



European Commission
DG Environment



European Institute of Public Administration
European Centre for Judges and Lawyers

EU ENVIRONMENTAL IMPACT ASSESSMENT (EIA) LEGISLATION



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WORKSHOP ON EIA LEGISLATION

CASE STUDY II: SCREENING SOLUTIONS

Answers to the questions

1. ***Do Articles 4(2) and 2(1) of the EIA Directive confer on a Member State the right to exclude from the EIA procedure established by the Directive from the outset the project for the restructuring of an airport with a runway shorter than 2,100 metres, even if it has significant effects on the environment?***

The second subparagraph of Article 4(2) of the EIA Directive confers on Member States some discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable.

However, as the ECJ points out, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95, *Kraaijeveld*, paragraph 50).

The criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain projects listed in Annex II. A Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an EIA would exceed the **limits of its discretion** under Articles 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see Case C-435/97, *WWF and others*, paragraph 38).

Whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive. The objective is that no project likely to have significant effects on the environment should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.

The ECJ emphasized that it is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment (see Case C-87/02, *Lotto Zero*, paragraph 37).

In the present case, the competent national court concluded that “the project at issue, by reason of its nature and size, and probably also by reason of its location in a hollow in the immediate vicinity of an industrial and a residential area, could have a significant effect on the environment” (see Case C-435/97, paragraph 26).

The answer to the question must be that Articles 4(2) and 2(1) of the EIA Directive are not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the EIA procedure established by the Directive certain projects falling within Annex II, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment (see Case C-435/97, paragraph 49).

2. ***To what extent does Article 2 of the EIA Directive allow a Member States to introduce and use alternative assessment procedures to that of an ordinary environmental impact assessment?***
 - a) ***What minimum requirements must such an assessment satisfy in order to be in compliance with the objectives of the EIA Directive?***

b) Would the participation of the public be a requirement of such alternative environmental assessment?

According to Article 2(2) EIA Directive “The EIA 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 [the] Directive.”

It is therefore clear from that provision that the Directive does not prevent the assessment procedure which it introduces from being incorporated in a national procedure which exists or is to be established provided that the aims of the Directive are met.

The ECJ, though, emphasized that, where a project requires assessment within the meaning of the Directive, a Member State cannot, without undermining the Directive's objective, use an alternative procedure, even one incorporated in a national procedure which exists or is to be established, to exempt that project from the requirements laid down in Articles 3 and 5 to 10 of the Directive.

Therefore, in the case of a project requiring assessment under the Directive, Article 2(1) and (2) must be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive. However, **an alternative procedure of that kind must satisfy the requirements of Articles 3 and 5 to 10 of the EIA Directive, including public participation as provided for in Article 6.** (see Case C-435/97, paragraph 50)

As the latter is not foreseen by the simplified procedure pursuant to Law N° 27, in the present case the application of that procedure would not be in compliance with EIA Directive requirements. Besides, in the present case the national court explained that it had doubts as to whether the consent procedure laid down in Law N° 27 is appropriate for fully identifying the effects of the project on the environment. It stated that neither noise nor the effects on the atmosphere were investigated, as Article 3 of the Directive requires.

3. When assessing whether the modification of an airport shall be made subject to an EIA what must be taken into account: Only the direct effects of the works envisaged or also the indirect environmental impact resulting from the increased airport activity?

The EIA directive requires an overall assessment of the effects of projects or the alteration thereof on the environment. The ECJ stressed that it would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works.

The list laid down in Article 3 of the EIA Directive of the factors to be taken into account, such as the effect of the project on human beings, fauna and flora, soil, water, air or the cultural heritage, shows, in itself, that the **EIA is designed to enable** not only the impact of the works envisaged but also, and above all, **the impact of the project to be carried out.** (see Case C-2/2007, paragraphs 43-44).

In the present case it would have to be taken into account to which extent the modification of the airport which seeks to enable an increase in the activity of an airport and, consequently, in the intensity of air traffic would lead, for instance, to additional significant noise effects.

4. May the airport modification be exempted from the Directive requirements pursuant to Article 1(4) because it simultaneously serves both civil and military purposes? What if the airfield is predominantly used for military purposes?

The EIA Directive, as stated in Article 1(4), does not cover ‘projects serving national defence purposes’. That provision thus excludes from the Directive's scope and, therefore, from the EIA procedure, projects intended to safeguard national defence.

The ECJ stated that Article 4(1) introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted

restrictively. Only projects which **mainly** serve national defence purposes may therefore be excluded from the assessment obligation (see Case C-435/97 paragraph 65).

In the present case the principal objective of restructuring the airport is to make capable of commercial use, even though it may also be used for military purposes which cannot be exempted from the Directive. Accordingly, the answer to this question must be that Article 1(4) of the Directive is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

5. Is Article 1(5) of the EIA Directive applicable in this case, where national Law No.3 adopts the regional development plan and the alteration of the airport is approved under a subsequent separate administrative procedure?

According to Article 1(5) the Directive is not to apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

The ECJ clarified that this provision exempts projects from the EIA procedure subject to two conditions. The first requires that the details of the project are adopted by a **specific legislative act**. Under the second condition, the **objectives** of the Directive, including that of supplying information, **must be achieved through the legislative process**.

With regard to the first condition, one has to bear in mind that Article 1(2) of the Directive refers not to legislative acts but to development consent, which is defined as "the decision of the competent authority or authorities which entitles the developer to proceed with the project".

Therefore, according to the ECJ, if it is a legislative act instead of such a decision of the competent authorities, which grants the developer the right to carry out the project, **that act must be specific and display the same characteristics as the development consent** specified in Article 1(2) of the Directive. The legislative act must lay down the project in a sufficiently precise and definitive manner and include all the elements of the project relevant to the environmental impact assessment.

If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include the elements of the specific project which may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.

It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project (see Case C-435/97, paragraphs 57-62).

In the present case the answer to the fifth question must therefore be that Article 1(5) of the Directive cannot be applied to the project in question, which, while provided for by a legislative provision (Law No 3 adopting the regional development plan), has received development consent under a subsequent separate administrative procedure.

6. If the Directive has been incorrectly transposed, is Article 4(2) in conjunction with Article 2(1), vertically directly effective (self-executing), i.e. may individuals rely on those provisions before a court in the sense that the authorities of the Member State are required to subject the projects at issue (here: airfield) to a full environmental assessment?

As regards the right of individuals to rely on a directive and of the national court to take it into consideration, the ECJ held that it would be incompatible with the binding effect conferred on directives

by Article 288 TFEU (former Article 249 of the EC Treaty) for the possibility for those concerned to rely on the obligation which directives impose to be excluded in principle.

Particularly where the Community authorities have, by directive, imposed on Member States the obligation to **pursue a particular course of conduct**, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set out in the directive (see Case 51/76, paragraphs 22-24, and C-72/95, paragraph 56).

Consequently, if that discretion has been exceeded and the national provisions must therefore be set aside on that account, it is for the authorities of the Member State, according to their relevant powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, **individuals may rely on those provisions before a court** of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions.

In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see Case C-435/97, paragraphs 70-71).

In the present case an individual should be allowed to rely directly on the provisions of Article 4(2) and 2(1) before the national court against the decision of the national authority. To which extent this also goes for the claiming NGO depends on its national access to justice (see insofar Article 10 a EIA Directive).