POSITION PAPER

BUSINESSEUROPE

20 March 2013

BUSINESSEUROPE comments on the proposal to amend the Environmental Impact Assessment Directive

KEY MESSAGES

1. Industry needs clear environmental planning rules to push ahead with industrial and infrastructure projects.
2. We have concerns that many proposals in the Environmental Impact Assessment directive will lead to considerable delays, increase administrative costs and greater chances of legal uncertainties.
3. On the contrary, revision of the directive should be used as an opportunity to streamline and to reduce burdens associated with the existing provisions.

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At a time when our economic recovery is so closely tied with lifting and instilling business confidence, BUSINESSEUROPE argues that this opportunity must be used to streamline and reduce burdens associated with the existing provisions. We therefore believe that no new obligations should be introduced in the Environmental Impact Assessment (EIA) Directive and that the existing audit programme should not be extended.

The proposal by the European Commission to amend the EIA Directive (COM(2012) 628 final) offers interesting perspectives in terms of streamlining provisions, in particular the establishment of coordinated or joint procedures to integrate different assessment procedures under EIA and other EU legislations (Art. 2) or the appointment of one competent authority to facilitate the permitting of other consent procedures for each project (Art. 2).

However, we have concerns that many other proposals for changes will lead to considerable delays for consent procedures, increase administration costs and create greater legal uncertainties. Industrial and infrastructural projects will be challenged and finally fail due to even more complex procedure. This is at the same time as not necessarily ensuring better environmental outcomes.

BUSINESSEUROPE has particular concerns about the following proposed amendments to the EIA Directive:

Substantive legal requirements in the EIA Directive

BUSINESSEUROPE 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 (i.e. the Industrial Emissions Directive and the Seveso Directive). In addition, the regulatory content of the proposed substantive 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 (e.g. Industrial Emissions Directive, Seveso Directive, Water Framework Directive, Natura 2000). Measures related to compensation of biodiversity offsets are currently discussed in the framework of the "Working Group on No net Loss of Ecosystems and their Services". Including such measures in the scope of the revised EIA Directive would pre-empt on-going work.

In addition, 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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Scope of the environmental impact assessment

BUSINESSEUROPE 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 and its nearby surroundings. 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 such as climate change. In particular, the assessment of environmental aspects such as climate change in combination with the cumulative effects of other projects and activities - explicitly provided for in the new annex IV, 5e - is critical.

Difficulties may also be caused by the requirement of assessing the natural and man-made disaster risks of the project (annex IV, par. 5). Whereas there is lack of any guidance in the Directive on how to do that with respect to natural disasters, it should be clarified that concerning man-made disaster risks, no new measures should be introduced in addition of those already envisaged by the Seveso Directive.

Furthermore, 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.

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.

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.

BUSINESSEUROPE 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.

We also oppose 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 high population density, land use and planning difficulties in Europe.

Compulsory scoping procedure

The voluntary scoping procedure should not be made compulsory as provided for in Article 5 par. 2 of the proposal. 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.

Obligation to prepare the environmental report by accredited experts

The 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 will 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.

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 is irrelevant.

Timeline of the EIA-process

The definition of prompt timelines for different actions of competent authorities, not only partially, but also for the whole procedure has the potential to reduce the duration of the EIA-process (Art. 4, 6 and 8). However, where Member State law provides for integrating the EIA consent procedure with other consent procedures, timelines must be adapted according to the specific requirements of these joint procedures. This must be reflected in the revised EIA directive.

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. Industrial Emissions Directive) already contains sufficient monitoring measures. Any double

regulation would lead to unnecessary bureaucratic burden and to considerable additional implementation efforts.

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 authorisation 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.

The addition of monitoring requirements would add additional costs and burdens, as well as complexity. For example, it is not clear what would occur in the event of a change of ownership of a land.

Extended delegated powers to the Commission

The Commission should not be empowered to adopt delegated acts adapting the Annexes II.A, II 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 amendments with regard to the EIA must continue to be decided by amending the EIA Directive through the ordinary legislative procedure. Extending these delegated powers would not enable the provision of a stable and predictable regulatory framework on which developers and investors’ confidence relies.

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. BUSINESSEUROPE rejects this provision which contradicts basic principles of law, such as non-retroactivity and legal certainty. This will 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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