Changes to the environmental impact regime in Ireland

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The *Amending EIA Directive 2014/52/EU* will take effect on the May 16, 2017. It will substantially change how Environmental Impact Assessment (EIA) is conducted in Ireland. This article outlines some of the changes it will make to the existing EIA regime in Ireland. The Directive attempts to introduce smarter and more integrated decision making in environmental impact assessment, and to implement Aarhus Convention 1998 UNECE obligations.

DEFINITION OF EIA

The Directive introduces (in Article 2) a definition of EIA for the first time. It is defined as the preparation of an EIA report by the developer; the carrying out of public consultations; the examination by the competent authority of the information presented in the EIA report and any supplemental information or information received through consultation.

This is a process based definition, which sets out a clearly structured four part procedure:

- The Report Phase – Environmental Impact Statement prepared by the Developer.
- The Consultation Phase – Consulting with the public, relevant national authorities, and transboundary consultation.
- The Assessment Phase – assessment of the above by the planning authority.
- The Decision Phase - issuing of reasoned decision that must include the mitigation and monitoring measures and a description of how the results of public consultation were taken into account.

This clearly distinguishes between the EIS preparation stage and the Consultation stage. It is interesting to note the positioning of the Consultation phase after preparation of the Environmental Impact Statement by the developer. This potentially conflicts with the obligations set out in Article 6(4) of the Aarhus Convention to provide for "*…early public participation, when all options are open…*".

If the Environmental Impact Statement has already been prepared by the Developer and the application submitted, presumably at that stage, a course of action has been determined from which it would be difficult to deviate. Alternatives have been considered and dismissed at that stage.

The COWI Report "*Study concerning the report on the application and effectiveness of the EIA Directive*" from 2009, indicates that 16 EU member States provide for scoping as a separate procedural stage with mandatory public participation, and 9 EU member States provided for mandatory public participation in screening.

Agustín García-Ureta in his article "*Directive 2014/52/eu on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations*?", from 2014, states on this issue '*…no matter how significant the assessment of environmental effects may be, if a decision has already been taken (at a political level) as to the need to execute a project, the former procedure is likely to have only a minor impact on obtaining development consent, save as an inconvenience that must nevertheless be overcome.*'

Article 6(5) of the Aarhus Convention requires that the Parties should encourage applicants to identify the public concerned and to enter into discussions with them before applying for a permit. This is clearly phrased in non-mandatory language, but is perhaps indicative of what is meant by early, effective participation.

There are currently no provisions in EU, or Irish law that could be said to achieve this level of early participation.

The new definition of Environmental Impact Assessment contained in the 2014 Directive is broader than the Irish definition, which described EIA as an examination carried out by the deciding authority, that identifies, describes and assesses the impacts under the headings of human beings, flora and fauna, soil, water, air, climate, the landscape, material assets, cultural heritage, and the interaction between these factors.

The 2014 Directive has also broadened the range of factors to be considered in EIA including biodiversity in relation to the Habitats and Birds Directives; effects on human health and vulnerability to major accident/hazards.

Clearly the Irish legislation will have to be amended substantially to reflect these changes.

NEW REQUIREMENT

Art 5(3)(a) of the 2014 Directive mandates that the developer must ensure that the environmental impact assessment report be prepared by competent experts. This was likely to address concerns raised regarding the variation in quality of the environmental reports being produced across the Member States.

Maria Lee, in "*EU Environmental Law, Governance and Decisions Making*", 2nd Ed., 2014, posits this could involve a national accreditation system or professional regulatory body for those who wish to work on the preparation of environmental statements.

INTEGRATED DECISION MAKING

Article 2(3) of the 2014 Directive provides for a one-stop shop approach to be developed for joint assessment in relation to EIA and Habitats/Birds Directive assessment.

Simplified application procedures are provided to assess impacts under other legal measures where they coincide with EIA such as Industrial Emissions.

In "*Better Regulation in Environmental Impact Assessment: The Amended EIA Directive*", Kalina Arabadjieva points out that it is the lack of a definition of 'appropriate assessment' and other matters mean that this amendment may lead to greater uncertainty about the boundaries of EIA, Appropriate Assessment under the Habitats Directive and SEA.

CHANGES TO SCREENING PROCEDURE

Developers requiring a screening decision on Annex II projects now require a specific information set to be submitted for screening determinations, including a description of the characteristics, location and likely impacts of the project (Article 4 of the 2014 Directive). A maximum time-frame of 90 days for the making of a screening decision is set down.

Information regarding the development consent application and the EIS will now have to be made available electronically. It is likely that information being more easily available will result in much wider participation and a greater level of objection to applications.

INCREASED REASON-GIVING OBLIGATIONS

The Directive, in Articles 8, 8a, and 9, places greater emphasis on giving reasoned decisions for both grant and refusal of permission. In particular a greater degree of detail regarding how submissions and observations were used in arriving the decision will be required.

The new obligation is to ensure the decision "Includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed."

It is clear that the requirement is an attempt to enhance the quality of public participation under Articles 5, 6 and 7 of the Aarhus Convention, as is evident from the ACCC's comments on the area in their guidance document "The Aarhus Convention: An Implementation Guide".

Time-frames for Public Consultations have been increased to 30 days. The current Irish framework provides a 20 day (4 week) period in most cases.

OBLIGATION TO CONSIDER 'REASONABLE ALTERNATIVES'

The standard regarding consideration given to alternatives by the developer seems to have been raised. The developer will presumably be required to actually demonstrate this.

CRIMINAL PENALTIES

Member States will have to set down criminal penalties for breaches of the provisions of the implementing legislation, which will be a new departure in this area.

CONCLUSION

It is arguable that the new Directive does not fully implement the obligations of the Aarhus Convention, particularly in the area of public participation opportunities. Genuine public participation would involve consideration of all options and alternatives, including what John Glasson (in "*Introduction to Environmental Impact Assessment*", 2012) refers to as the '"no action' or 'business as usual' option. While the new EIA Directive will certainly strengthen public consultation once the application is filed, it does not provide for the type of early participation envisaged by the Aarhus Convention.

It seems that difference between "consultation" (passive involvement) and "participation" (active involvement) has not yet been recognised in the legal framework or accepted at EU level. Many of the 'public participation' measures introduced in this and other legislation are actually transparency measures.

It seems likely, given the ongoing problems with transposition of the old EIA Directive in Ireland, that next year will see the introduction of yet more problematic legislation, and further litigation on the issues of bringing national legislation into line with EU law. If the current piecemeal implementation by way of amending Statutory Instruments continues to be utilised, this is an area of law that is set to become ever more byzantine.