical” way.

However, the Czech law does not express the requirement to inform the public in an adequate, timely and effective manner as required by article 6.2 of the Aarhus Convention. In reality, there are problems with insufficient use of such “locally usual methods” that would be available to the public not working with the Internet to a greater extent (for example local newspapers, bill-posting, etc.). Apart from this when making voluminous documentation public on the Internet problems with “downloading” published information also occur in some cases.

As is stated above, the arrangements for informing the public of decision-making procedures, following on to the EIA process, is not sufficiently clear (a combination of arrangements in several acts.), nor sufficient from the aspect of the requirements of the EIA Directive and particularly not followed in practice. A change to the Nature and Landscape Conservation Act accepted in connection with the new Building Act also complicates the access by NGOs to information about the commenced decision-making procedures.⁷⁴

- *EIA Directive requires that “reasonable time-frames for the different phases shall be provided allowing sufficient time for informing the public*
 - *does the law envisage reasonable time-frames?*
 - *are they observed in practice?*

In the EIA process everyone is entitled to make comments to the of the project within a time limit of 20 days of the information being made public and within 30 days of the information being made public to the detailed documentation and to the assessment (if this is written up, i.e. if the EIA process does not end in a screening procedure). These time limits could be considered “reasonable” if not considering problems with acquiring the information about the corresponding information being made public which may occur. The wording of the regulation of the public consultations is not very good, in some cases it may result in too short a time limit for preparation of holding them.⁷⁵

⁷⁴On the contrary to the current wording it will be sufficient to make an announcement in the form of placing the information on the Internet.

⁷⁵ Pursuant to the provision of Section 9 (9) of the EIA Act, public consultations on the documentation or opinion are held only if the competent body has received a dissenting standpoint concerning those documents. In line with the provision of Section 17, public consultations must take place no later than within 5 days after expiration of the deadline for submitting comments of public.. If the first dissenting standpoint is received on the last day of the deadline, the public is informed 5 days prior to the date of public consultations. Such a short time contradicts the Directive’s requirement for providing a reasonable time frame for preparation and effective participation of the public in the process.

The time limits for participation in subsequent decision-making procedures are not determined uniformly. In most cases the actual length of the time limit for lodging objections is not the problem but definition of the groups of subjects which are entitled to do so.

Pursuant to Article 6 para 4 of the EIA Directive, the public concerned shall be given early and effective opportunities to participate in decision-making procedures. Due to the fact that the Czech legal system fails to define the term “public concerned” the following problems are encountered:

Individual laws (as a Building act) and/or their common interpretation link the participation of individuals in the environmental decision-making procedures mostly to ownership of the property, not to the fact that a person would be affected by, or have an interest in, the decision-making process. Participation in procedures in which the range of participants is governed by a general regulation, i.e. the Administrative Code, is limited. The Administrative Code links the participation to an involvement of rights or obligations but fails to guarantee participation to persons having an interest in the decision-making process.

Pursuant to Section 23 para 9 of the EIA Act, participation of NGOs in decision-making procedures subsequent to EIA is limited by three requirements. Only one of them complies with the Directive (the NGOs must submit their written comments to the notification, documentation, or opinion within the stipulated deadline). The other two (the competent authority has stated in the “final EIA opinion” that the NGO’s comments are partly or fully included in the authority’s opinion and the decision-maker in the follow-up procedure, has not decided that the public interests promoted by the NGO are not affected by the project) are beyond the scope of the EIA Directive and cannot be met by activity of the NGO itself, since they depend on the will of public authority.

This is also connected with the insufficient transposition and incorrect implementation of Article 10a of the EIA Directive (according to which the public concerned must have access to a review procedure before a court of law to challenge the substantive or procedural legality of decisions, acts or omissions (inactivity) concerning public participation provisions of EIA directive. The Czech legal regulations (in particular Act No. 150/2002 Coll., Code of Administrative Justice) or, more precisely, the accustomed interpretation thereof induces a number of problems:

- the EIA final opinion is not considered “reviewable” by Czech courts, due to its non-binding character (see above)
- the number of subjects considered to have standing against the development consent is restricted, in comparison to the definition of “public concerned
- non-governmental organisations, in cases when they have the position of a party to the administrative procedure, can only successfully challenge violation of their procedural rights at court; objections concerning material aspects of the development consent are mostly not taken into consideration by courts
- administrative action does not automatically have a suspensory effect. Courts may decide on a suspensory effect only if strict requirements are met and do so very seldom and practically never for actions lodged by NGOs. As environmental court proceedings have an average length of more than one year and as an action cannot be lodged immediately after the EIA opinion was issued but only against the issue of consent (see above), the preparations of the project in questions have, in a majority of cases, moved forward a great deal or, in the worse case, the project has been even completed by the time of the court’s decision.

7) assuring that results of EIA are taken into account in the final decision whether to approve the project

Pursuant to Article 8 of the Directive, the results of consultations and the information gathered during assessment must be taken into account in the development consent procedure. Pursuant to the EIA Act, only the “final opinion” of “EIA authority” is obligatorily considered in the subsequent administrative procedures (the respective authority must involve the specific measures concerning protection of environment in the development consent, or justify the reason why it has not done so). As standard practice, the investor only submits the EIA opinion apart from other documents to administrative bodies. In our opinion this is contrary to art. 8 of the EIA directive. Moreover, this provision is also indirectly violated by the limited opportunities for public participation (see above).

8) transboundary assessment

- *does the law correctly transpose the requirements concerning transboundary consultations?*
- *are they carried out in practice?*

Czech legislation allows affected Member States to participate in the EIA procedure itself, but not in the subsequent decision-making procedures (see above).

In practice the transboundary assessment rarely takes place even if the environment of a neighbouring state is seriously affected.⁷⁶

4. Conclusions

Despite most of EIA Directive requirements is transposed into Czech legislation, there are still examples of insufficient transposition, many of them caused by the concept of EIA as a separate procedure finished by a non-binding opinion and regulated separately from subsequent decision-making procedures. This particularly concerns:

- not transposing some items from Annex II of EIA directive
- not transposing a whole number of requirements of Annex IV of the EIA directive, concerning information about the projects,
- some of the information required by art. 6.2 of EIA directive (e.g. list of the follow-up decisions and competent authorities, the course of the procedures, details concerning the manner of public involvement) is not required by EIA Act.
- Czech legal system fails to define the term “public concerned”. This causes that the number of persons entitled to participate in the decision – making procedures and having access to justice is narrower than the Directive requires. The conditions for NGOs are also restrictive.
- only the “final opinion” of “EIA authority”, not all information pursuant to art. 8 of EIA directive, is obligatorily considered in the subsequent administrative procedures

Following typical practices of authorities can be emphasized as the most important examples of incorrect implementation of EIA directive:

- insufficient justification of screening decisions (conclusions)
- failure to carry out environmental impact assessment of the whole project (“salami-slicing”)

⁷⁶ See the R 52 (Czech) and A5 (Austrian) case studies as examples.

- insufficient assessment of all the impacts of the projects, particularly indirect and synergic effects
- non-assessment of real alternatives to the projects
- failure to guarantee effective and timely public participation, especially to present all information in reasonable form and time frames and to take into account comments by the public
- not respecting determination of a trans-border assessment
- not making the contents of the development consent available to the public
- the impossibility of achieving an effective judicial review of the results of the EIA process

It is clear that the competent authorities are often not aware of the requirements of the EIA Directive or that they are ignoring the requirements for the sake of economic development.

ESTONIA



1. General information on the transposition of EIA directive, in particular:

- *whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive); names of national act(s) transposing the directives:*
 - Directive 85/337/EEC

The Directive has been transposed in time with the Environmental Impact Assessment and Environmental Auditing Act (enforced 01.01.2001), amended later with new Environmental Impact Assessment and Environmental Management System Act (enforced 03.04.05).

- Directive 97/11/EC

The Directive has been transposed in time with the Environmental Impact Assessment and Environmental Auditing Act (enforced 01.01.2001), amended later with new Environmental Impact Assessment and Environmental Management System Act (enforced 03.04.05).

- Directive 2003/35/EC

The directive has been transposed in time with following acts (according to information from State Chancellery overview of the transposition of EU law⁷⁷):

- Environmental Impact Assessment and Environmental Management System Act
- Administrative Proceedings Act
- Integrated Pollution Prevention and Control Act
- Water Act
- Ambient Air Protection Act
- Earth's Crust Act
- Waste Act
- Radiation Act
- Planning Act
- Building Act

- *any other information on transposition you consider necessary*

The main part of the transposition lays in provisions about environmental impact assessment (EIA) procedures. The public participation provisions of Directive 2003/35/EC have been transposed into special acts, listed in previous point. However, the public participation provisions in these special acts (see the list above) have been enacted already before Directive 2003/35/EC came into force and were presumably inspired from the Aarhus Convention which came in force in October 2001.

2. Overall framework of EIA scheme (up to 1 page), in particular:

In EIA proceedings, there are following roles for different officials/persons (very simplified overview):

- developer – is responsible for organising EIA and cover the expenses related to EIA

⁷⁷ http://www.riigikantselei.ee/failid/Vastavusloetelu_01.04.06.xls (13.09.06)

- decision-maker – the issuer of a development consent, is responsible for initiating EIA and integrating the environmental requirements into the development consent (competent authority according to EIA Directive);
- supervisor of EIA – Ministry of Environment (MoE) or the county department of MoE, responsible for verifying the lawfulness of a decision to initiate or refuse to initiate the EIA and checking fulfilment of other kinds of procedural requirements; will decide whether the EIA report can be approved or not;
- EIA expert – assesses environmental impact, is required to have an EIA licence (is hired and paid by the developer).

Overview of the EIA procedure according to Estonian law:

- a developer files a request for development consent
 - a competent authority will carry out the screening and decide whether or not to initiate EIA proceedings
 - the public will be informed of initiation and refusal to initiate EIA via Official Announcements⁷⁸ - a certain webpage for official notifications (in case of refusal to initiate EIA, the notification can be made together with decision to issue or refuse to issue a development consent)
 - the EIA expert shall prepare an EIA programme (basis for structure and scope of the EIA)
 - the competent authority arranges notification (on expense of the developer) of the EIA programme, public display of the programme and public hearing;
 - public has a possibility to present comments and objections to EIA programme (the minimum duration of public display is 2 weeks); the comments will be presented to
 - the
 - the developer is obliged to give responses to written comments from public and make necessary amendments in EIA programme;
 - the EIA supervisor decides whether or not the EIA programme can be approved;
 - the EIA expert will carry out EIA and prepare an EIA report;
 - the competent authority arranges notification (on expense of the developer) of the EIA report, public display of the report and public hearing;
 - public has a possibility to present comments and objections to EIA report (the minimum duration of public display is 2 weeks);
 - the developer is obliged to give responses to written comments from public and make necessary amendments in EIA report;
 - the EIA supervisor will decide whether or not to give approval to the EIA report; in case of approving the report, supervisor shall determine environmental requirements to be taken into account when issuing development consent.
-
- *relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relation, which is “principal” and which “implementing” decision (see- Case C-201/02 Delena Wells)*

The EIA proceeding is a stage of proceedings of development consent. In sense of the Estonian EIA Act, “development consent” cannot be regarded as final and comprehensive consent to the

⁷⁸ <http://www.ametlikudteadaanded.ee>

whole project. Development consent is defined in EIA Act as any kind of permit, more specifically any kind of “document, permitting proposed activities with potentially significant environmental impact”. A project in the meaning of Directive could contain several activities in the meaning of EIA Act, and therefore several EIA proceedings could take place, in order to issue permits to one project. For example, in order to open a peat mine, mining permit and water use permit are required and EIA could be initiated in both permit proceedings.

According to judicial practice, approval to EIA report (which also determines environmental requirements to be taken into account while issuing development consent) is only procedural act in the proceedings of development consent and therefore cannot be considered as “principal decision”.

The approval to EIA report is not strictly binding to the decision-maker: upon making a decision to issue or refuse issue a development consent, the decision-maker shall “take into account of the results of EIA and the environmental requirements appended to the report”, but the decision-maker has a possibility to not take the requirements into account. In this case, decision-maker has to set out reasoned justification in the decision about development consent. However, the law is not consistent in this matter: it also says that development consent “shall not be issued of the developer is not able to comply with the determined environmental requirements”. (This could mean that the EIA approval is indeed binding to the decision-maker, but again – the law is not clear in this matter.)

In practice there are also cases where EIA is carried out without any application to development consent and constitutes an independent separate proceedings and outcome (although legal status of such outcome is highly questionable). In fact, also in case of port of Saaremaa, the EIA was initiated before application for development consent was presented to the Ministry of Environment. Therefore, the practice is inconsistent in this matter.

- *whether there are special procedures/arrangements made for transport projects*

At the moment there are no specific procedures for EIA of transport projects. The road construction regulation itself is special regulation towards general building regulation and includes some specific provisions about EIA, but this specific regulation is not clear and cannot be considered as special arrangement for EIA for transport projects (see also p III 1)).

There are discussions about rearranging the planning and EIA of transport projects (especially concerning long roads that go through several municipalities and/or even regions), but these discussions are in initial stage only.

- *relation to SEA*

The EIA is to be carried out for development consents, SEA for strategic planning documents (land-use plans, development plans and any other kind of plans, enacted by governmental institutions in specific fields of activity). Ideally, SEA should precede EIA proceedings (whereas land-use plans, serving as decisions about location and general parameters of projects, should be subject of SEA).

The law gives decision-maker possibility to refuse initiate EIA in case the environmental impact has already been assessed in course of SEA arising from implementation of the plan which is the basis for proposed activities. In this case, SEA would in fact serve as EIA as well.

3. Particular issues

1) Requirement for EIA and development consent - Art 2.1 and Case C- 201/02 Delena Wells. The Directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also "made subject to a requirement for development consent".

The Estonian EIA Act does not require general 'development consent' for projects. Permits are required for specific activities (water use, construction works, emitting pollutants in the ambient air etc). Only IPPC permits could be considered as general 'development consents', but these are not required for every project.

General consents to whole projects are given on more strategic level – according to judicial practice, decisions about location and general parameters of projects are made when enacting land-use plans. However, these plans are subject to SEA and therefore are out of scope of the present analysis.

The particular question is if modernisation of existing roads does require a development consent and thus is subject to EIA?

The road construction issues are regulated by Roads Act. Modernisation of existing roads could be "road construction" or "road repairs" in the meaning of this act. The difference between these concepts lies mainly in the result – the result of road construction is a new road, a change to the class of a road, a new junction or an auxiliary lane. The result of road repairs is the original technical state of road elements. Road repairs do not result in a change to the class of the road.

Road repairs do not require development consent, road construction does. Presuming that "modernisation" is supposed to give the road a new quality (change to the class of road, a new junction or an auxiliary lane), modernisation can be considered as road construction and therefore it does require development consent – a road construction permit. If to assume that road modernisation covers also works consisting e.g. in resurfacing of a road (change its current surface), it can be considered as road repairs and does not require clear development consent in form of a permit. For such works, a technical project or calculation of costs shall be composed, but it is not clear who and in what kind of decision should approve the project or calculation of costs (if at all). The Roads Act foresees only supervision over such projects.

A road construction permit is a development consent in the meaning of EIA Act and therefore needs screening for EIA (it may fall to the category of activities, definitely having significant environmental impact, or the initiation of EIA has to be decided on basis of discretion, depending on certain qualities of the project and the surrounding environment).

However, the Roads Act (§ 19 (5) refers to need for EIA only in case of construction of new roads. The question rises, whether this provision means that in case of re-building old roads the EIA is never necessary. As such provision would be not in accordance with the EIA Directive, and taking into account the general approach of EIA Act, the answer should be negative. The EIA Act names certain areas, in case of which the decision-maker is required to analyse, whether the activities have significant environmental impact. The list of these areas has been specified by a regulation of Government⁷⁹ and the specified list includes area "Infrastructures", more specifically also "road construction or repair, except for cases, named

⁷⁹ Government's Regulation No 224 of 29th August 2005 „Detailed list of areas of activity which require analysis, whether they have have significant environmental impact”

in § 6 (1) (13) of EIA Act”.⁸⁰ It therefore appears that road modernisation works that are considered as “road repair”, may need EIA, but not concrete development consent in form of a permit. It is clear that law is inconsistent in this matter and that Roads Act is in controversy with EIA Act.

2) approach to transposition of annexes (in particular Annex I point 7 and Annex II point 10) - Art.4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v Belgium

- screening method
 - case-by-case
 - categorical
 - combined

The screening method is combined. The decision-maker is required to analyse, on the basis of the criteria specified in EIA Act, whether the activities of certain areas have significant environmental impact. The list of certain areas, further specified with the regulation No 224 of Government, is analogous to Annex II of the EIA Directive, but not exactly the same.

However, as the list of areas is not exhausting, the screening should in fact be still carried out by case-by-case method. According to explanation from Ministry of Environment, the list of areas is just helping material in the screening process, but the decision-maker has to decide about initiating EIA in every case.

- in case-by-case screening
 - is the screening decision required to be accompanied by justification (Case C-87/02 Commission v Italy)

According to EIA Act, the screening decision has to be accompanied by justification in case the decision was made on basis of discretion (§ 11 (4) of the EIA Act). (In case the decision to initiate EIA because the activity falls to the threshold or category of obligatory EIA, the justification is not required).

- in practice: are the justifications credible?

It is hard to evaluate if the justifications of screening decisions are credible. First, the practice of the screening decisions is quite new (the obligation was enforced with new EIA Act which came in force on 3rd April 2005). Secondly, the practice depends heavily on the administrative body – some municipalities are publishing screening decisions in Official Publications⁸¹, whereas other do not even know that they have to give justification to the screening decision.

In case of road constructions, the screening decisions should be published in the register of construction works⁸² (EIA Act § 12 (2)), but so far no such decisions can be found in that register⁸³. Therefore, it is not possible to give evaluation to their justification. It is highly likely that there is none.

⁸⁰ § 6 (1) of the EIA Act is list of the cases with significant impact – cases when EIA is always obligatory

⁸¹ Ametlikud Teadaanded, <http://www.ametlikudteadaanded.ee>

⁸² Ehitisregister, <http://www.ehr.ee>

⁸³ last search made on 12th September 2006

3) *use of thresholds and selection criteria - art. 4.3 and Annex III, and Case C-392/96 Commission v Ireland*

- *in case-by-case screening*
 - *are the criteria of Annex III required to be followed?*

In case-by-case screening, the criteria of decision-making are following (§ 6 (3) of the EIA Act):

- the environmental conditions of the area where the activities are carried out and its vicinity;
- the nature of the activities, including their technological level, use of natural resources, volume of waste generation and volume of energy demand, and other activities in the vicinity;
- the consequences associated with the activities, e.g. water, soil or air pollution, waste generation, noise, vibration, light, heat, radiation and smell;
- the possibility that emergency situations resulting from the activities arise;
- the magnitude, spatial extent, duration, frequency and reversibility, effect and cumulativeness of the impact resulting from that specified in clauses 1)-4) of this subsection and the transboundary impact and the probability of the impact.

The list is not exactly the same as in Annex III, especially regarding the attention to specific areas, listed in p 2 of the Annex III (wetlands, coastal zones, mountain and forest areas etc).

- *are they followed in practice?*

It is hard to evaluate, first because of there is no general overview of the whole practice (and the practice is quite new), secondly because that considerations about these criteria are often not made apparent in the justifications of the screening decisions.

- *in categorical screening*
 - *are the criteria of Annex III required to be followed?*

The situation is the same as by case-by-case screening.

- *are they followed in practice?*

The situation is the same as by case-by-case screening.

4) *measures taken to avoid “salami slicing” and assure assessment of cumulative effects - Case C-392/96 Commission v Ireland (with respect to changes made by Directive 35/2003, concerning assessment of changes or extensions of existing projects - Annex I, point 22 and Annex II, point 13 of consolidated version of EIA Directive - there is relation to the problem of modernisation of existing roads - see point 1) above).*

The assessment of changes or extensions of existing projects is solved through case-by-case screening. Changes in an activities, listed in § 6 (1) of the EIA Act (activities with significant environmental impact) or in activities, belonging to categories that require considering of initiating EIA, are prescribed in the regulation No 224 of the Government as separate category that requires consideration of initiating EIA.

It may be concluded that Estonian national legislation is not in accordance to Art 4.1 and Annex I p 22 as it allows the changes in activities, falling into scope of Annex I, only to be considered to be subjected to EIA.

5) information to be supplied by the developer - Art.5 and Annex IV, in particular approach to alternatives and non technical summary

According to EIA Act, the information about characteristics of projects, location of projects and characteristics of the potential impact as well as description of remedying measures and outline of the possible alternatives is given in the EIA report. In practice, the burden for providing the information falls to EIA expert, not directly to the developer. This concerns specifically consideration of alternatives.

Another problem in the EIA Act is that the EIA report only has to describe “real” alternatives, but there is no definition what is “real”. The law does not foresee obligation to explain how and why the alternatives were selected. In practice, the most common solution is to describe only ‘zero-alternative’ besides the planned activity, whereas developer declares that he sees no other actual alternative to activities, proposed by him.

6) public participation, in particular:

- *EIA Directive requires public to be informed “early in the environmental decision-making” about the procedure:*
 - *does the law envisage clearly such requirement?*

There is no clear requirement in EIA Act that public should be informed “early in the environmental decision-making”. However, the public participation is very strictly regulated in the EIA Act. There are two stages for the public to be involved:

1. before approval to the EIA programme (a document, determining the methodology, scope and timeframe for the EIA);
2. before approval to the EIA report.

In both cases, public shall have minimum 2 weeks to access the EIA documents and submit proposals, objections and questions.

It can be said that according to law, the public should be involved clearly and early enough (practice is a different matter).

- *is this a rule in practice?*

In practice, the public is involved in both of these two stages, the problems lie mainly in other sides of participation, namely that:

1. the information about EIA does not reach the public;
2. public has no access to all information or the information is not sufficient;
3. time-frames are unreasonably stringent;
4. it is unclear what kind of objections the public can and should present in EIA proceedings (is it only objections to EIA or also objections to the development consent).

- *EIA Directive requires ‘detailed arrangements for informing the public...shall be determined’*
 - *are they determined sufficiently clear?*

The arrangements for informing the public are clear. Following conditions have been determined by the law:

1. where the information about EIA programme and report has to be published;
2. what should be the content of this notification.

Both conditions have been set as minimal requirements (however, they are usually taken by practitioners as strict requirements to be kept).

- is the public informed in an adequate, timely and effective manner” as required by article 6.2 of the Aarhus Convention?

The public is not informed in an adequate, timely and effective manner.

According to EIA Act, the notifications have to be published in Official Announcements and in one national or one local or regional newspaper. The Official Announcements (Ametlikud Teadaanded) is a specific website for public announcements which is probably not known for majority of population and is methodologically not considerable source of such kind of information for ordinary people. Publication in the national newspaper may not guarantee informing the local people, whereas publication only in the local newspaper may not guarantee informing other people, possibly interested in the case (e.g. landowners who do not live in this area etc).

This problem does not concern the most active environmental NGOs who are members of Environmental Council of Estonian Environmental NGOs (EKO) – according to law, NGOs will be informed separately through their umbrella organization. The problem concerns most the ordinary people, especially in rural areas, but similarly local grassroots NGOs.

The Supreme Court of Estonia has stated at least in one case⁸⁴ that consequently to principles of democracy and good governance, administrative body should inform the public more intensively as foreseen in law, in case it is clear that the information channels prescribed by law may not be sufficient for actual information of interested persons and in case the additional informing does not involve unreasonable costs.

Estonian Fund for Nature has made a suggestion to Ministry of Environment to publish EIA announcements also at least in one publicly used building or place of the location of proposed activity (e.g. bus station, local shop, library etc – analogous regulation has already been enforced in proceedings of land-use plans). ELF is of opinion that such additional informing will probably be not too big financial burden to the developer.

- *EIA Directive requires “reasonable time-frames for the different phases shall be provided allowing sufficient time for informing the public*
 - *does the law envisage reasonable time-frames?*

The EIA Act sets minimum time-frames for consulting with public (2 weeks for EIA programme and 2 weeks for EIA report). This would be sufficient in small cases only. However, the law gives possibility to determine longer time-frames so theoretically it should be in accordance to the Directive.

⁸⁴ Case No 3-3-1-31-01

- *are they observed in practice?*

In practice, the minimum time-frames (2 weeks) are strictly implemented. In many cases, this is not reasonable – especially in case of major projects with large amount of materials to be elaborated.

7) *assuring that results of EIA are taken into account in the final decision whether to approve the project - Art.8*

According to § 24 of EIA Act, upon making a decision to issue or refuse issue of a development consent, the decision-maker shall take account of the results of environmental impact assessment and the environmental requirements appended to the report. If, upon making a decision to issue or refuse issue of a development consent, the decision-maker fails to take account of the results of environmental impact assessment and the environmental requirements appended to the report, the decision-maker shall set out a reasoned justification in the decision to issue or refuse issue of the development consent. A development consent shall not be issued if the developer is not able to comply with the determined environmental requirements.

In this respect, the national legislation is in accordance with the EIA Directive.

8) *transboundary assessment - Article 7 of EIA Directive*

- *does the law correctly transpose the requirements concerning transboundary consultations?*

The transposition of the provisions of transboundary consultation is in general been carried out, but is not correct in following details:

- the national legislation does not oblige to give the other MS reasonable time in which to indicate whether it wishes to participate;
- the developer has no direct obligation to present information, determined in Art 5 (except for application for development consent) so part of this information may not be sent to the other MS.
- *are they carried out in practice?*

There has been very little practice about the transboundary consultations. There have been cases where it questionable whether the project has transboundary impact or not – e.g. oil transit port in NE coast of Estonia (port of Sillamäe) was determined by the environmental authorities as not to have transboundary impact, although activity of the port may affect the whole part of Baltic Sea in this area (possible affected countries would be Finland and Russia).

4. Conclusions

EIA is an issue thoroughly and strictly regulated in Estonia and is in general following the purpose of EIA Directive. Participation possibilities are granted for public and there are strict requirements in order to guarantee good quality of EIA (the practice is another matter).

However, the current regulation apparently has some faults in respect of establishment of big infrastructure projects, main problems of which are following:

1. EIA is carried out in proceedings of specific permits, not as EIA to 'development consent' to whole project, as foreseen by EIA Directive. This creates possibility to assess impacts only in small portions as each of the permits covers only some specific activity (and some activities are not covered by permits at all); this situation could somewhat be softened by fact that general impacts of projects should already be assessed on strategic level in SEA proceedings of relevant plan, but the hierarchy of plans and projects is in turn controversial point;
2. The regulation of permitting and assessing impacts of road construction is in controversy with EIA Act, as the road modernization might need EIA, but no development consent in the meaning of EIA Directive (in this case, EIA might not be carried out or can be carried out with no clear legal status for the outputs).

In regard of these issues it should be deduced that Estonian legislation is not in accordance with the EIA Directive, whereas the faults described above can and has proved to be difficulties especially when designing new infrastructure projects (including road construction).

HUNGARY



1. General information on the transposition of EIA directive, in particular:

- *whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive):*
 - *Directive 85/337/EEC*

Transposition of this directive was formally finished.

The first comprehensive EIA regulation of Hungary dated back to 1995 which was later replaced by a new EIA regulation of 2001. By the time of Hungary's accession to the EU, the respective domestic norm was in place.

- *Directive 97/11/EC*

Transposition of this directive was formally finished.

The aforementioned new EIA regulation of 2001 took into consideration the amendment of the EIA Directive. By the time of Hungary's accession to the EU, the respective domestic norm was in place.

- *Directive 2003/35/EC*

Transposition of this directive was formally finished.

According to official standpoint, the current EIA regulation of 2005 transposes – inter alia – this directive. Therefore, the necessary regulatory framework is in place.

- *names of national act(s) transposing the directive*

Act No. 53 of 1995 on the General Rules of the Protection of the Environment (Environmental Protection Act)

Government Decree No. 314 of 2005 (25 of December) on the EIA and IPPC procedures (EIA Decree)

- *any other information on transposition you consider necessary*

Before the adoption of the 2005 EIA Decree, there was practically no screening procedure in Hungary, however, the previously prevailing system comprised of a two-phase assessment process sometimes being more demanding than the expectations of the EIA Directive. The 2005 EIA Decree remedied this situation. Nevertheless, the Commission of the EU has formally started recently an infringement procedure against Hungary for the 2001 EIA Decree not being in compliance with the EIA Directive, despite that the 2001 EIA Decree was entirely replaced by the 2005 EIA Decree from 1 January 2006.

2. Overall framework of EIA scheme (up to 1 page), in particular:

According to the current EIA scheme in force in Hungary, certain projects that fall under the scope of the EIA Decree (practically those that are contained in Annex I of the EIA Decree) must undergo an EIA procedure. Other projects (contained in Annex III of the EIA Decree) may undergo the EIA procedure in case the competent authority so decide after having completed the screening procedure. Contents of the screening documentation are regulated in detail by Annex IV to the EIA Decree. Aspects to be taken into consideration when making a decision on the necessity of an EIA procedure by the competent authority are likewise defined in detail in Annex V to the EIA Decree. The competent authority issues a formal resolution at the end of the screening process which then can be appealed at the superior national environmental

authority by those having standing, including environmental NGOs working in the impact area. Then the final administrative resolution can be taken to a court for a judicial review process by the same group of parties. In case an EIA process is necessary, the EIA Decree again defines in detail the mandatory contents of the Environmental Impact Statement (Annex VI), the method of defining the impact area of the project (Annex VII), and the authorities to be consulted during the decision-making (Annex XII). Both the procedure of screening and of the actual impact assessment has public participatory components where the public has sufficient time to comment on documentations submitted by the project developer. In the actual impact assessment phase, there is an obligation to hold at least one public hearing upon the project. In case the project is approved by the competent environmental authority, the procedure ends with a formal administrative resolution in the merits of the case granting the project developer an environmental permit. That permit can be appealed at the superior national environmental authority, whose final administrative resolution in the merits of the case can later be taken to a court for a judicial review process. In case the project also falls under the scope of the IPPC requirements, there are three options the details of which are regulated by the EIA Decree: a) to run a separate IPPC procedure, b) to connect it to the EIA procedure or c) to entirely merge the two procedures.

The EIA procedure flows according to the following order:

- the project developer must submit an application for a screening process, attaching thereto a so-called screening documentation and paying a certain procedural fee
- the Environmental Inspectorate publishes a communication on its website, containing – inter alia – a call for comments within 21 days regarding the need for an EIA
- the Environmental Inspectorate at the same time sends the clerks of the affected municipalities the communication, the application and its attachments for posting it in public places
- the Environmental Inspectorate holds a meeting with the project developer and the consulted authorities to discuss the necessity of an EIA
- the Environmental Inspectorate must ensure public access to all information related to this stage of the process within 5 days
- the Environmental Inspectorate makes a decision on the necessity of an EIA
- the project developer, if the latter decision was positive, submits an application for an environmental permit and an Environmental Impact Statement attached thereto and pays a certain procedural fee
- the Environmental Inspectorate publishes a communication on its website and in a local or national newspaper, containing information on the start of the process and on possibilities of commenting during the process
- the Environmental Inspectorate at the same time sends the clerks of the affected municipalities the communication, the application and its attachments for public access and for posting it in public places for minimum 30 days
- the Environmental Inspectorate must ensure public access to all information related to this stage of the process within 5 days
- the Environmental inspectorate holds minimum one public hearing at the location of the planned project to which the invitation must be published at least 30 days prior
- public comments can be submitted until the date of the public hearing either to the municipality clerk or to the Environmental Inspectorate
- the Environmental Inspectorate makes a decision, based upon the available information, taking into due account the comment received during the process, and either issues the environmental permit or rejects the permit application

- *relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relation, which is “principal” and which “implementing” decision (see- Case C-201/02 Delena Wells)*

EIA is a separate procedure that ends with a separate formal administrative resolution of the competent authority in the merits of the case. In case the project assessed is approved, this resolution takes the form of an environmental permit. In the construction permitting of those projects that previously underwent an EIA procedure, the outcome of the EIA process plays a role in two respects:

- the environmental permit is a mandatory annex of the construction permit application documentation, and
- the competent environmental authority that issued the environmental permit is to be mandatorily consulted by the competent construction authority in the construction permitting procedure.

In this context, the environmental permit being a prerequisite of construction permitting plays a certain “principal” role in the overall permitting regime.

- **whether there are special procedures/arrangements made for transport projects**

Act No. 128 of 2003 on the Public Interest Character and the Development of the Highway Network of the Republic of Hungary (Highway Act) introduced a special regime for the EIA procedures of those highways whose construction is considered an overriding public interest (the list of such highways are included in Annex I and II to the Highway Act). According to these rules:

- the competent authority to decide in the merits of the case on the first instance is the superior national environmental authority
- the appeal against the first instance decision can be directed to the leader of the superior national environmental authority
- the mandatory public hearing must be realized with the involvement of the project developer
- alignment of a main road or a motorway to highway does not require a screening procedure
- the maximum duration of the administrative procedure can not be lengthened in such cases
- the court must hold the first hearing in a case initiated against the final permit of such highways within 45 days

It is worth mentioning, that the above provisions of the Highway Act were subject to a process by the Aarhus Convention Compliance Committee that concluded that “... while the contested new Hungarian legislation on the development of the expressway network reduces the opportunities for public participation in decision- making on this type of specific activity as well as the opportunities for access to justice in this regard in comparison with previously existing legislation in this field, it does not, prima facie, fall below the minimum level of public participation and access to justice required by the Convention ...”⁸⁵

⁸⁵(see www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.4.e.pdf).

- *relation to SEA*

Government Decree No. 2 of 2005 (11 of January) on the Environmental Assessment of Certain Plans and Programs (SEA Decree) regulates SEA in Hungary. According to Art. 1.2.ba of the SEA Decree, those plans and programs must mandatorily undergo an environmental assessment that “are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in the annex of the respective law on EIA but without any restrictions relating to the size or the location of the projects.”

3. Particular issues

1) requirement for development consent - Art 2.1 and Case C-201/02 Delena Wells

The directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also “made subject to a requirement for development consent”. The particular question is if modernization of existing roads does require a development consent and thus is subject to EIA?

“Realignment and/or widening of an existing road so as to provide four or more lanes, where such realigned and/or widened section or lane of road would be 10 km or more in a continuous length” falls under the scope of Annex I (under Point 39) to the EIA Decree, therefore they always require an EIA and consequently, must possess an environmental permit to be able to proceed to the construction permitting phase. Other sorts of modernizations of existing roads not reaching this threshold do not require an EIA and do not even fall under the scope of the EIA Decree; therefore not even a screening process must be run for them.

2) approach to transposition of annexes (in particular Annex I Point 7 and Annex II Point 10) - Art. 4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v. Belgium

- screening method
 - case-by-case
 - categorical
 - combined
- in case-by-case screening
 - is the screening decision required to be accompanied by justification (Case C-87/02 Commission v. Italy)
 - in practice: are the justifications credible?

Combined method.

3) use of thresholds and selection criteria - Art. 4.3 and Annex III, and Case C-392/96 Commission v. Ireland

- in case-by-case screening
 - are the criteria of Annex III required to be followed?
 - are they followed in practice?
- in categorical screening
 - are the criteria of Annex III required to be followed?

Yes, there is an Annex V to the EIA Decree which literally includes the aspects of Annex III to the EIA Directive as ones to be taken into consideration during screening.

- *are they followed in practice?*

Since a formal screening procedure in EIA cases only exists in Hungary since 1 January 2006, there is no sufficient evidence to answer this question with certainty, however, no cases were reported so far by the environmental NGO community where the rules of Annex V to the EIA Decree were neglected.

4) measures taken to avoid “salami slicing” and assure assessment of cumulative effects - Case C-392/96 Commission v. Ireland

Within the EIA regime of Hungary, a number of regulatory solutions try to solve the problem of salami slicing and to assure the assessment of cumulative effects:

Firstly, the obligation to perform an EIA (or at least to run a screening procedure) does not only apply to certain defined activities and installations but to the significant modifications exceeding a threshold thereof, as well. Thus law makes efforts to avoid situations when initially small-scale projects are expanded gradually by steps always being under the threshold but finally and cumulatively manifesting in a large-scale project that would otherwise require an EIA. Conditions of significant modifications are regulated in a lengthy and complicated manner full of technical details by the EIA Decree.

Secondly, there is an exception in the EIA regime that EIA does not apply to activities and installations (otherwise listed in the annexes to the EIA Decree) if they only serve research, development or testing purposes. However, this exception is so strict that it hardly can be misused, and projects normally falling under the scope of the EIA Decree can not disregard the EIA obligation by referring to this provision.

Thirdly and specifically relating to linear infrastructure projects, certain individual sections can be separately permitted but only in case it can be supposed, based on the submitted documentation, that the continuation of the projects meets the environmental and nature conservation requirements.

Among the technical details regulated by the annexes to the EIA Decree, there are a number of provisions that intend to assure that cumulative effects are taken into account during the EIA: Annex IV (contents of the screening documentation): Point 1.d) in case of linear infrastructure projects, the summary of environmental impacts of the continuation and further construction of the projects, must be presented.

Annex V (aspects of necessity of an EIA): Point 1.g) the drawing force of the project for other activities and installations with significant environmental impact to settle in the vicinity of the project must be taken into account during the screening decision-making. Point 3.d) another aspect to be taken into account is the possibility of impacts to cumulate with the impacts of other running or planned activities somewhere else in the region.

Annex VI (contents of the EIS): Point 4.ab) it must be presented whether the impacts of the project can add to impacts of other activities.

Annex VII (definition of the impact area): Point 5.c) those areas also belong to the impact area of a project where diverse impacts can cumulate.

5) information to be supplied by the developer - Art. 5 and Annex IV, in particular approach to alternatives and non technical summary

Alternatives

There is no clear and absolute legal requirement towards the project developer to present feasible alternatives to the project proposed. Although in some provisions of the EIA Decree, some references to alternatives appear, but they are unable to ensure the presentation of real alternative solutions. These are the following:

- the competent environmental authority must designate those options that it thinks feasible in case the project developer presented alternatives
- one of the mandatory contents of the screening documentation is the basic data of the alternatives studied but only if the project developer studied any
- one of the mandatory contents of the EIA documentation is the presentation of the main alternatives taken into account by the project developer and the main reasons that played a role when selecting therefrom, as well as the detailed description of the alternatives studied, but again, only if the project developer took into account any

Non-technical summary

According to Annex VI to the EIA Decree, the non-technical summary is a mandatory component of the EIS. The summary must also be a part of the documentation package that the competent environmental authority sends to the municipalities of location of the project and to the neighboring municipalities after the submission of the permit application by the project developer.

6) public participation, in particular:

- *EIA Directive requires public to be informed “early in the environmental decision-making” about the procedure:*
 - *does the law envisage clearly such requirement?*

Yes, the permit application as well as the screening documentation submitted by the project developer must be sent to the municipality clerks of the location of the project and of the potentially affected municipalities by the competent environmental authority for posting it in public places and in the locally customary way. Then the public may make comments on the presented documents.

- *is this a rule in practice?*

Since a formal screening procedure in EIA cases only exists in Hungary since 1 January 2006, there is no sufficient evidence to answer this question with certainty, however, no cases were reported so far by the environmental NGO community where the rules of public participation in the screening phase of the EIA Decree were neglected.

- *EIA Directive requires that “detailed arrangements for informing the public ... shall be determined”*
 - *are they determined sufficiently clear?*

Yes, the public, the venues and the timeframes of participation as well as access to information and taking into account of public comments are regulated in detail by the EIA Decree.

- *is the public informed in an adequate, timely and effective manner” as required by Article 6.2 of the Aarhus Convention?*

Yes, both active and passive access to information ensures adequate, timely and effective implementation of the information access right within the EIA procedure.

- *EIA Directive requires that “reasonable time-frames” for the different phases shall be provided allowing sufficient time for informing the public*
 - *does the law envisage reasonable time-frames?*

Rules of the EIA Decree apply the following timeframes for public information:

- the communication of the competent environmental authority published in the office and on the website of the authority must contain a warning that within 21 days the public may make comments on the screening documentation
- the municipality clerks of the location of the project and of the potentially affected municipalities must publish the screening documentation received from the competent environmental authority within 5 days by posting in public places and in the locally customary way
- access to the entire screening documentation is ensured by the competent environmental authority within 5 working days of its availability (e.g. the minutes of the mandatory screening meeting is available within 5 days of the meeting)
- the municipality clerks of the location of the project and of the potentially affected municipalities must publish the screening decision within 5 days by posting in public places and in the locally customary way
- the municipality clerks of the location of the project and of the neighboring municipalities who receive the EIA documentation must publish it by posting in public places and in the locally customary way
- the public has at least 30 days for access to information and commenting
- publication of the data of the public hearing in a local or national daily newspaper and by posting in public places by the clerks of the participating municipalities must precede the hearing at least with 30 days
- access to the entire EIA documentation is ensured by the competent environmental authority within 5 working days of its availability (e.g. the consulted authority statements are available within 5 days of their submission)
- the municipality clerks of the location of the project and of the potentially affected municipalities must publish the EIA decision within 5 days by posting in public places and in the locally customary way

Consequently, there are provisions in the laws that require that the public be informed in a timely manner, and the adequacy of such information can also be considered as satisfactory. However, the effectiveness of public information could be debated, based on the experience showing that only a very low portion of the public takes active part in the commenting processes of an EIA.

- *are they observed in practice?*

In most of the cases, the rules are observed in practice, and no cases were reported so far by the environmental NGO community where the rules of public information of the EIA Decree were neglected. In those cases where such rules of public information might have been

breached, this alone is a sufficient legal basis for contesting the procedural legality of the EIA decision.

7) assuring that results of EIA are taken into account in the final decision whether to approve the project - Art. 8

Since the decision taken by the competent environmental authority in the merits of the case takes the form of an authoritative resolution that can be either the granting or the refusal of an environmental permit (that later serves as an annex of further development consent/permit applications), it is absolutely guaranteed that results of the EIA are taken into account in the final decision whether to realize the project or not.

4. Conclusions

Overall, the EIA legal regime and its public participatory components are satisfactory in Hungary and align with the requirements of the EIA Directive as well as the Aarhus Convention. The recent 2005 EIA Decree has remedied those shortcomings that the 2001 EIA Decree has had previously. As regards practice of EIA and public participation therein, cases with the most widespread participation and the best implementation of access rights have been and still are the EIA cases where not only a broad standing of environmental NGOs prevail but also intense public commenting takes place, according to the experience of the last decade.

POLAND



1. General information on the transposition of EIA directive, in particular:

- *whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive):*
 - *Directive 85/337/EEC*
 - *Directive 97/11/EC*
 - *Directive 2003/35/EC*

Directive 85/337/EEC as amended by the Directive 97/11/EC was formally transposed by Environmental Protection Law Act of 2001 and the EIA Regulation of 2002 (now substituted by the EIA Regulation of 2004). Therefore the transposition was formally finished on time (prior to Poland's accession to the EU).

Directive 2003/35/EC was transposed by the Act of 18 May 2005 amending EPLA (in force since 27 July 2005). The Directive was to be implemented by 25 June 2005.

- *names of national act(s) transposing the directive,*

Environmental Protection Law Act of 27 April 2001 (consolidated text: Official Journal of Laws of 2006 No 129 item 902 as amended) - EPLA

Regulations of the Council of Ministers of 9 November 2004 on the categories of projects that may have significant environmental impact and on the criteria of screening projects for environmental assessment (Official Journal of Laws No 257 item 2573 as amended) - EIA Regulation

- *any other information on transposition you consider necessary*

The basic legal framework for environmental impact assessment in Poland is the Environmental Protection Law Act (EPLA) of 27 April 2001. This regulates the details of the EIA procedure and is the main legislation for transposing the EIA Directive.

the existing legal framework for EIA The legal scheme for EIA, mainly due to some deregulatory changes in the general legal framework concerning development controls introduced in 2003 and 2004, raised a number of doubts concerning its compliance with the relevant *acquis* and had been heavily criticized by the European Commission (EC) for its shortcomings in the transposition of Directive 85/337/EEC (EIA Directive)⁸⁶ and Directive 92/43/EEC (Habitats Directive).⁸⁷

The problems were related to the following issues: requirement for development consent, transposition of annexes, approach to screening, and impact on Natura 2000 sites. Also of some concern were details concerning public participation and conformity of the special EIA procedure for roads. The Road Act exempted roads from the general EIA procedure and replaced it with a simplified procedure which is generally in compliance with the EIA Directive, except for the scoping requirement whereby an authorizing body must specify the scope of the EIA report required (Article 5.2): in the case of roads there is no scoping at all. These shortcomings were considered important enough for the Cohesion Fund to withhold funding until Poland could give assurance that all projects significantly affecting the environment would be subject to proper assessment in line with the requirements of the

⁸⁶ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175.

⁸⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7.

relevant Community laws. This has prompted the Polish government to take steps to rectify the situation in 2005.

The 2005 changes were introduced by:

- the Act of 15 April 2005 introducing changes to the Environmental Protection Law Act (EPLA) of 27 April 2001 (2005 EPLA Amendment)⁸⁸
- the EIA Regulations of 10 May 2005 introducing changes to the EIA Regulations of 2004 (the 2005 Regulations).⁸⁹

2. Overall framework of EIA scheme (up to 1 page), in particular:

- *relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relation, which is “principal” and which “implementing” decision (see- Case C-201/02 Delena Wells)*

Traditionally, EIA in Poland had been integrated into the various decision-making procedures which authorize particular categories of projects, as follows (Article 46.4 of EPLA):

- location decisions
- construction permits
- mining concessions
- water permits:
- for constructing water facilities
- for underground abstraction
- for agricultural use of wastewater
- consents for works related to water regulation and flood protection
- decisions on restructurization of rural land holdings
- consents for changing forests into arable land.

In addition, under the Road Act, EIA was also related to road location decisions and road construction permit procedures.

Since for many categories of projects more than one of these authorization procedures was required, in practice EIA had to be carried out at least twice for most projects. This was considered to be an excessive burden beyond the requirements of the EIA Directive. On the other hand, the EC has questioned which of several decisions shall be treated as ‘principal decisions’ and which as ‘implementing decisions’ in the sense given in the judgment in Case C-201/02 Delena Wells,⁹⁰ followed by the question whether the EIA procedure connected with

⁸⁸ Dz.U. 2005 Nr 113, poz. 954.

⁸⁹ Dz.U. 2005 Nr 92, poz. 769.

⁹⁰ *R (Delena Wells) v The Secretary of State for Transport, Local Government and the Regions* [2004] 1 CMLR 31. See J Lowther, ELM 16 [2004] 1 31, where: ‘...the court then considered the question of the point at which an EIA must be undertaken. It stated clearly the directive’s requirement, at Article 2(1), that the EIA must come before the grant of consent. The preamble to the directive requires the competent authority to take account of environmental effects at the earliest possible stage. In a circumstance where there may be several stages, for example where there is a principal decision and an implementing decision limited by the parameters of the former, the environmental effects should be identified and assessed at the time of the procedure relating to the principal decision, unless the effects can only be identified later in the process. Thus, the ECJ required an EIA of the effects of the reactivation of the mining consents, reiterating the point that an EIA should, in principle, be carried out as soon as possible’.

the decision to be treated as the 'principal' decision really complied with the requirements set by the EIA Directive.

The 2005 EPLA Amendment envisages a significant breakthrough in the EIA legal scheme in Poland and introduces a brand new procedure (the EIA decision) established solely for the purposes of providing EIA. Instead of integrating EIA into the various development consent procedures listed in Article 46.4 of EPLA, the special EIA decision has to be obtained before an application for any of the development consent listed in Article 46.4 of EPLA is made. Thus, the new decision does not replace the existing ones but merely supplements them. Moreover, the EIA decision is required early in the decision-making process for any project which may have significant impact on the environment irrespective of whether such a project is to be implemented in an area where a local land use plan exists or not.

The EIA decision, depending on the category of projects, is to be granted by environmental authorities at various levels: most of them by local (gmina) authorities, some by district (powiat) authorities and some by regional (voivodship) authorities.

Since 1989 Poland has also a special authority to monitor quality control of the assessment: the EIA Commission. The Commission was set in 1989 as an advisory body to the Environment Minister and consisted of 75 members, drawn from academics and representatives of environmental NGOs and authorities.

In 2000 the EIA Commission gained proper statutory basis and was divided into the National EIA Commission, which advises the Environment Minister and regional EIA commissions, which advise the regional authorities.

Their role is to advise both on EIA and SEA issues. In case of EIA they evaluate the EIA reports and give advice whether to approve the evaluated projects and under what conditions they can be approved. Authorities are not bound to seek the advice nor to follow it. Since the involvement of the EIA Commission is not a mandatory procedural step in fact they are getting involved only in some cases, usually the most difficult or precedential ones.

The 2005 EPLA Amendment provides certain changes in categories of decisions listed in Article 46.4 of EPLA i.e. those which under the hitherto existing scheme required an assessment to be made.

Thus, Article 46.4 of EPLA does not include anymore the following decisions:

- location decisions (first decision required within a development process, followed usually by construction permit)
- water permits for underground water abstraction
- water permits for agricultural use of wastewater.

The consequence of this is that issuing any of the above decisions does not have to be preceded by an EIA decision (which means: by assessment to be made). The assumption was that all the projects subject to EIA under the EIA Directive and requiring any of the abovementioned decision also require another authorisation - one of those still listed in Article 46 of EPLA (i.e. those before which obtaining an EIA decision is required). Whether this is always the case is doubtful. For example point 1 b) and d) of Annex II to the EIA Directive includes: 'conversion of forest or uncultivated land into arable land' and 'afforestation (...) or deforestation for the purpose of conversion to another type of land use'. Neither of those

requires any of the decisions listed currently in Article 46 of EPLA but may well require a location decision.

On the other hand, the 2005 EPLA Amendment adds a requirement for the EIA decision to be obtained in the case of projects which may have significant impact on the environment and which do not require a construction permit but require notification of the relevant authorities before starting construction works (for example modernisation of roads).

The newly introduced EIA decision is intended to be a 'development consent' in the meaning of Article 1.2 of the EIA Directive and to play the role of a 'principal decision' in the meaning given in the Delena Wells case. The main question is thus, whether EIA decision "entitles the developer to proceed with the project"? Moreover, is it "the principal decision" in the meaning given in Delena Wells case which sets the basic parameters of the project? Whether this is the case is doubtful.

Indeed, no project which may have significant impact on the environment and which requires any construction works (or any significant change of existing use of a building) may be implemented without obtaining an EIA decision. Moreover, it is required early in the decision-making process when all options are open; it sets the basic environmental parameters of the project in question, and it is binding on the authority issuing the relevant construction permit.

On the other hand however, the 2005 EPLA Amendment does not affect the fact that the location decision remains to play the role of the main development consent in Polish law. As rightly observed in the letter of the Environment Minister dated 19 October 2004 - the location decision sets the basic parameters of the development for a particular project.

The 2005 EPLA Amendment does not require EIA decision to be obtained before getting a "general" location decision (except for the road location decision). Neither it provides any hints as to the mutual relation of both decisions. On the other hands both decisions are binding upon construction permit.

Another question is if it really always serves as a 'principal decision', while the construction permit or any other decisions mentioned in Article 46 of EPLA serve as only 'implementing decisions' in this respect. Another words- is the EIA decision always a decision that "entitles the developer to proceed with the project". The point is that in itself the EIA decision alone does not entitle the developer to proceed with the project, since the developer needs to obtain also a construction permit.

The EIA decision is granted at such early stage of the development process that often no precise details of the project are known already. Such details are usually known only when a detailed construction design is prepared for the purpose of obtaining the construction permit. And at this stage there is no EIA, since the law states clearly (Article 46 para 3 EPLA) that EIA may be required only once for a given project. This seems to be not in line with the ECJ rulings in cases C-508/03 i C-290/03 which both require possibility to carry out another EIA procedure also at the later stage of the development consent process - should particular features of the project require such second EIA procedure.

Therefore, if indeed the EIA decision is the only decision when EIA can be carried out, while in fact the development consent process consists of several decisions - the EIA decision can not be always treated as a decision that "entitles the developer to proceed with the project".

- *whether there are special procedures/arrangements made for transport project*

Since 1994 Poland has also had a special legal framework for the location and construction of certain types of roads, which provides for special rules for EIA procedure in relation to these roads. This was introduced by the Toll Motorways Act of 27 October 1994⁹¹ and is now regulated by the Act of 10 April 2003 on Special Rules for the Preparation and Implementation of Schemes concerning National Roads (the Road Act).⁹² The 2005 EPLA Amendment abolishes a special EIA procedure for roads and provides a set of EIA rules applicable in all cases - also for roads.

- *relation to SEA*

There is no clear-cut relation between EIA and SEA. As opposed to IPPC, where there is a formal co-relation in form of special requirements for environmental reports concerning IPPC installations, the law does not envisage any such formal relation between EIA and SEA. However, there is a practical relation because projects located on areas where local land use plans exist are somehow subject to both SEA and EIA and the conditions set in local land use plans (subjected to SEA) are binding for EIA decisions. Moreover, EIA decisions are mostly issued by local authorities, which are also responsible for local land use plans.

3. Particular issues

1) Requirement for development consent - Art 2.1 and Case C- 201/02 Delena Wells

The Directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also "made subject to a requirement for development consent".

The particular question is if modernisation of existing roads does require a development consent and thus is subject to EIA?

As far as the requirement for development consent is concerned, there are some doubts if indeed in case of all categories of projects listed in Annexes I and II this requirement is sufficiently assured.

The main issue in Poland was the fact that certain projects which required screening under the EIA Directive (for example modernisation of roads) were no longer under an obligation to obtain a location decision and construction permit as long as authorities were notified. The notification, however, could not be treated as a 'development consent' in the meaning of the EIA Directive, and did not trigger EIA procedure, nor meet the requirements allowing proper screening under the EIA scheme.

The 2005 EPLA Amendment does attempt to solve problems in this respect identified as problematic under the hitherto existing legal framework in relation to projects subjects to Cohesion Fund - in particular the issue of modernisation of roads. It adds a requirement for the EIA decision to be obtained in case of projects which may have significant impact on the environment and which do not require a construction permit but require notification of the relevant authorities before starting construction works (for example: modernisation of roads). Thus, the 2005 EPLA Amendment assures that any project which may have significant impact on the environment and which requires any construction works (or any significant change of existing use of a building) will be subject to EIA decision. Thus, if the EIA decision is to be treated as "development consent" in the meaning of article 2.1 of EIA Directive and Delena Wells case (which as already mentioned is doubtful) the problem is solved.

⁹¹ Cons. text: Dz. U 2001 Nr 110, poz. 1192, as amended.

⁹² Dz. U. 2003 Nr 80, poz. 721, as amended.

There are however some other issues of concern. There are still doubts if there is a proper requirement for development consent in case of conversion into another type of land use, storage of scrap iron, afforestation, and intensive livestock rearing.

Polish law, following point 1 b) and d) of Annex II, requires screening to be undertaken in case of:

- “conversion of forest or uncultivated land into arable land”
- “afforestation ... or deforestation for the purpose of conversion to another type of land use”.

It is not clear however, if all of the above activities are made subject to requirement for development consent, in particular whether they are subject to any of the decisions listed in Article 46.4 EPLA. Some of the activities (namely: change of forest into arable land) is made subject to a special decision: “consent for changing forest into arable land” issued under the Forrest Act of 28 September 1991⁹³. The consent does not cover uncultivated land not considered as “forest” under the Forrest Act, neither it covers changing forests into other uses.

As for afforestation, according to Article 14.3 of the Forrest Act, the grounds to be afforested “are being designated in the local land use plan or in the location decision”. This particular provision does not seem to sufficiently provide for a requirement for such a decision in case someone undertakes to plant the forest.

Storage of scrap iron, including scrap vehicles, if undertaken without any construction works involved (which happens quite often in practice) is not subject to any of the decisions listed in Article 46.4 EPLA. It requires however authorization under Article 63 of the Waste Law which mentions a number of decisions authorizing and setting conditions for storage of waste.

Polish law, following point 17 of Annex I and point 1 e) of Annex II, requires EIA or screening to be undertaken in case of intensive rearing of livestock. There is a clear requirement for development consent in case such activity involves construction of a building. Quite often however such activities, exceeding the thresholds set in the EIA Regulations, are being undertaken in the existing buildings (old collective farms) and quite often it happens without being subject to any consent and any EIA. This is despite the fact that such a requirement might be interpreted from the existing law. The point is that this requirement is not designed clearly enough. Under Article 59 of the Spatial Planning Act of 2003 a change of use of a building requires a location decision. Under Article 71.1 of the Building Law Act of 7 July 1994⁹⁴, a change of use of a building is defined by involving i.a. activities that change the environmental conditions. This clause, without a clear reference to EIA Regulations, is not precise enough to assure in practice a proper trigger for EIA to be applied.

2) Approach to transposition of annexes (in particular Annex I point 7 and Annex II point 10) - Art.4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v Belgium

In Poland, projects which may have significant impact on the environment are divided into two groups:

- those which always require an EIA report (so-called Group I projects)

⁹³ Cons. text: Dz. U. 2000 r. Nr 56, poz. 679, as amended.

⁹⁴ Cons. text: Dz. U. 2003 Nr 207, poz. 2016, as amended

- those for which an EIA report may be required after individual screening (so-called Group II projects).

Categories of projects belonging to the two groups are listed in the regulations of the Polish Council of Ministers issued under EPLA (the EIA Regulations): formerly the Regulation of 24 September 2002⁹⁵, then replaced by the Regulation of 9 November 2004⁹⁶.

The definition of “project” in the Polish law, although basically follows the relevant definition from the EIA directive, includes also reference to development consent decisions to which EIA is related. Such reference may cause problem since under this definition any activity which is not subject to development consent decisions listed in Article 46.4 POS may not be considered as “project”.

- *screening method*
 - *case-by-case*
 - *categorical*
 - *combined*

In Poland, EIA procedure is currently based on the combined approach to screening, including the so-called ‘traffic lights’ approach.⁹⁷ As a result, the Group I projects include Annex I projects plus some Annex II projects, while Group II include Annex II projects but only above certain thresholds.

For example: Annex I includes waste water treatment plants with the capacity exceeding 150 000 population equivalent, while Annex II includes all other waste water treatment plants. Thus - using “traffic lights” approach - in Poland Group I includes waste water treatment plants with the capacity exceeding 100 000 population equivalent, Group II includes waste water treatment plants with the capacity exceeding 400 population equivalent, while any waste water treatment plant with smaller capacity is considered to have no significant impact and not even subject to individual screening.

- *in case-by-case screening*
 - *is the screening decision required to be accompanied by justification (Case C-87/02 Commission v Italy)*
 - *in practice: are the justifications credible?*

Case-by-case screening relates only to Group II projects. Screening decision, under article 51 para 2 EPLA, takes the form of a procedural order under Administrative Procedure Code (APA) and therefore under Article 124 para 2 of APA requires a justification.

In practice this requirement is often treated in purely formalistic way which results in very short and absolutely un-informative couple of sentences. In particular, such justifications rarely (usually only in case of projects financed from UE funding and therefore carefully scrutinized) provide a clear reference to using the criteria for screening (see below).

As far as screening decisions are concerned - while neighbours have access to justice in relation to all decisions related to EIA (including screening decisions), for NGOs there is no

⁹⁵ Dz. U. Nr 179, poz. 1490

⁹⁶ Dz. U. Nr 257, poz. 2573 as amended

⁹⁷ A systematic, staged approach to screening whereby changes and extensions are characterized, in order to identify their likely physical and other impacts, and these impacts are then checked against the criteria to assess whether or not EIA is required – Green (no EIA), Amber (EIA must be considered) and Red (EIA required).

possibility to appeal against screening decision. NGOs have the right to participate (and to appeal against the final EIA decision) only in case there is EIA report required. Lack of such possibility seems to be not in line with the Directive, in particular in the light of the judgment in case C-435/97 Bolzano Airport (para 69 and 71).

3) Use of thresholds and selection criteria - art. 4.3 and Annex III, and Case C-392/96 Commission v Ireland

- *in case-by-case screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

This is a positive screening i.e. project would require EIA report only if it meets certain criteria. The criteria for screening are regulated in the already mentioned EIA Regulations of November 2004. They are quite detailed and relate to the nature of the project, its location and its potential impact. They follow strictly Annex III of the Directive.

- *in categorical screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

Article 51 EPLA para 8, which provides authorization to list categories of projects subject to EIA, does not clearly require the Council of Ministers to use all the criteria for screening listed in Annex III to the EIA Directive. There is no clear sign also that all such criteria were used in practice while screening Annex II projects to be listed. In fact, traditionally in Poland mostly only the criteria related to the size of the project have been employed. 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 Directive⁹⁸.

The situation slightly changed in 2005 when the 2004 Regulations were amended to introduce various screening criteria in relation to certain projects listed – for example items 40, 90 and 90(a). In fact, in many instances the criteria are not needed since the 2005 Amendment significantly increased categories of projects which always require EIA as well as categories of projects subject to screening (in the latter case, by removing any thresholds). In particular, this concerns all kind of works (including modernization) relating to roads, which are now subject either to mandatory EIA or at least individual screening.

4) Measures taken to avoid “salami slicing” and assure assessment of cumulative effects - Case C-392/96 Commission v Ireland

Polish law includes provisions meant to prevent “salami slicing” and assure assessment of cumulative impact. The EPLA requires, in Article 46.2a that projects technologically linked shall be treated as one project even if implemented by different developers. It is not clear however what “technologically linked” mean in practice, in particular in situations where projects are clearly “functionally linked” (like for example two adjacent shopping centres).

Regulations of 2004 include also another provision - in para 4 it require to sum up the parameters of the same kind related to similar projects situated within the same facility or object. In 2005 the Regulations were amended to further address the issue by modifying this provision, by adding that the requirement to sum up parameters relate to both planned and

⁹⁸ Para 65 of the judgment in Case C-392/96

existing projects. It is doubtful if the above amendment is sufficient enough in order to fully take into account cumulative impact in screening, since there might be cases where the cumulative impact needs to be assessed in relation to similar projects situated not within the same facility or objects but at adjacent facilities.

Worth noting are also Articles 33.1 and 34.3(1) of the Building Law, which require construction permit to be granted on the basis of the entire project, which is meant to prevent 'salami slicing' of construction schemes. This requirement is upheld by administrative courts (see judgment IV S.A 676/99 not published). However, breach of this requirement is not considered by administrative courts important enough to find the decision null and void (see judgment OSK 21/04).

5) Information to be supplied by the developer - Art.5 and Annex IV, in particular approach to alternatives and non technical summary

The requirements for EIA report seem to be all in full conformity with the requirements of the EIA Directive. Some of the issues could perhaps be addressed more precisely, like for example "material assets, including architectural and archeological heritage' but in principle everything is there.

In particular, Article 52.1.3) EPLA requires environmental report to include description of the alternatives studied by the developer, including mandatory both 'zero' alternative and "most environmentally friendly" alternative. There is also a clear requirement for indicating the reasons for his choice.

The law requires clearly a non-technical summary to be always included in the report. The law does not precise neither the length nor the format of such a summary. In practice this requirement is often treated in purely formalistic way which results in very short and absolutely un-informative couple of sentences.

6) Public participation, in particular:

- *EIA Directive requires public to be informed "early in the environmental decision-making" about the procedure:*
 - *does the law envisage clearly such requirement?*
 - *is this a rule in practice?*

Polish law does not envisage clearly such requirement in Article 32 EPLA. However, in practice this is a rule for Group I projects, whereby immediately after the request for development consent together with the environmental report were filed, public authorities make this fact publicly known.

In case of Group II projects, the law does not envisage any public participation in screening/scoping. The general public is informed only after the environmental report have been submitted. In case of negative screening decision (ie. if the report was not required) there is no public participation but nevertheless the screening decision has to be made available for the public. Thus a notice about such negative screening decision is put in publicly accessible record but Polish law does not require the public to be notified about this fact.

- *EIA Directive requires 'detailed arrangements for informing the public...shall be determined'*
 - *are they determined sufficiently clear?*

- *is the public informed in an adequate, timely and effective manner” as required by article 6.2 of the Aarhus Convention?*

The notification of the public, according to EPLA, shall be provided by placing the information on the notice board at the seat of the authority which is responsible for the matter and bill-posting in the vicinity of the proposed project; and where the seat of the responsible authority is located in a community other than the community which is relevant in terms of location given the subject of the notification, also by a publication in the local press or in a manner commonly used in the locality or localities which are relevant given the subject of the notification.

The notification of the public shall be provided also by placing the information on the www homepage of the authority responsible for making the decision if the authority has such a homepage.

Polish law, following the EIA Directive, misses one, possibly important, obligation. Article 6.2 of the Aarhus Convention requires that the information shall be done in “an adequate, timely and effective manner”. Such requirement is not included neither in Article 6.2 of the amended EIA Directive nor elsewhere in this directive. And such clear obligations may be of utmost importance in practical implementation of the Convention.

To illustrate possible problem one can have a look at a practical example.

The law (Articles 3.19 and 31.3 of the Environmental Protection Law) require the public to be informed, inter alia by “provision of information in a customary manner at the seat of the authority which is competent in the matter” and by “bill-posting in the vicinity of the proposed project” and also by “placing of the information on the www homepage of the authority competent for making the decision”. This will work perfectly in case of a project located in big cities or urban areas in well-off regions. In case however of a project located well outside human settlements, in a poor region where most people have no access to Internet, and with the seat of competent authority being in a town located 15 km from the respective area the situation may look differently. The key issue would be how to interpret the phrase “vicinity of the project”. If the “vicinity of the project” were interpreted literally - the legal obligation would be met by bill-posting in the middle of countryside. In such case, even if the information was put “timely”, in practice no one from the local public would have a chance to ever learn about the project and thus - to participate in decision-making. And this will all be in line with the requirements of both the EIA Directive and Polish provisions transposing it, which both do not require clearly that the public is informed about the proposed activity in “adequate” and “effective” manner? But the Aarhus convention does - and this makes a difference. In order to meet such requirement the notice would have to be put in places where the public concerned would be able to see it. Such a clear legal requirement involve some degree of active consideration on the part of authorities which should carefully consider which means of notifying the public would be ‘adequate’ and “effective”. In different situation such means can be different but always subject to judicial control. Bearing this in mind lack of the above requirements in the Directive may well be treated as significant deficiency in implementing the Aarhus Convention.

- *EIA Directive requires “reasonable time-frames for the different phases shall be provided allowing sufficient time for informing the public*
 - *does the law envisage reasonable time-frames?*
 - *are they observed in practice?*

Polish law does not provide clear time-frames for the different phases of the procedure except for the period for submitting comments in relation to the application for the development consent and the relevant environmental report.

It is doubtful however if the fixed 21-day period for commenting provided by Polish law can be treated as “reasonable” in case of certain larger or complicated projects.

7) Assuring that results of EIA are taken into account in the final decision whether to approve the project - Art.8

The obligation is included in Article 55 EPLA which require not only that results are taken into account but in fact require that if the environmental impact assessment procedure results in finding that a project should be implemented in a way other than the proposed one, the administration authority shall either, if the applicant agrees, in the EIA decision indicate the alternative authorised to be implemented; or, if the applicant fails to agree, shall refuse to grant consent to the project.

The point is that the final decision whether to approve the project is usually different than EIA decision it is usually one of the decisions listed in Article 46, most often the construction permit. And the law although require such a decision to include conditions approved in EIA decision but do not provide any control in this respect.

8) Transboundary procedure

There is a set of obligations concerning transboundary procedure. They are basically in conformity with the EIA Directive requirements,. The major problem is that they relate the procedure mostly to EIA decision which - as already indicated - is doubtful whether it can be treated as development consent.

4. Conclusions

There is a number of conformity problems with the current EIA scheme in Poland. The most fundamental problems relate to the nature of the EIA decision and its role in the entire development control scheme.

SLOVAKIA



1. General information on the transposition of EIA directive, in particular:

- *whether the transposition was formally finished and whether it was finished on time (within the deadline set by the directive):*
 - *Directive 85/337/EEC*
 - *Directive 97/11/EC*

Both of these directives were formally transposed into Slovak legislation, however not in time. The new EIA legislation was passed only at the end of the year 2005 – by Environmental Impact Assessment Act No. 24/2006 Collection of Laws, which is in force since February 1, 2006. The old law – Environmental Impact Assessment Act No. 127/1994 Coll. of Laws did not fulfill all the requirements of the above mentioned Directives, but despite some improvements the new act cannot be considered as correct transposition as well.

- *Directive 2003/35/EC*

Transposition of this directive was also formally finished, though not in time. The old EIA Act contained some provisions about public participation, but those were not in conformity with Directive 2003/35 (neither with Aarhus Convention). The new EIA Act is in force since February 1, 2006, however the Directive set the deadline for national laws / regulations / administrative provisions necessary to comply with the Directive by June 25, 2005 at the latest.

2. Overall framework of EIA scheme (up to 1 page), in particular:

According to EIA Act certain strategic plans (Annex 1 of the EIA Act) and projects (Annex 8 of the EIA Act) must be assessed within SEA / EIA. There is also list of the activities which must be assessed in transboundary EIA (Annex 13 of the EIA Act). Other projects / plans are assessed in EIA if the Ministry of the Environment decides so.

The structure of EIA has not change remarkably in past few years. Phases of EIA are the same since 1994:

- Investor (developer) files a proposal of the project concerned for commencing of EIA. Depending on the character of the project it is obligatory assessed or it is assessed within screening procedure.
- Screening procedure is done by the competent EIA authority. The outcome of the screening procedure is decision whether the project will be assessed in EIA or not. The screening procedure is not done according to general Administrative proceeding Code, there are no remedies available and the decision of the competent EIA authority is final.
- Scoping and timetable is created by competent EIA authorities and it designs which variant shall be further elaborated in details, which of the proposed connected activities shall be assessed together, which parts of the EIA Report shall be taken specifically into account.
- The EIA Report contains complex findings, describings and evaluation of assumed impacts of proposed project in locality concerned.
- Technical Review is processed by the professionally eligible persons – they are independent professionals hired and paid by developer - different from the persons preparing the EIA Report. Review contains in particular evaluation of the completeness of the Report, completeness of the positive and negative impacts of

the project proposed, describing of the methods used in assessment, variants of the activity proposed, suggestion of the technical solution with regard to reached knowledge level in particular area, and proposal of the measures to eliminate or decrease negative impacts of project proposed.

- The Final EIA Statement contains the overall assessment of the project and the “recommendation” or “non-recommendation” of realisation of the project assessed. The Final Statement is inevitable document for further proceedings – esp. for further development consent procedures.

Public can participate in all stages of EIA, but within some of them (like screening) provides only limited public participation.

- *relation of EIA to “general” development consent procedures (whether EIA is integrated into such “general” development procedures or is a separate procedure, what is their mutual relation, which is “principal” and which “implementing” decision (see- Case C-201/02 Delena Wells)*

EIA is a separate procedure from following development consent procedures. “Final Statement” is concluding document of EIA where competent authority presents overall impact assessment of the project concerned and the statement whether the realization of project assessed is approved - “recommended” (and under which conditions) or not.

The “Final Statement” is inevitable document for following permitting procedure. According to EIA Act competent permitting authority must take into account content of the Final Statement and at the same time permitting authority cannot issue the decision on approving the activity concerned without enclosing the Final Statement. In other words, if project concerned is supposed to be assessed in EIA according to EIA Act (and its Annex), it is impossible to issue the permission for such an activity without presenting the Final Statement. Investor must present the Final Statement together with other relevant documents which are prescribed by law to the deciding authority.

However, the Final Statement is not binding for permitting authority, and this fact is disputed a lot. This means that despite of negative Final Statement realisation of the project concerned can be approved (with certain exemption of the activity realised on Natura 2000 sites) and activity can be realised. Thus the effect of the whole EIA is questionable.

Projects / activities usually require more than one following permissions issued in various proceedings. Usually it is the land-use permit issued according to the Building and Construction Act No. 50/1976 Coll. of Laws which set the principal parameters of the project and its realisation.

- *whether there are special procedures/arrangements made for transport projects*

There are no special provisions concerning the EIA procedure of transport projects in Slovakia.

Some specifications and particularities concerning transport projects are included in other general acts based on which the permissions concerning transport projects are issued, e.g. Building and Construction Act or laws regulating noise level. But these are proceedings following EIA. There is also special Act on Some Measures to Accelerate Preparation of Construction of the Highways and the Roads for Motor Vehicles No. 129/1996 Coll. of laws.

- *relation to SEA*

Provisions on SEA are part of the EIA Act.

The old EIA Act contained very succinct provisions on assessment of development conceptions and generally binding legal acts. These provisions were not sufficient in relation to the SEA Directive.

New EIA Act regulates assessment of strategic documents proposals, where “strategic document” is a proposal of policy, development concept, plan and program, including their modifications, which are subject of preparation and authorization on state, regional or local level, or which are prepared for approval through parliamentary or governmental process, where those documents could have impact on the environment including the impact on protected areas.

The SEA process is analogous to EIA, but there are two separate processes regulated by the EIA Act. There is a list of areas and kinds of strategic documents in Annex 1 of EIA Act, which are compulsory assessed. Some other documents are assessed depending on outcome of screening. SEA has the same levels of assessment as EIA. The outcome of SEA is also “Final Statement” issued by competent SEA authority which is inevitable and mandatory base for the approval the strategic document itself.

It is difficult to evaluate the adequacy of such procedure, since it is quite new and not too many outcomes are available already. Only after some strategic documents are assessed and approved in subsequent proceedings it will be possible to evaluate effectiveness and sufficiency of such procedure.

3. Particular issues

1) requirement for development consent

Art 2.1 and Case C-201/02 Delena Wells

The directive requires in Article 2.1 that Member States shall assure that projects likely to have significant effects on the environment are not only made subject to EIA but also “made subject to a requirement for development consent”. The particular question is if modernization of existing roads does require development consent and thus is subject to EIA?

According to Annex 8 of EIA Act, point 13 subject of compulsory EIA are:

- *Highways and express roads including objects (buildings)*
- *Roads of I. and II. class and realignment or widening of an existing road of I. and II. class connected to the ground from 10 km of constructional length*

The roads of I. and II. class and realignment or widening of an existing road of I. and II. class connected to the ground are subject of screening where the road length is from 5 km to 10 km.

According to the general provisions of EIA Act subject of compulsory assessment are also **changes** of the project planned which is listed in Annex 8, if:

- *due to changes the threshold cited in Annex 8 will be exceeded,*

- *in activities where the threshold is already exceeded, the sum of all changes increasing the extent of the activity in past 5 years exceed 50% of threshold or if due to planned change the extent of the activity will increase at least 25% or more,*
- *there does not exist a threshold for an activity planned (according to Annex 8) and the sum of the changes increasing the extent of the activity in past 5 years exceed 50% of originally assessed extent of an activity planned according to the EIA Act.*

Briefly, subjects of compulsory EIA are also some significant changes of already existing projects.

However, the problem with building or with realignment of the roads is concerning the length and using of “salami-method” in roads building in Slovakia. Reconstruction or building of the roads is often planned in length less than 10 km and in more than one stage, even though the final new road /reconstructed road is longer than 10 km.

2) approach to transposition of annexes

in particular Annex I Point 7 and Annex II Point 10) - Art. 4.2 and Case C-72/95 Kraaijeveldt and Case C-133/94 Commission v. Belgium

- *screening method*
 - *case-by-case*
 - *categorical*
 - *combined*

The Slovak EIA Act generally uses combined screening method. “Categorical” method is appointed for compulsory EIA – there are either thresholds (limits) listed in Annex 8 of the EIA Act (mostly) or there are just types of the activities listed which are subject of EIA in every case.

The “case-by-case” method is used in screening procedure where the EIA is not compulsory – these activities are listed in Annex 8 part B of the EIA Act or there are also criteria for screening other activities (also based on case-by-case screening). If the project is realised in protected area or in considerably encumbered area, the Ministry of the Environment can decide that this project is subject of EIA even it is not listed in Annex 8. The Ministry can decide on assessment also in other cases – with respect to the character and range of the activity, location, significance of the expected impacts.

Concerning the transport activities, Annex I point 7 of the EIA Directive is transposed correctly into the Slovak legislation. The provisions of the Annex II point 10 of the Directive are transposed as well within the meaning of the Art. 4 par. 2 of the Directive. Nevertheless, there are some disproportions in transposition of other provisions of Annex I and II of the EIA Directive into Slovak legislation.

- *in case-by-case screening*
 - *is the screening decision required to be accompanied by justification (Case C-87/02 Commission v. Italy)*
 - *in practice: are the justifications credible?*

The screening decision is issued by the EIA authority and has to be justified. There are criteria set for screening process: the authority should take into account the character and range of the

planned activity, location, significance of the expected impacts. Public can comment on project proposal, but cannot participate in decision making process within the screening. The screening procedure is not ruled by an Administrative Proceedings Act. The decision is released to the public, but the public (or other possible participants) cannot file a remedy against it or otherwise examine the lawfulness, propriety and justice of the decision. The court review is theoretically possible but due to restricted provisions on standing it is not possible in all cases.

This provision is not new in EIA Act but the experiences in Slovakia are not the best. The screening process and the decision itself are usually only formalistic and not resposing properly to the needs of environment protection. The provision seems to be not transposed correctly due to impossible public participation in the screening process – as mentioned above, public can only comment on project proposal, but cannot participate in decision making procedure, cannot file a remedy against it. Moreover, the public (NGOs) have not access to participation within the following administrative procedures.

3) use of thresholds and selection criteria

Art. 4.3 and Annex III, and Case C-392/96 Commission v. Ireland

- *in case-by-case screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

The criteria are formally correctly transposed into Slovak legislation (Annex 10 of EIA Act) as criteria for assessing the project within screening procedure, regardless it is case-by-case screening or categorical screening. Concerning the practice we must state that the criteria are followed only formalistically and for example the real cumulation with other projects and activities (existing or planned) is not examined in deep.

- *in categorical screening*
 - *are the criteria of Annex III required to be followed?*
 - *are they followed in practice?*

If there are set thresholds for the project planned and the project is subject of screening, the criteria set by the Annex III of the EIA Directive are followed as transposed into the Slovak EIA Act (Annex 10). Concerning practice – see above.

4) measures taken to avoid “salami slicing” and assure assessment of cumulative effects

Case C-392/96 Commission v. Ireland

Such measures are formally correctly transposed into the Slovak EIA Act (as mentioned above). But this does not necessary lead to thorough avoidance of “salami slicing method” and it is still one of the most serious problems. “Salami slicing method” is not used only to avoid the compulsory EIA by “crawling under” the threshold set in the Annex 8 of the EIA Act (this referes to the length of the roads of I. and II. class). It is mostly used to lower the real effects of the project in its overall complexity.

5) information to be supplied by the developer

Art. 5 and Annex IV, in particular approach to alternatives and non technical summary

Approach to alternatives:

According to the EIA Act proposal of the project to be assessed must contain at least 2 alternatives plus so called “zero variant” (i.e. situation in case the project is not realised). All alternatives are supposed to be compared and the optimal alternative should be suggested with justification.

In case there is not any other locality available or there is not any other technology existing competent authority can exempt from the obligation to present various alternatives. This provision does not allow competent authority to exclude also zero variant. Nevertheless, possibility to exempt from the obligation to present the various alternatives of the project is not intended in the Directive.

If – due to requests presented to the proposal of the project to be assessed – it comes out that there is another possible variant available, it shall be considered in the process.

The problem with the alternatives is another serious one. The EIA Act does not contain any specifying or detailed information about the alternatives. It is already common practice to propose only one realistic variant and other variants are described only perfunctorily – just to formally fulfill law requirements. If it is a road (motorway, express way...) assessed the developer presents the alternatives not along the whole road assessed. E.g. the assessed road has 15 km of length, but the developer presents variant only on 7 km of its length. There are no provisions forcing the developer to elaborate in details all the variants of assessed project, though the purpose of the EIA Directive is clear in this.

Non-technical summary:

Non-technical summary is part of the Report and is the EIA Act refers to it as “generally comprehensible closing summary”.

6) public participation, in particular:

- ***EIA Directive requires public to be informed “early in the environmental decision-making” about the procedure:***
 - ***does the law envisage clearly such requirement?***

Slovak transposition of the obligation to inform public early in the environmental decision-making is quite comprehensive. The public is informed on every stage of the EIA by the legally prescribed way:

- public is informed “in a way usual within the area affected” for certain number of days (beginning with publishing the “proposal” of the project planned),
- proposal of the project planned as well as EIA report are published also on the web side of the Ministry of the Environment (<http://eia.enviroportal.sk/zoznam.php>)

Publishing “in a way usual within the area affected” means that the information are published obligatory on the official notice board and not obligatory by local press, local television and likewise.

Concerning following decision-making process, there is a provision within Administrative Code (No. 71/1967 Coll. of Laws) stating: “Administrative authorities are obliged – on the official notice board of the administrative agency, on the internet if possible, or possibly by other appropriate means - comprehensibly and timely to inform public about commencing, realization and completing of the proceedings in cases which are of interest of public or on which the special

law states so... Official notice board of the administrative agency must be constantly accessible by the public."

- *is this a rule in practice?*

Since similar obligation was incorporated also in former EIA Act it is usually implemented. Anyway there is a problem concerning the real public awareness about projects assessed. Unfortunately the new EIA Act does not order to competent authority real use of all accessible means of broadcasting the information. The official notice board is usually only one within the town which makes it difficult to public to check the information on it frequently. There are usually other means of broadcasting information available in villages / towns / cities. There are local loudspeakers within villages frequently used for transmission of such information as waste disposal, cultural events market-sellers coming to the village. But these are usually not used for communicating the actual EIA proposal. Similar situation is in bigger locations – towns, cities. There are local newspapers in most of the cities and there are also local televisions in a lot of them. However the new law does not prescribe obligatorily use all the alternative means of broadcasting information, only non-mandatorily.

The old EIA Act stated it otherwise – it did not say what the expression “way usual within the area affected” means. The Highest Court stated that under such provision the responsible authority is obliged to use **all** possible means of broadcasting – to guarantee the widest possible broadcasting of the information.

- *EIA Directive requires that “detailed arrangements for informing the public ... shall be determined”*
 - *are they determined sufficiently clear?*
 - *is the public informed in an adequate, timely and effective manner” as required by Article 6.2 of the Aarhus Convention?*

As mentioned above the arrangement for informing the public is determined within the framework of the EIA Directive. The problem is cost by the restrictive specifying of the “way usual within the area affected”. There is not clear provision stating that the manner of informing the public shall be adequate, timely and effective as required by the Aarhus Convention. There are provisions regulating proper time limits for informing the public, but the provisions concerning effectiveness of information means are not sufficient and do not comply with provision “effective manner”.

- *EIA Directive requires that “reasonable time-frames” for the different phases shall be provided allowing sufficient time for informing the public*
 - *does the law envisage reasonable time-frames?*
 - *are they observed in practice?*

It can be said that the EIA Act sets down reasonable time-frames. They are approximately by half shorter comparing to the old EIA Act, but seem to be sufficient. However, the time-frames are made for “active” public, e.g. public with quite high legal awareness. The time-frames are almost unattainable for public with no experience in development consent procedures or EIA.

Time-frames for specific stage of the EIA are as follows:

Proposal of the project:

- basic information on the proposal of the project and on the developer must be put on the website of the Ministry of the Environment “*without unnecessary delay*”,

- municipality informs public on the proposal of the project within 3 days after its receiving
- the project proposal must be available for public to see for at least 21 days and public can comment on it for 21 days (since it was made public).

Screening:

- the above mentioned time-frames are used in screening similarly,
- the municipality informs public on the decision reached by the screening authority without unnecessary delay.

Scoping:

- developer in cooperation with municipality inform public on the scoping without unnecessary delay,
- public can comment on scoping within 10 days.

The EIA report:

- municipality informs public on the possibility to read the report within 3 days after receiving it and exposes the generally comprehensible closing summary for 30 days,
- public can comment on the report within 30 days,
- public must be informed on the public hearing at least 10 days prior it takes place.

Final EIA statement:

- municipality informs public on the final statement within 3 days after receiving it.

The time-framework is usually followed, but since the EIA is quite complicated and highly technical process and the documentation is quite voluminous, time given might be not sufficient for laymen to go through it. And again – the problem is the way how the public is informed and whether public has real chance to get knowledge about the EIA as such.

7) assuring that results of EIA are taken into account in the final decision whether to approve the project - Art. 8

Slovak EIA Act follows the EIA Directive: “When deciding during the development consent procedure the content of the final EIA statement must be taken into account.” Responsible authority “cannot issue permission without presenting the final EIA statement”.

The transposition of this provision is within the frame of the EIA Directive. However, the implementation of this provision is rather problematic in practice.

The expression “to take into account” is not defined and the responsible authorities misuse it often. There are two major problems concerning such situation:

- It is not rare that the development consent is issued despite of negative Final EIA Statement and even without proper and convincing justification (justification consists usually of one-two perfunctorily sentences). Such decisions are contravening the substance of the EIA as such.
- Another problem concerns the conclusion of the Final Statement. According to the EIA Act the competent authority shall state in the Final Statement whether the realization of the project assessed is *recommended* or *not recommended*. *Recommended* variant is inevitable part of the Final Statement (according to Annex No. 12 of the EIA Act). Despite of such clear provisions the respective EIA authority tends to not explicitly and

definitely express its final opinion and the Final Statement does not include “*the recommended variant*”, but ranking of (some of) the variants assessed within EIA. The responsible authority then issues the development consent which is often not assessed as the most convenient, but is only listed among “ranking” variants. This is not usually justified in development consent.

8) transboundary assessment

- *does the law correctly transpose the requirements concerning transboundary consultations?*
- *are they carried out in practice?*

According to the Slovak EIA Act subjects of transboundary assessment are:

- strategic documents likely to have significant effects on the environment,
- the project in accordance with Annex No. 13 of the EIA Act (List of activities which are subject of mandatory transboundary assessment) and the activities in accordance with Annex No. 8 of the EIA Act likely to have significant effects on the environment,
- strategic documents and projects previous listed, if other party requests so,
- strategic documents and projects realised within the territory of another state which are likely to have significant effect of the environment of Slovak Republic.

According to the EIA Directive transboundary assessment applies to all projects *which are likely to have significant effects on the environment*, regardless they are listed in the Annex to the Directive. This regulation refers only to SEA of *the strategic documents*. SEA of the projects is regulated differently: *projects* are subjects of SEA only if the activity concerned is listed in Annex No. 8 or Annex No. 13 (where Annex No. 8 contains list of projects which are subjects of EIA and Annex No. 13 contains list of projects which are subjects of SEA). This is not in conformity with the EIA Directive.

The transboundary assessment is so rare that it is impossible to evaluate its regulation.

4. Conclusions

We can state that most of the EIA Directive requirements are transposed correctly into Slovak legislation. However there are still some deficiencies which occur especially in the implementation of the EIA Directive. This concerns especially:

- insufficiency concerning the “binding” of the Final Statement of EIA,
- deficiency in prevention of using salami-slicing method concerning assessment of the roads,
- screening is very formalistic and the decision issued in screening proceedings is final with no remedy possible,
- proposal of different variants of the project proposed and their assessment is often only formalistic and the variants proposed do not always represent real alternatives,
- informing the public is regulated more strictly in new EIA Act than it was in old one.

The main issue concerning the implementation of the EIA Directive is the fact that EIA is considered to be a requisite obstacle in economic development of the country and that environmental criteria are not crucial in development consent procedure, whereas economic factors are.

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