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ENVIRONMENTAL IMPACT ASSESSMENT PROCEDURE

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Abstract

The environmental impact assessment procedure is a worldwide known procedure for comprehensive evaluation of the likely impact of a proposed activity on the environment. In this contribution, the author attempts to compare the basic features of this procedure set by the 1991 Espoo international convention, by the EC Directive 85/337/EEC as amended by the Directive 97/11/EC, and the Czech legislation. The main interest is devoted to selected legal problems which must be faced in the national law. They can be divided into the following areas, such as the definition of activities to which the EIA procedure is applied, timeliness of the procedure, the complexity of the analysis, correctness of the outcomes and participation of the public. The contribution deals specifically with problematic parts of> the Czech national law and tries to find ways how to solve them.

Introduction

The environmental impact assessment procedure (EIA) is already a worldwide known procedure for comprehensive evaluating of the likely impact of a proposed activity on the environment. The EIA was firstly applied in the USA as a very significant legal tool of prevention in the field of environmental protection. It was introduced in the 1969 National Environmental Policy Act and lately it has been applied in many different countries of the world including European countries. In 1985 the European Community passed Council Directive 85/337/EEC on the assessment of certain public and private projects on the environment to unify the different laws in EC member states. This directive was substantially amended in 1997 by Directive 97/1 I/EC. On the broader international scale the Espoo Convention was adopted in 1991 in Finland with the aim to apply this procedure to projects that might have a significant transboundary impact on the environment and to bring the parties concerned to cooperation in this field.

The EIA procedure may be applied not only to specific projects, but also to programmes and plans which might influence the environment. Therefore the Directive 2001/42/EC of the European Parliament and of the Council on the assessment of certain plans and programmes on the environment (SEA) was passed in 2001. Lately, the legally binding Protocol to the Espoo Convention on the strategic environmental impact assessment has been adopted on the occasion of the 5th Ministerial conference „Environment for Europe“ at an extraordinary meeting of the Parties to the Convention in Kiev in May 2003. Besides that, the 1998 Aarhus Convention dealing with the public participation in the environmental protection has a close relation to the EIA procedure as well.

In the Czech Republic, the first EIA law was passed in 1992. In order to meet the requirements of the EC law, it has been amended a couple of times and finally a complete new Act No. 100/2001 Sb. has been passed. Nowadays, it is more than 10 years since the legislation dealing with environmental impact assessment is in force in the Czech Republic. This contribution is dealing with some legal problems related to the environmental impact assessment of certain projects which must be faced. They can be divided into the following areas:

1. Definition of activities to which the EIA procedure is applied.
2. Timeliness.
3. Complexity of the analysis.
4. Correctness of the outcomes.
5. Participation of the public.

For the reasons of simplicity, this article is focused on the assessment of projects. The assessment of plans and policies is not analyzed.

Ad 1/ Definition of activities under the EIA procedure

The EIA procedure applies to certain projects (buildings, constructions, technologies and other activities), changes of projects and plans, programmes and policies. There are different ways how to specify activities which are subject to the EIA procedure. One way is to put them on a list. Another way, a screening procedure, aimed to find if there is a significant impact of the proposed activity or not, might be used. The combination of both ways is also possible.

Under the *Espoo Convention,* the activities subject to the EIA are listed in Appendix I (power plants, combustion installations, construction of motorways, deforestation of large areas, large dams and reservoirs and others). According to the *EC Law,* the activities that must be assessed are listed in Annex I of the Directive 85/337/EEC. Projects listed in Annex II will be determined through a case by case basis or through thresholds or criteria set by the Member state whether the project shall be made subject to an assessment or a combination of methods may be used.

Under the *Czech law* (Act No. 100/2001 Sb.), the EIA procedure relates to activities on the list. Similarly to the EC law, those activities listed in the annex I., 1st category must be always assessed, and activities listed in the annex I., 2nd category must be assessed only if the screening procedure says so. The EIA procedure also applies to the changes of activities listed in the annex. Nevertheless, the range of the change must be specified exactly. The exemptions of the common rule are set for the case when the government decides on projects in the case of war conflict, Acts of God and other emergency situations.

Besides the specific projects already mentioned, plans and programmes set by the law and/or by the directive in the field of agriculture, forestry, fishery and game keeping management, waste disposal, water management, transportation, tourism, energy resource management, regional development planning, telecommunications, environment and nature protection are subject to the EIA procedure as well. Out of these, there are exemptions concerning plans for the state defence, emergency planning, financial plans and budgets and regulation plans.

The advantage of the listed activities is a great certainty for the developer. If he finds his project on the list, he knows that the EIA must take place. However, this approach does not look for specific conditions of the site and specifics of the projected activity itself, because the criteria for evaluation are always the same. On the other hand, with the approach based on the screening procedure, the investor does not know, if his project will be evaluated under the EIA procedure, until the finding of no significant or a significant impact. The aim of the screening procedure is to evaluate the characteristic of the project (its size), its location (the site) and the predicted impacts on the environment and inhabitants (possible risks etc.). According to its findings, it is decided if the EIA is going to take place or not. The screening procedure will also show further specific information for which it is desirable to be put into EIA documentation (also EIA report).

One of big the problems in the Czech law was the specification of changes of projects. In the former legislation, the change of the project was not quantified appropriately. The legislation in force sets a requirement to apply the EIA if the projected capacity will increase by 25% and more or if the technology is changed significantly and the screening procedure finds the need for environmental assessment. Each activity which is listed in the Annex I must be assessed under the EIA procedure, if its capacity will be changed so that the limit set in the Annex will be reached or exceeded and the screening procedure finds a significant impact on the environment.

Ad 2/ Timeliness

To fulfill its preventive role, EIA is necessary to be conducted before the development consent for the projected activitity is granted. Similarly, the purpose of SEA is to ensure that the environmental consequences of plans and programs were identified and assessed before their adoption.

The *Espoo Convention* sets the obligation of each party to ensure that the El A is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant transboundary impact. According to the *EC Directive,* member states shall ensure that projects defined in Article 4 are made subject to a requirement for development consent and an assessment with regards to their effects, before consent is given (Art. 2.1.)

In the *Czech law,* it is supposed that the investor will submit the final EIA statement (in cases required by the law) with the permit (development consent) application. This permit is usually issued by the Construction Authority. The EIA statement is used as a basis for the decision on the projected activity. But what happens, if the developer is asking for the permit without having an EIA statement? In this case, the decision-making authority is obliged to interrupt the administrative procedure, set an appropriate time limit and ask for the EIA statement or the conclusion of the screening procedure finding of no significant impact on the environment (FONSI). If the proponent of the activity will not submit the EIA report in a given period of time, the administrative procedure is stopped and the decision is not made.

Ad 3/ Complexity of the analysis

Complexity of the analysis means that all the possible effects of the projected activity on the environment, including human health and safety, are defined and analyzed. It means that any direct and indirect effect caused by the proposed activity on flora, fauna, soil, water, air, climate, landscape and historical monuments must be explored including interactions among these factors.

In accordance with the *Espoo Convention (Appendix II),* the EIA documentation should contain:

- description of the proposed activity (project),
- description of reasonable alternatives including the no-action alternative,
- description of the environment likely to be significantly affected (EC, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors),
- description of a potential environmental impact of the proposed activity and estimation of its significance (EC - an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project),
- description of mitigating measures to keep adverse environmental impact to a minimum,
- identification of gaps in knowledge and uncertainties encountered in compiling the required information,
- non-technical summary of information and other.

The *EC Directive* (in ANNEX IV) sets similar requirements on the content of the EIA documentation. These are:

- description of the likely significant effects of the proposed project on the environment resulting from:
  - the existence of the project,
  - the use of natural resources,
  - the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the developer of the forecasting methods used to assess the effects on the environment.
- requirements during the construction and operational phases.

At the same time, the description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project. The size and location of the proposed activity should be also considered. The environmental sensitivity and special importance of certain areas such as wetlands, national parks or sites of cultural or historical importance must be considered.

According to the *Czech law,* the assessment includes identification, description, analysis and evaluation of all presumed direct and indirect impacts of the proposed activity including a no-action alternative. Their specification is further set in the Annex. The assessment relates to the whole life cycle of the proposed activity (preparation, realization of the project, operation and close-up). The consequences connected to closing up the activity must be taken into consideration. It is very important that predicted consequences of common (usual) operation as well as possible accidents must be assessed.

Ad 4/ Correctness of the EIA outcomes

During the EIA procedure, different documents are elaborated under the Czech law. These are the conclusion of the screening procedure (finding of a significant impact or finding of no significant impact), the EIA documentation (EIA report), the review of the documentation and the environmental impact statement. The correctness of these documents may be ensured by various means, especially by:

- the review of the EIA documents,
- the expert qualification requirements,
- the opinion given by authorities likely to be concerned,
- the possibility of anybody to be informed of and to comment upon the EIA documents.

In the *Espoo Convention,* the requirement to ensure the correctness of the EIA outcomes is not specified. Nevertheless, the Article 9 sets the obligation of the parties to give special consideration to the setting up, or intensification of, specific research programmes aimed at, inter alia, improving existing qualitative and quantitative methods for assessing the impacts of proposed activities. The parties are required to seek the services of competent international bodies and scientific committees in methodological and technical aspects pertinent to the achievement of the purposes of this Convention.

As far as the *EC Directive* is concerned, it imposes a duty for Member states to consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project and of the environmental features likely to be affected. According to the EC law, a developer may be reasonably required to compile this information having regard to current knowledge and methods of assessment. In Article 3, the requirement is set to identify, describe and assess the effects of the project in „an appropriate manner“. According to Article 6, Member states must ensure that the authorities likely to be concerned by the project are given an opportunity to express their opinion on the information supplied by the developer and on the request for the development consent.

The review of the EIA documents is a mean to ensure that the impact assessment is correct. The question is how the national law should meet this requirement. The *Czech legislation* implements this requirement by means of a two-step procedure and by the participation of experts and authorities concerned. A very important role in meeting this requirement is played by the public, because anybody has the right to be informed of and to comment upon the EIA documents in each stage of the procedure (see below).

According to the Czech law, there are a couple of documents completed in the EIA procedure. In the first stage, the screening procedure results in finding if there is a significant impact of the projected activity on the environment. If the answer is yes, then the EIA documentation is produced by an authorized expert. This documentation is commented upon by the concerned authorities and by the public. In the second stage, another expert, which must be a person different from the first one, will make a review of this documentation. In his review, he checks up if the documentation is complete, if the methods used and the findings are correct. This review is made public again and may be commented upon by the public and authorities concerned. Based on the documentation and its review, the final environmental impact statement (EIS) is issued by the state authority. According to the Czech law, neither the result of a screening procedure, nor the environmental impact statement can be reviewed. The environmental impact statement is not legally binding. It is used as a basis for administrative decision approving the proposed acitivity. This is the reason, why it cannot be appealed directly. The participants, including the public, can appeal only the final decision on the development consent issued in the subsequent administrative procedure.

One of the biggest problems in the Czech legislation is, that the public cannot appeal the outcomes of the EIA procedure itself- it is especially impossible to appeal the outcome of the

screening procedure for the Czech public, if there was „FONSI“ - finding of no significant impact. Even though the public is allowed to make comments in all stages of the EIA procedure, it can do nothing if their comments were not taken into account properly. However, the public has a much better chance in the consequent decision - making procedure. There is one condition that must be fulfilled in this case -the public must become a participant of the administrative procedure to be entitled to appeal the development consent.

As far as the participation of experts is concerned, the EIA procedure is one of the means of high level protection - it means that it is based on scientific knowledge -expertise - and it is highly professional. The question is, how can the expertise of the EIA outcomes be ensured?

In the *Czech legislation,* the first problem with the quality of these documents was related to the financing of both experts. In practice, the compiler of the documentation is paid directly by the investor. The impartiality of the documentation ought to be ensured by the review. The reviewer is to make sure that the documentation is correct. But how could it work, if the reviewer was also chosen and paid directly by the investor? It might influence the quality of both documents, because both experts are dependent financially on the developer and they will be prone to behave according to the motto: „whose bread you eat, his song you sing“. Therefore it was needed to exclude the possibility of any relations between the reviewer and the investor. Nowadays, based on this experience, the reviewer is chosen by the competent authority, he is also paid by this authority and the investor must reimburse the authority for the accrued expenses.

The other problem is closely related to the qualification and to the field of expertise of individual assessors. The documentation and the review is prepared by two independent experts. According to the Czech legislation these persons must be authorized. There are requirements set for the authorization that must be fulfilled as far as the expertise is concerned. These are:

- education, (university)
- length of practice (3 years)
- passing an examination.

As far as the range of assessment is concerned, the impacts on the whole environment, including flora, fauna, air, water, soil, climate, landscape, natural resources, historical monuments and the impacts on the human health are assessed. This imposes enormous requirements on the expertise of the assessors, their knowledge and education. It seems to be impossible that one person could handle all these fields of study including technical education as far as the way of operation of different technologies is concerned.

There are different ways how to solve this problem. One way is to enable other non-authorized persons to participate in preparation of documentation. At the same time, an authorized person - the assessor is responsible for the whole outcome. Of course, the person who participated in preparation of the documentation cannot participate in compilation of its review. This way was chosen in the first Czech law, however, practice showed, that in most cases the documentation was prepared only by one person and often its quality was very poor.

The other way how to counter this problem is to divide the authorization into different types. For example - authorization type A relates to natural sciences

- Authorization type B relates to technical sciences
- authorization type C relates to human health. Then the whole documentation and/or its review might be prepared by either one person with all three types of authorization, or by two or three persons authorized in one of these fields. (1)

The Czech legislation in force sets the rule that the documentation and its review may be prepared by an authorized person and if there is a project listed in the category I and other specific projects, the assessment of the impact on human health must be prepared by an expert possessing a special certificate.

The third possible solution concerning the problems with the expertise is to put well-known experts that have fulfilled given conditions on the list according to their area of expertise and set a commission on a case by case basis, based on the field of expertise of the listed experts and on the character of the project.

The authorized experts are not the only persons to ensure the correctness of the EIA documents. The authorities likely to be concerned by the project are given a opportunity to express their opinion on the EIA documents and on the request for the development consent.

Ad 5/ Participation of the public

Public participation is one of the main features of the EIA procedure. It is a tool how the correctness of the EIA outcomes can be ensured and, at the same time, it is the way the right to a favourable environment is implemented. The problem of the public participation is dealt with in the Aarhus Convention in a broader scope. The provisions of it are closely connected to the Espoo Convention and the EC directive.

In the *Espoo Convention,* the public is defined as one or more natural or legal persons. The Convention sets the requirement to give the opportunity to the public in the areas likely to be affected to participate in the relevant EIA procedures. The same for the public of the Party concerned. The public in the areas likely to be affected should be informed of, and be provided with possibilities for making comments on or objections against the proposed activity.

According to the *EC Directive,* the outcome of the screening procedure must be made public. The directive also sets the requirement to make the information public and to enable the public to comment upon the EIA documents. In the Article 6(2), member states are required to ensure that any request for the development consent and any information gathered in the environmental impact assessment are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted. When a decision to grant or refuse the development consent has been taken, the competent authority or authorities have to inform the public and make the information set in Article 9 available to the public.

Under the *Czech legislation,* the information gathered in every stage of the El A procedure must be made public. The public has to be informed about the date of the public hearing in advance. The ways of making this information public may differ. First of all, the competent authority has a duty to make them public at the official board. Beside this, relevant information must be made public via electronic media (on the internet) and at least in one more way of publication, which is common in the area concerned (newspaper, local broadcasting).

According to the Czech law, the public is represented by anybody in the EIA procedure. The legislation does not differentiate between definition of the public, public concerned or public interested, as it is set for example in the Aarhus Convention. There is only the public, that participates in all stages of the procedure:

a. At first, the investor submits a notice about a proposed activity to the competent authority. At this stage, this notice must be made public and anybody has the right to comment upon it
b. In the second stage, the screening procedure takes place, based on the comments of the public, beside others. The findings must be made public .
c. In the third stage, the documentation (EIA report) is compiled. Anybody can make comments upon it.
d. As the fourth step, the documentation is reviewed by another expert. In his review, he has to consider the public comments.
e. When the review is completed, there is a public hearing enabling the discussion on the projected activity and EIA documents. The public is allowed to make comments and these comments must be considered in preparation of the final environmental impact statement which is issued by the competent authority.
f. The EIS is made public in a given time period.

One of the problems in the former legislation that had to be solved was related to the late participation of the public. Formerly, the public entered the EIA procedure, when the EIA documentation was already completed. According to the new law, the public is allowed to make comments from the beginning - when the investor submits the announcement of the projected activity. This brought improvement into the cooperation between the investor, experts and the public. It is also necessary to establish a reasonable time-frame for phases of public participation and the duty to take due account of the outcome of the public discussion and comments and what happens if this duty is not obeyed.

The EIA is not itself a permitting or authorization process. It is a tool for decision-making. The environmental impact statement has a character of an expertise and as such it cannot be appealed. Therefore it is necessary for the public to become a participant of the subsequent permitting procedure. This right, however, does not belong to anybody. Only nongovernmental organizations promoting environmental protection and meeting requirements set by the law may have a standing in the subsequent administrative procedure. As a party to the administrative procedure, the public has

the right to appeal the decision. If the appeal is not successful, the final decision may be reviewed by the court. According to the former Czech legislation the courts reviewed only procedural aspects; the new legislation is already based on full jurisdiction of administrative courts. (2, 3)

Conclusions

In the Czech Republic, the environmental impact procedure is regulated in three different levels. These are the level of international law, the level of European law and the national level. The obligations contained in the international convention set only a very general frame for the assessment procedure with the aim to regulate it mainly with regards to the projects with the expected transboundary effect. The Council Directive 85/337/EEC as amended by the Directive 97/1 I/EC set the aim and general requirements in the field of the EIA that must be met by Member states. As the directives are not directly applicable, their provisions must be implemented by the national law. Each Member state must find a way how to regulate the EIA procedure as an effective tool of environmental protection. There are many methods that might be used; however, it is necessary to provide the national legislation with forceful rules that will ensure the effective function of the environmental assessment. The attention must be given to the precise determination of activities that are to be assessed, to the data that must be gathered, to the complexity of the analysis and to the way to ensure that the outcomes are correct. This requirement can be met by the participation of authorized experts, by the participation of authorities likely to be concerned, by the participation of the public and by the revision of the EIA documents. There are many ways to enable the public to participate. The legislation should provide for early public participation when all options are open, it should encourage the public to enter into discussions and to allow the public to be informed and to submit any comments or opinions. It is very important to ensure that due account is taken of the outcome of public participation. To fulfill the aim of the EIA procedure, it is necessary to obtain the outcome (environmental impact statement) before the projected activity is permitted and to ensure that due account is taken of the outcome of the EIA procedure in the consequent decision-making procedure.

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Poveikio aplinkai vertinimo procedūra

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***Pagrindinės sąvokos**: poveikio aplinkai vertinimo procedūra, planai ir projektai, susiję su aplinka, Espoo konvencija, Direktyva dėl planų ir programų poveikio aplinkai vertinimo, tiesioginis ir netiesioginis poveikis.*

SANTRAUKA

Poveikio aplinkai vertinimo procedūra pasaulyje žinoma kaip planuojamos veiklos galimo poveikio aplinkai vertinimo procedūra. Šiame straipsnyje autorė siekia palyginti šios procedūros esminius klausimus,

kurie nustatyti 1991 m. Espoo tarptautinėje konvencijoje, EB Direktyvoje 85/337/EEB, ją pataisančioje Direktyvoje 97/11/EB ir kitur. Daugiausia dėmesio skiriama rinktinėms teisinėms problemoms, su kuriomis susiduriama nacionalinėje teisėje. Šios problemos gali būti klasifikuojamos į tokias sritis kaip veiklos, kurioms taikoma poveikio aplinkai vertinimo procedūra, procedūros nenutrūkstamumas, analizės kompleksiškumas, rezultatų korektiškumas ir visuomenės dalyvavimas. Autorė pateikia apibrėžimą veiklos rūšių, kurioms turi būti taikoma poveikio aplinkai vertinimo procedūra pagal Espoo konvenciją, EB Direktyvą 85/337/EEB bei Čekijos teisę. Konvencija nustato pareigą, kad poveikio aplinkai vertinimo procedūra turi būti atlikta prieš priimant sprendimą leisti pradėti planuojamą veiklos rūšį iš Konvencijos 1 priede minimų veiklos rūšių. Pagal EB Direktyvą 85/337/EEB valstybės narės privalo garantuoti, kad šioje Direktyvoje minimų projektų įtaka yra vertinta. Pagal Čekijos nacionalinę teisę investuotojas turi sutikti su poveikio aplinkai vertinimo procedūros ataskaita, pateikiama kartu su leidimu vykdyti atitinkamą veiklą. Pabrėžiama, kad jeigu pareiškėjas nesutinka su jam pateikta poveikio aplinkai vertinimo procedūros ataskaita, įgaliota institucija nutraukia leidimo išdavimo pareiškėjui procedūrą ir nustato terminą, per kurį pareiškėjas turi pateikti išvadą apie tai, kad jo planuojama veikla nedarys akivaizdžios įtakos aplinkai. Poveikio aplinkai vertinimo procedūra turi būti atliekama kompleksiškai, vertinami visi galimi poveikiai aplinkai, įskaitant žmogaus sveikatą ir saugumą. Gautų atliktos procedūros rezultatų patikimumas turi būti garantuojamas atliktos poveikio aplinkai vertinimo procedūros dokumentų apžvalga, ekspertų kvalifikacija, suinteresuotų institucijų pateikiama nuomone bei kiekvieno asmens galimybe būti informuotam ir pateikti savo pastabas dėl minėtos procedūros dokumentų. Valdžios institucijos turi informuoti visuomenę, taip pat skatinti ją dalyvauti diskusijose, pateikti savo nuomonę ir komentarus dėl poveikio aplinkai vertinimo procedūros, nes tai būtina norint pateikti tinkamą, valdžios institucijų bei visuomenės aprobuotą poveikio aplinkai vertinimo ataskaitą.

Straipsnyje pateikiami probleminiai poveikio aplinkai vertinimo procedūros aspektai ir, vadovaujantis 1991 m. Espoo konvencijos bei EB Direktyvos 85/337/EEB nuostatomis, galimi šių probleminių aspektų sprendimo būdai.