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Euracoal comments on the proposal to amend the EIA Directive

The European Commission has submitted a proposal amending the EIA Directive on 26 October 2012 (COM (2012) 628 final).

EURACOAL argues for using the amendment of the EIA Directive to streamline the existing provisions. No new obligations should be introduced and the existing audit programme should not be extended.

The EIA Directive has been identified by the Commission as a potential instrument for a simplification of the existing legislation in the context of the better regulation. However, after evaluating the Commission proposal, EURACOAL believes that it will lead to considerable delays of the consent procedures, to increased administration costs and to great legal uncertainties. It bears the risk that due to the even more complex procedures coal mining as well as other industrial and infrastructural projects will become contestable and finally fail.

EURACOAL in particular rejects the following amendments to the EIA Directive:

No substantive legal requirements in the EIA Directive

EURACOAL is explicitly against the introduction of substantive legal requirements into the EIA Directive. Such requirements would lead to difficulties in delimiting the EIA Directive from other substantive laws (e.g. the Industrial Emissions Directive). In addition, the substantive regulatory content of the proposed amendments is unclear.

The EIA Directive until now is limited to procedural requirements in advance of a decision on the substance without providing substantive obligations itself. The proposed amendment of Article 8 now contains substantive requirements. Article 8 par. 2 provides that mitigation and compensation measures may be determined, regardless of the relevant substantive national or European regulations.

Also, Article 8 par. 1a can be interpreted in a way that the competent authority is entitled to impose environmental obligations based on the environmental impact assessment pursuant to Article 3. Article 8 par. 1b can be read in a way that the authority has a choice with regard to the project.

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No inadequate extension of the scope of the environmental impact assessment

EURACOAL objects to the proposed extension of the scope of the environmental impact assessment in Article 3 and Annex IV to supra-regional or even global environmental aspects such as biodiversity, climate change and greenhouse gas emissions. The EIA is supposed to specify framework conditions for the assessment of (significant) environmental impacts of a specific project. It is not possible or at the most with disproportionate efforts to technically assess the effects of a specific project on supra-regional and global environmental phenomena.

In particular the assessment of environmental aspects such as climate change in combination with the cumulation of effects with other projects and activities explicitly provided for in the new Annex IV, 5e is critical.

In addition, terms such as biodiversity, climate change, greenhouse gases or land use are not legally defined within the context of the EIA Directive. This will lead to significant difficulties when implementing these measures in practice (e.g. which spatial delimitation is necessary? Parallel projects at regional, national or even European level?) causing substantial legal uncertainty for investment decisions. The frame of the assessment should therefore be limited to those effects which are caused explicitly by the specific project and have significant effects on the environment.

No extension of the information requirements for the preliminary assessment

The information to be provided by the developer for the preliminary assessment of the project should not be extended. Article 4 par. 3 in conjunction with Annex II.A considerably exceeds the requirements of the current EIA Directive. Such detailed listing is not provided for to date and doesn’t seem reasonable. Also Article 4 par. 4 in conjunction with Annex III, containing a detailed listing of the selection criteria should not be extended in an inadequate manner.

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No extension of the scope of information to be provided in the new environmental report

The data to be provided by the developer for the environmental impact assessment which shall be included into an environmental report should not be extended. Article 5 par. 1 of the proposal refers to Annex IV the scope of which has been extended considerably compared to the Annex of the current Directive. The information to be included into the environmental report should be – corresponding to the objective of the Directive – restricted to the information which is necessary in order to conduct the EIA as provided for in Article 3.

EURACOAL rejects the obligation to provide a baseline scenario (Annex IV no. 3). Article 5 par. 1 sub-par. 2 could be interpreted in a way that the developer must present alternatives to the planned project as such and not just the assessed alternatives related to the implementation of the project. EURACOAL is against the presentation of alternatives as this would not contribute to reaching the objective of the EIA, to determine the effects of the planned project.

The concept of “reasonable alternatives” is too wide and imprecise. It is likely to increase the number of appeals to the detriment of the legal certainty of the projects. Assigning the right to determine alternatives to the competent authority would affect the freedom of enterprises to decide on the strategic guidelines of the project and its appropriateness and not only on its impacts. In addition, in practice normally no alternative exists due to the population density, land use and planning difficulties.

No compulsory scoping procedure

The voluntary scoping procedure should not be made compulsory as provided for in Article 5 par. 2 of the proposal. The introduction of a mandatory scoping procedure will so extend pre-development timescales that some projects will simply become unviable, particularly where a rapid response to changing market circumstances is required. Hence, the application of the scoping procedure including the elements of information to be provided for the environmental report should rather be left to the entire discretion of the developer. This would stronger emphasise the servicing role of the authorities.

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No obligation to prepare the environmental report by accredited experts

The proposed Article 5 par.3 stipulates that the environmental report shall be prepared by accredited and technically competent experts. This provision is not reasonable. As far as a developer has the expertise required he must as hitherto have the opportunity to prepare the environmental report himself. The accreditation would result in additional costs and further delays. The option of verifying the environmental report by committees of national experts also raises concerns with regard to their composition and representativeness. Also this verification step by the competent authority would have consequences for the timeframe and ultimately on the successful completion of projects.

No baseline scenario as part of the final decision to grant the development consent

The assessment of the likely evolution of the existing state of the environment without implementation of the project in Article 8 par. 1b) is not realistic and irrelevant.

No monitoring obligation after the EIA is finalised

The obligation proposed in Article 8 par. 2 to adopt monitoring measures through the authorities as far as the EIA predicts significant adverse environmental effects should be deleted. The decision if and to which extent monitoring and/or compensation measures related to environmental effects of a project may be necessary should be based on the specific substantive law. The existing European law (e.g. IED) already contains sufficient monitoring measures. Any double regulation would lead to unnecessary bureaucratic burden and to considerable additional implementation efforts.

Sufficient scope for the developer on the information required at the time of the decision of the competent authority

Article 8 par. 4 obliges the competent authority before a decision to grant or refuse development consent is taken to verify whether the information in the environmental report is up to date. It is particularly difficult in an authorization process lasting one year

or more (apart from the year necessary to establish the fauna and flora inventory required for achieving the environmental report) to have “up to date” information. Sufficient scope should be left for the developer.

New regulation necessary to clarify the relevance of procedural errors

On the occasion of a revision of the EIA Directive, regulations should also be provided to clarify which kind of procedural errors in the context of an environmental impact assessment are, firstly, crucial for the legality of the decision and therefore would require the rescindment of the decision, and secondly, can be considered as irrelevant. Thirdly, it should be clarified whether or not certain procedural errors could be remedied after the decision has already been issued without the need to repeat the whole EIA procedure.

Because of the vast array of vague legal terms as well as the extensive procedural requirements in the EIA Directive, in practice it is almost inevitable that (minor) errors can occur during an environmental impact assessment, a preliminary examination or a “Scoping”. In this respect, a high degree of legal uncertainty exists with authorities and at national courts as to whether and which procedural steps are deemed to be crucial for the decision from the view of the EIA Directive, so that an error must imperatively lead to the rescindment of the decision and cannot be made up (discretely). This issue is in urgent need for a coherent regulation in European law.

As permitting procedures are already exceedingly complex and time consuming, a requirement of a flawless EIA procedure would lead to an extremely high legal and investment risk for projects in Europe. It is obvious that not every conceivable and for the procedure potentially irrelevant error should require the rescindment of the decision, so that the whole decision/EIA procedure had to be carried out again. In order to establish legal certainty for industrial projects in Europe, a clarifying regulation is therefore required. For that purpose, the principle underlying the EIA Directive should be that not every (procedural) mistake causes an unlawful decision, but only those which could have been crucial for the decision (for example, because the decision in a procedure without the respective mistake could have been different). Procedural errors which are not relevant for the outcome of the decision should be considered as being insignificant. At the same time, it should be possible that relevant, but for the decision minor (procedural) errors can be discretely made up (even after the decision has been

issued). A requirement to repeat the whole permitting procedure for non-crucial errors would be inadequate and would generally lead – as a consequence of the usual proceeding duration – to the termination of most projects.

No extended delegated powers to the Commission

The Commission should not be empowered to adopt delegated acts adapting the Annexes II.A, III and IV as provided for in the proposed Articles 12a and 12b. This empowerment would go too far giving the Commission the right to extend EIA to other projects without sufficient involvement of Member States and the European Parliament. These substantial amendments with regard to the environmental impact assessment must continue to be decided by amending the EIA Directive through the ordinary legislative procedure.

No retroactive application of the revised EIA Directive

Article 3 of the Commission proposal stipulates that projects for which the request for development consent was introduced before the date Members States bring into force the implementing provisions shall be subject to the obligations under the revised EIA Directive. EURACOAL rejects this provision which contradicts basic principles of law such as non-retroactivity and legal certainty. It would most likely lead to the repetition of procedural steps and consequently to delays as well as increased costs and efforts both for the project developer and the competent authority.

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