



European Commission
DG Environment



European Institute of Public Administration
European Centre for Judges and Lawyers

EU ENVIRONMENTAL IMPACT ASSESSMENT (EIA) LEGISLATION



WORKSHOP ON EIA LEGISLATION

CASE STUDY III PUBLIC PARTICIPATION SOLUTIONS

<Solutions >

1. Access to a review procedure in order to challenge the legality of decisions subject to the public participation provisions of Directive 85/337 is guaranteed by article 10(a). Its objective is to give the public concerned a wide access to justice.

Participation in the decision-making procedure has no effect on the conditions for access to the review procedure. Members of the “public concerned” within the meaning of Article 1(2) and 10a of the EIA Directive must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views (C-263/08, *Djurgården*, paragraphs 32-39).

Non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest according to the Directive.

This organization would most probably have legal standing under French national law, since its objective is environmental protection. Nevertheless, a judge would have to check that the geographical area of interest defined by the organization’s statutes is either:

- national, given the importance of the project;
- covering the area of the project or close to it if local.

Inhabitants of the nearest town would have standing if:

- they are directly concerned by the noise or visual pollution (or, for that matter, any kind of pollution);
- they have property or similar rights in the vicinity.

Which property belongs to the affected neighbourhood depends on the impact of the development project which must be found by a case by case examination.

Recently, the question of NGOs’ and individuals’ legal standing was raised in a case against the decision to create an area for the development of wind farm (a so-called “zone de développement de l’éolien”), in which the French national distributor of electricity has to buy the electricity produced by companies or individuals. The decision to create such areas is thus founded on economic more than environmental reasons. The Conseil d’Etat still declared admissible a request introduced by a non-gouvernemental organization as well as by an individual, under the same conditions as previously exposed (CE, 16 avril 2010, *Association Rabodeau Environnement*, 318067).

2. To answer this question, we need first to determine whether, prior to granting the consent for the first two phases of the project, it was necessary to conduct an environmental impact assessment meeting the requirements of Directive 85/337. If so, the lack of public participation is contrary to the provisions of the Directive.

Installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337. Applications were submitted on 4 and 18 December 1997 and on 23 January 1998, i.e. before 14 March 1999 (time limit laid down in article 3 of Directive 97/11). As such, the first two phases of the wind farm were not subject to Directive 85/337.

However, article 3 of Directive 97/11 also states that “if a request for development consent is submitted to a competent authority before the end of the time limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply”. The first two phases of construction required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d). Consequently, Directive 85/337 was applicable to the first two phases of construction of the wind

farm in so far as they involved specifically the carrying out of work on projects referred to in Annex II to that directive.

It follows that the MS was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (C-72/95 *Kraaijeveld and Others*).

Given the important effects on the environment and the size of the project, it was most certainly covered by Directive 85/337 (this is the solution given by the ECJ in C-215/06, *Commission v. Ireland*). Therefore, the authorizations granted do not respect the provisions concerning public information and participation.

One could even argue that it does not matter to determine whether the project should have been covered by Directive 85/337 given its size and impact on the environment. Article 6.2 of the Directive indeed states: "Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public". Insofar as an EIA was carried out, even if it could not have been from a legal point of view, one could thus claim that this EIA should have been made available to the public. This reasoning was held by the French Conseil d'Etat (7 juillet 2004, *Ministre de l'Équipement c/ Association des paysages du sud de la Drôme*, 258051).

3. As regards the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

Point 13 of Annex II to Directive 85/337 as amended refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

Whether the approval to the change in the type of wind turbines originally planned falls under Directive 85/337 must be examined in the light of Annex III of the Directive, especially the effects of the project on the environment and the risk of accidents having regard inter alia to the technologies used, and having regard to the specific features of the site.

According to ECJ in C-215/06, this change of turbines should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended. As a consequence, an EIA should have been carried out.

Is it however possible to consider that to submit the project to a commission before consent was an adequate step, with regard to the definition of "public concerned" in Directive 85/337? Member States may determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted (C-216/05, *Commission v. Ireland*). However, it is clear that one of the Directive's objectives is to promote large public participation. In a case where public consultation is limited to a commission, it appears that many people are not given an early and effective opportunity to participate.

This solution was adopted by the Conseil d'Etat concerning the project to dismantle a nuclear reactor, which had only been submitted to a commission created for this single purpose. France had not entirely complied with Directive 85/337 at that time. However, the Conseil d'Etat considered this situation contrary to objective of the Directive (CE, 6 juin 2007, *Association Le Réseau Sortir du Nucléaire*, 292386).

4. The Court held that the Directive covers “modifications to development projects” even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if “modifications to development projects” were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment (*Kraaijeveld*, paragraph 39). Is the renewal such a modification? Most of the time, it is not (many examples in French national law, for instance CE, 14 juin 2002, *Association pour la protection de l’environnement du Val de Copponex*, 222695). However, in particular cases, especially when there has been a change of circumstances, or when it allows negative effects on the environment, a renewal of the authorization should be subject to an EIA and public information and participation.

5. There is no definite answer to that question in the ECJ’s jurisprudence. The circumstance that it is given on a separate document does not seem to be a problem, as long as it is clear to the public that such a motivation exists. The French Conseil d’Etat decided, for instance, that the competent authority could explain why the authorization was granted / not granted on a separate document (2 juin 2003, *UFC Que Choisir de la Côte d’Or*, n° 243215). In the same decision, the judges found that the lack / absence of motivation had no influence on the lawfulness of the authorization granted. The conformity of this approach with the objectives of Directive 85/337 and its article 9 is open to debate.