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## List of requirements of the Espoo & Aarhus Conventions and the EIA Directive to be met by a national framework in the field of environmental impact assessment

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### Concepts and definitions

1. The EIA Directive implements the Espoo Convention and the provisions of the Aarhus Convention related to specific activities.
2. Despite some small differences in terminology (for example: proposed activities vs projects or development consent vs permit) all three instruments are based on the same concepts, with the definitions of these concepts contained in the EIA Directive being the most precise and detailed.
3. While not all of the definitions must be included, the national framework aiming to implement Espoo and Aarhus Conventions and EIA Directive cannot define the concepts used in these three instruments differently than they are defined therein.

### Activities (projects) covered

4. The national framework as a tool to implement Espoo and Aarhus Conventions and EIA Directive should cover all categories of proposed activities (projects) listed in Appendix I to the Espoo Convention, in Annex I to Aarhus Convention, and in Annexes I and II of the EIA Directive, including for example “nuclear power stations” and also “intensive rearing of pigs” or “opencast mining” or “deforestation” or “offshore hydrocarbon production” or “groundwater abstraction” (art. 2.2 of the Espoo Convention + art. 6.1 (a) of the Aarhus Convention and Art. 2.1 of the EIA Directive).
5. All activities listed in Appendix I to the Espoo Convention and in Annex I to Aarhus Convention are included either in Annex I or in Annex II to the EIA Directive.
6. Article 1.2 (a) of the EIA Directive defines a ‘project’ to mean
  - the execution of construction works or of other installations or schemes,
  - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

7. Article 1, item (v) of the Espoo Convention, defines a 'proposed activity' to mean 'any activity or any major change to an activity...'. Similarly, changes or extensions to activities/projects are covered by Annex I to Aarhus Convention and Annexes I and II of the EIA Directive.
8. Thus, when designing the national framework it should be borne in mind that it should cover:
  - a. also major changes to activities/projects - for example modernization of motorways and express roads (ECE/MP.EIA/IC/2009/2, para. 30);
  - b. not only activities involving construction, for example for the purposes of the Espoo Convention maintenance of a depth in a waterway constitutes continuation of such activity and remains subject to the obligations under the Convention" (ECE/MP.EIA/IC/2010/2, annex, para. 40)

### **Development consent (permit) and place of the assessment**

9. Article 1.2 (c) of the EIA Directive defines 'development consent' to mean „the decision of the competent authority or authorities which entitles the developer to proceed with the project". This definition serves for the purpose of implementing the provisions of the Aarhus Convention regarding „decisions on whether to permit proposed activities" and the provisions of the Espoo Convention regarding „final decision on the proposed activity".
10. All categories of proposed activities (projects) listed in Appendix I to the Espoo Convention, in Annex I to Aarhus Convention, and in Annexes I and II of the EIA Directive must be subject to regulatory control. Those likely to have significant effects on the environment must be subject to a requirement for development consent and an assessment with regard to their effects.
11. All projects belonging to categories of projects listed in Annex I to the EIA Directive by definition are likely to have significant effects on the environment and therefore must be subject to environmental assessment and the requirement for development consent. Some individual project belonging to categories of projects listed in Annex I to the EIA Directive may be found – as a result of screening using the screening criteria (see- Screening) as not likely to have significant effects on the environment and therefore not requiring environmental assessment and development consent.
12. Development consent must take the form of a decision in which a specific activity/project is authorised, its parameters are defined and conditions of its execution and operation are prescribed. No "tacit agreement" is allowed (Case C-230/00 EC v Belgium).
13. Environmental assessment must be carried out before development consent is granted (art 2.1). Project cannot start to be implemented without the assessment and development consent, assessment conducted after the project started to be implemented is not in line with the EIA Directive (Case C-215/06 EC v Ireland).
14. If national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision (Case Delena

Wells C-201/02). If, however, in the case of development consent procedure comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects not yet assessed – it must be subject to the assessment again at the second stage (Cases Crystal Palace/White City C-508/03) and Barker C-290/03).

### Authorities

15. National framework must clearly designate (article 1 (ix) of the Espoo Convention and 1.2 (f) of the EIA Directive) :
  - a. Authorities competent to take a decision to grant or refuse development consent
  - b. Authorities responsible for performing the tasks related to transboundary procedure
16. There should be also designated authorities which due to their specific environmental responsibilities should be consulted.. They can be designated either in general terms or on a case-by- case basis (art.6.1 of the EIA Directive).

### Screening

17. Projects belonging to categories of projects listed in Annex II to the EIA Directive must be subject to determination whether they are likely to have significant effects on the environment and therefore must be subject to environmental assessment and development consent. The determination can be done through:
  - a. a case-by-case examination;
  - b. thresholds or criteria set by the Member State
  - c. a mixture of a) and b)
18. Regardless of which procedure is used to make a determination, it must always take into account the selection criteria set out in Annex III to the EIA Directive (Case C-156/07 Aiello). The determination:
  - a. may not use as a criterion only the size of the project (but first of all its location and other environmental factors- Case 392/96 EC.v.Ireland)
  - b. may not result in excluding a whole class of projects (Case C-133/94 EC v.Belgium and Grosskrotzenburg Case C-301/95 EC v.Germany)
19. Results of screening determination must be publicly available (art.4.4 of the EIA Directive). Negative screening require justification – Case C-87/02 EC vs Italy).

### Scope of assessment and content of EIA documentation

20. Both Espoo Convention (art1 (vii) and EIA Directive (art.3) define very broadly the general scope of assessment. It must include “any effect caused by a proposed activity on the environment including **human health** and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on **cultural heritage** or socio-economic conditions resulting from alterations to those factors; (art. 1 (vii) of the Espoo Convention).

21. Following the broad scope of assessment both Espoo Convention (Appendix II) and EIA Directive (art. 5.3 and Annex IV) provide for a list of mandatory elements which must be contained in each EIA documentation. In particular:
- a. The Espoo Convention's provision requiring that the EIA documentation includes a description, where appropriate, of reasonable alternatives (appendix II, item (b)) is mandatory for the legal implementation of the Espoo Convention by a Party (ECE/MP.EIA/IC/2009/2, para. 39);
  - b. It is important that the no-action alternative should be addressed fully so that the evolution of the environment in the absence of the project could be considered (ECE/MP.EIA/IC/2010/2, para. 33);
  - c. The non-technical summary is a mandatory element of the EIA documentation and it should outline in nontechnical language the findings included in each of the earlier chapters corresponding to items (a)–(h) of appendix II, including visual presentations as appropriate (maps, graphs etc) (ECE/MP.EIA/IC/2009/2, para.16);
  - d. Identification of gaps in knowledge and uncertainties encountered in compiling the required information is also a mandatory element of the EIA documentation.
22. When designing the national framework it should be borne in mind that while the Espoo Convention and EIA Directive list some mandatory elements of the content of the EIA documentation, a case-by-case determination of the scope of information to be included into these elements of the EIA documentation ('scoping') is an effective method for streamlining the assessment and reducing its costs. The EIA Directive requires that if the proponent/developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the scope of information to be included into the content of the EIA documentation. However a case-by-case determination of the scope of information to be included into the content of the EIA documentation may form a mandatory part of the procedure.

### **Public participation**

23. When designing the national framework it should be borne in mind that organization of public participation under the Aarhus and Espoo Conventions and EIA Directive is the responsibility of the competent authority and not of the project proponent/developer. Nevertheless, it might be possible under national systems that the competent authority and the proponent would organize the public participation together. However, the proponent should not be responsible for public participation without the competent authority (ECE/MP.EIA/IC/2010/4, para. 19(b)) Thus, these observations regarding the role of the developers (project proponents) shall not be read as excluding their involvement, under the control of the public authorities, into the organization of the public participation procedure (for example conducting public hearings) or imposing on them special fees to cover the costs related to public participation (ECE MP.PP//2011/11/Add.2para 81).
24. To ensure proper conduct of the public participation procedure, the administrative functions related to its organization may be delegated to bodies or persons which are specializing in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making.(ECE/MP.PP/C.1/2010/6/Add.4 para 79).
25. The public shall be informed promptly and properly not only about initiation of the procedure and possibilities to participate but also of the issuing of the final decision (permit) (art. 6.2 and 6.9 of the Aarhus Convention).

26. National framework shall contain detailed requirements for informing the public, as required under article 6, paragraph 2, of the Aarhus Convention, about the initiation of the procedure and possibilities for the public to participate. In particular there should be a clear requirement:
  - a. That the public is informed in a adequate, timely and effective manner;
  - b. Specifying the mandatory forms of the public notice, including a notice in the vicinity of the venue of proposed activity and on the web-site of the public authority competent for decision-making;
  - c. Specifying mandatory contents of the public notice (as compared with the requirements specified in para. 2 (a)-(d) of art. 6 of the Aarhus Convention).
  
27. If the main means of informing the public is via Internet:
  - a. It must be clearly required that all documents, including the application, EIA documentation etc. must be submitted by proponents/developers also in electronic form;
  - b. That the info is available on the specially designated and easily recognisable Internet websites of the authorities and not only on websites of proponents/developers.
  
28. Specific timeframes for the public participation process shall be set, including in particular sufficient time-frames:
  - a. For the public to examine available information and documents and to prepare to participate effectively;
  - b. For the public to prepare and submit the comments; ((ECE/MP.PP/C.1/2009/2 para 10 (d));
  - c. For the public officials to take any comments into account in a meaningful way (ECE/MP.PP/C.1/2009/2 para 10 (e)).
  
29. In relation to access to information relevant to decision-making:
  - a. The provision of information should not be limited only to selected parts of EIA documentation (ECE/MP.PP/C.1/2009/2 para 10 (g));
  - b. Copyright protection should not be considered as allowing for the prevention of the public availability of the full environmental impact assessment documentation” (ECE/MP.EIA/IC/2010/4, para. 20);
  - c. There shall be a clear requirement that
    - i. information is provided regardless of its volume (ECE/MP.PP/C.1/2009/2 para 10 (b)
    - ii. information required to be provided by proponents/developers is not generally exempted from disclosure (ECE/MP.PP/C.1/2009/2 para 10 (h)).
  
30. In addition to public hearing, the public should have the possibility to submit in writing
  - (a) Any comments related to the respective decision-making without the requirement that these comments are reasoned;
  - (b) During the entire commenting period (art. 6.7 of the Aarhus Convention)
  
31. When designing a national framework it should be borne in mind that the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure public participation in compliance with article 6, paragraph 7, of the Aarhus Convention (ECE/MP.PP/C.1/2010/6/Add.4 para 95).

## Consultation with environmental authorities

32. Regardless of what public authority is entrusted with decision-making powers, the authorities likely to be concerned by the project by reason of their specific environmental responsibilities must be given an opportunity to express their opinion on the information supplied by the developer (EIA documentation) and on the request for development consent
33. Detailed arrangements should be made in the national framework for such consultations (art.6.1 of the EIA Directive).

## Transboundary procedure

34. In addition to the general obligation to clearly indicate in the national framework where in the decision-making process there is a place for a transboundary EIA procedure and who is responsible for carrying it out and by which means (ECE/MP.EIA/10, decision IV/2, annex I, para. 64) the national framework should provide also other necessary details of the transboundary procedure both in respect of acting as “the Party of origin” and as “affected Party”.
35. Necessary condition for conducting transboundary procedure is early involvement of environmental authorities, for example by requiring proponents/developers to submit a “declaration of intent” to such authorities, which in turn could decide if there is likelihood of transboundary impact and initiate the process of transboundary notification. This should be complemented with obligatory scoping in case of finding likelihood of transboundary impact. As an additional tool for successful screening of activities likely to cause significant adverse transboundary effect the Parties, either individually or through bilateral or multilateral agreements or other arrangements, might find useful to establish a list of activities, with thresholds if appropriate, that should automatically be subject to notification (ECE/MP.EIA/IC/2010/2, para. 21).
36. When designing a national framework it should be borne in mind that:
  - (a) There is a common responsibility of the concerned Parties for providing equivalent opportunities for public participation in the affected Party, including accurate and effective notification of the public. In that context, while recognizing the lack of administrative powers of the Party of origin’s competent authority on the territory of the affected Party, at a minimum it had to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin (ECE/MP.EIA/IC/2010/2, para. 37);
  - (b) The concerned Parties should share the responsibility for ensuring that the opportunity provided to the public of the affected Party was equivalent to that provided to the public of the Party of origin, including access to at least relevant parts of the documentation in a language the public could understand, as set out in article 2, paragraph 6; article 3, paragraph 8; and article 4, paragraph 2 of the Convention (ECE/MP.EIA/IC/2010/2, para. 35);
  - (c) The Party of origin’s competent authority should furthermore support the affected Party’s competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary environmental impact assessment (ECE/MP.EIA/IC/2010/4, para. 19 (c));
  - (d) Environmental impact assessment documentation should include a separate chapter on transboundary impact to facilitate translation (ECE/MP.EIA/IC/2010/2, para. 35);
  - (e) Entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment would not be adequate, unless the proponent was the State (ECE/MP.EIA/IC/2010/2, para. 36).

(f) Consultations under article 5 of the Espoo Convention are bilateral or multilateral discussions between authorities that have been authorized by the concerned Parties, and should not be confused with public participation under article 3, paragraph 8, and article 4, paragraph 2, or with consultation of the authorities under article 4, paragraph 2, in the areas likely to be affected (ECE/MP.EIA/IC/2010/2, para. 39).

37. When designing a national framework it should be ensured that:
- (a) There is a legal mechanism that comments under article 3.8 and 4.2 of the Espoo Convention of foreign authorities and the public regarding information in the EIA materials are taken into account so that transboundary impact is properly addressed (art. 6.1 of the Espoo Convention);
  - (b) There is a legal mechanism assuring that results of consultations with foreign authorities under article 5 of the Espoo Convention are binding upon authorities issuing final decision (art. 6.1 of the Espoo Convention);
  - (c) There is a legal and financial mechanism allowing public authorities to undertake their duties related to provide public participation in case of transboundary procedure.

### **Final decision**

38. National framework should clearly indicate which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Espoo Convention (ECE/MP.EIA/10, decision IV/2, annex I).
39. There should be a clear requirement that in the final decision due account is taken of the outcome of the environmental impact assessment, including the EIA documentation, as well as of the public participation, transboundary procedure and consultations with environmental authorities (article 6.1 of the Espoo Convention and article 6.8 of the Aarhus Convention, and art. 8 of the EIA Directive).
40. While Parties to the Espoo Convention are free to decide which of the multitude of decisions required within their regulatory framework should be considered final for the purpose of the Espoo Convention, their discretion in this respect is limited to those decisions that in real terms set the environmental conditions for implementing the activity (ECE/MP.EIA/10, decision IV/2, annex I, para. 61) and which embrace all the basic parameters and main environmental implications of the proposed activity in question (ECE/MP.PP/2008/5/Add.10 para 43).
41. National framework should be designed in such a way that in case of each of the decisions considered to be final in relation to given activity there is clarity what are the authorised basic parameters of the proposed activity and the respective environmental conditions for implementing this activity. If the conditions attached to a decision can be altered subsequently by other decisions, the former cannot be considered the 'final decision' in the meaning of the Espoo Convention (ECE/MP.EIA/IC/2009/2, para. 21). The same applies if the other decision is capable of significantly changing the above basic parameters or addressing significant environmental aspects of the activity not already covered (ECE/MP.PP/2008/5/Add.10 para 43).
42. There should be a clear requirement that:
- (a) The final decision shall be accompanied with the statement of reasons and considerations on which it is based (art. 6 of the Espoo Convention and art. 6.9 of the Aarhus Convention);

(b) Texts of decisions, along with the reasons and considerations on which they are based, are publicly available. (ECE/MP.PP/C.1/2009/2 para 10 (j));

(c) Public authorities:

i. inform promptly the public of the decisions they have taken and of how the decisions along with the reasons and considerations on which they are based, can be accessed;

ii. maintain and make accessible to the public, through publicly available lists or registers, copies of the decisions they take, along with the reasons and considerations on which they are based and other information relevant to the decision-making, including the evidence of fulfilling the obligation for having informed the public and provided it with opportunities to submit comments.

43. When designing national framework there should be borne in mind that in the light of article 3, paragraph 8 there is an obligation to inform the public concerned in the affected Party of the final decision”(ECE/MP.EIA/IC/2009/2, para. 27).

44. The final decision should provide a summary of the comments received pursuant to article 3, paragraph 8, and article 4, paragraph 2, and the outcome of the consultations as referred to in article 5, and should describe how they and the outcome of the environmental impact assessment had been incorporated or otherwise addressed in the final decision, in the light of the reasonable alternatives described in the environmental impact assessment (ECE/MP.EIA/IC/2010/2, para. 40).

#### **Access to justice**

45. National framework must ensure that members of the public concerned:

a. having a sufficient interest, or alternatively;

b. maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the provisions related to development consents and environmental impact assessment procedure.