

28th December 2018

To:

European Commission
Directorate-General for Environment

Subject:

Complaint on the non-compliant transposition of certain requirements of Directive 2011/92/EU as amended by Directive 2014/52/EU in Hungary

Dear Sir/Madam,

Association Justice and Environment, z.s. (J&E) and its member organizations on the national level are active in EIA matters, both by monitoring legislation and working in practice, in cases and legal consultations. Since 2012, J&E participated actively in the EU-wide revision procedure of the EIA Directive; we collected national case law examples on the application of the current legislation, prepared recommendations for the EU decision-makers, organized meetings with stakeholders at the national and at the EU level and did advocacy intensely together with other NGOs.¹

Due to the adoption of Directive 2014/52/EU, the updated Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the EIA Directive) provides clearer requirements for the assessment of the projects' impact on biodiversity, climate change, disaster risks and the landscape. These areas are covered generally, but the new rules should result in an increased emphasis in these areas, as those are to be reflected better in the development consent procedure. According to Article 3(1) of Directive 2014/52/EU, Member States were required to comply with the amended EIA rules by 16 May 2017 and to notify the transposing measures to the European Commission.

In order to contribute to the better and more efficient implementation of the EU EIA legislation and - in the long term - to improve the quality of the EIA procedures by meaningful transposition and enforcement of the revised EIA Directive, J&E has been working on awareness raising at the level

¹ http://www.justiceandenvironment.org/cases-and-studies/?tx_casesandstudies_all%5BcaseStudy%5D=4&tx_casesandstudies_all%5Baction%5D=show&tx_casesandstudies_all%5Bcontroller%5D=CaseStudy&cHash=b2d5e35c7a2a3bbc28f0355521be59ef

of the Member States among environmental authorities and NGOs on the improvements of the revised EIA Directive, highlighting issues of the implementation of the new EIA Directive. In 2018, our staff lawyers identified the following instances of non-compliance in the transposition of the EIA Directive as amended by Directive 2014/52/EU.

Exemptions from the scope of the EIA Directive

Article 1(3) of the EIA Directive - as amended - provides that *Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects, or parts of projects, having defence as their sole purpose, or to projects having the response to civil emergencies as their sole purpose, if they deem that such application would have an adverse effect on those purposes.*

Article 2(4) of the EIA Directive lays down that *Member States may, in exceptional cases, exempt a specific project from the provisions laid down in this Directive, where the application of those provisions would result in adversely affecting the purpose of the project, provided the objectives of this Directive are met.*

In Hungary, the provisions of the EIA Directive (and its amendments) have been transposed by the amendment to Act No. 53 of 1995 on the general rules of environmental protection² (the ‘Environmental Protection Act’) and Governmental Decree No. 314 of 2005 (25 December) on environmental impact assessment and the IPPC (IED) permits³ (the ‘EIA Decree’).

The principles of environmental protection, access to environmental information, public participation in environmental administrative proceedings and the general rules of preliminary assessment (screening), and environmental impact assessment are laid down by the Environmental Protection Act. In addition to this Act, specific pieces of legislation, i.e. governmental and ministerial decrees provide the legal framework of the protection of the environmental elements and establish the system of environmental protection administration.

The Environmental Protection Act stipulates that prior to the commencement of activities that have or may have a significant impact on the environment, an environmental impact assessment shall be carried out. In addition, the Government shall specify the activities for which an environmental impact assessment is required at all times and shall define the activities in connection with which the environmental protection authority has the powers to decide case-by-case - based upon the criteria set out in the relevant government decree - as to whether an environmental impact assessment is required.

² Act LIII of 1995 on the general rules of environmental protection. 1995. évi LIII. törvény a környezet védelmének általános szabályairól, available at: http://nit.hu/cgi_bin/njt_doc.cgi?docid=23823.348950

³ Governmental Decree No 314/2005. (XII. 25.) on environmental impact assessment and the consolidated environmental use permits. 314/2005. (XII. 25.) Korm. rendelet a környezeti hatásvizsgálati és az egységes környezethasználati engedélyezési eljárásról, available at: http://nit.hu/cgi_bin/njt_doc.cgi?docid=96394.350208

The specific governmental regulation listing the activities subject to screening or mandatory EIA and establishing detailed rules to assess the likely impacts of certain activities on the environment is provided by the EIA Decree. Therefore, the Environmental Protection Act requires in general that an environmental impact assessment is compulsory in the case of any activity likely and significantly affecting the environment, and the EIA Decree designates the specific projects/activities which shall undergo a screening or an EIA proceeding.

By referring to Articles 1(3) and 2(4) of the EIA Directive, the Environmental Protection Act also introduces the possibility of exempting activities from the application of the national EIA legislation. Articles 66(1a)⁴ and 67(4)⁵ of the Environmental Protection Act provide that any use of the environment may commence or be carried out without a preliminary assessment (screening) and/or an environmental impact assessment (EIA) procedure in cases provided for by an Act of Parliament. However, the national legislation does not adequately reflect the EIA Directive's requirements as the national rules do not provide that those exemptions might be applied only on a case-by-case basis and only where it would have an adverse effect on the purpose of defence or the purpose of the specific project.

The national provision contains a simple cross-reference to the EIA Directive's requirements, which does not ensure that the conditions set out for their application shall be taken into account under the national legislation.

On the other hand, the EIA Decree explicitly excludes certain projects from its scope. According to its Article 1(2)⁶, the EIA Decree does not apply to activities which are listed in its Annex 3 (transposing Annex II to the EIA Directive) which are used for research, development or the testing

⁴ 66.§ (1a) A környezethasználat (...) az egyes köz- és magánprojektek környezetre gyakorolt hatásainak vizsgálatáról szóló, 2011. december 13-i 2011/92/EU európai parlamenti és tanácsi irányelv 1. cikk (3) bekezdésének vagy 2. cikk (4) bekezdésének végrehajtása érdekében, törvényben meghatározott esetekben a környezeti hatásvizsgálati eljárás lefolytatása nélkül kezdődhet meg, illetve folytatható.

66.§ (1a) (...) any use of the environment may commence or be carried out without an environmental impact assessment procedure in cases provided for by an act, in the interest of the implementation of Article 1(3) or Article 2(4) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

⁵ 67.§ (4) Az egyes köz- és magánprojektek környezetre gyakorolt hatásainak vizsgálatáról szóló, 2011. december 13-i 2011/92/EU európai parlamenti és tanácsi irányelv 1. cikk (3) bekezdésének vagy 2. cikk (4) bekezdésének végrehajtása érdekében, törvényben meghatározott esetekben nem kell előzetes vizsgálati eljárást lefolytatni.

67.§ (4) In the interest of implementation of Article 1(3) or Article 2(4) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, no preliminary examination procedure is required in cases provided for by law.

⁶ 1.§ (2) Nem terjed ki a rendelet hatálya azokra a (...) 3. számú melléklet 1-128. és 130-132. pontjában szereplő tevékenységekre, amelyeket kutatásra, fejlesztésre, valamint új termékek és folyamatok tesztelésére használnak.

1.§ (2) The scope of this Governmental Decree shall not cover activities listed (...) in points 1 to 127 or 129 to 131 of Annex 3 which are used for research, development or the testing of new products or processes.

of new products or processes. This exclusion is contrary to the EIA Directive and narrows the scope of implementation thereof in Hungary.

Arrangements for appropriate participation in trans-boundary EIA proceedings

According to Article 7 of the EIA Directive, where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the affected Member State shall be also informed on the relevant features of the project. The Member States concerned have to arrange for the information to be made available, within a reasonable time, to its competent authorities and the public concerned in the territory of the Member State likely to be significantly affected and ensure them the opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

The amended Article 7(5) of the EIA Directive requires that detailed arrangements for the provision of the relevant information to the competent authorities and the public concerned, including the establishment of time-frames for consultations, shall be determined by the Member States concerned, and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures for the project. The arrangements in transboundary EIAs shall be based on the arrangements and time-frames applicable in the proceedings referred to in Article 6 of the EIA Directive.

Articles 13 to 16 of the EIA Decree implemented the provisions of Article 7 of the EIA Directive, however, the amendment to Article 7(5) has not been reflected by the national provisions. The current national legal framework does not provide exact time-frames and detailed arrangements for the provision of the relevant information to the competent authorities and the public concerned. Therefore, it is not ensured that the public concerned in the territory of the affected Member State will be able to participate effectively in the environmental decision-making procedures for the project.

Timing of the transposition of Directive 2014/52/EU

Article 3(1) of Directive 2014/52/EU stipulates that projects in respect of which the determination referred to in Article 4(2) of Directive 2011/92/EU was initiated before 16 May 2017 shall be subject to the obligations referred to in Article 4 of Directive 2011/92/EU prior to its amendment by this Directive. In Hungary, Governmental Decree No 139 of 2017 amended the EIA Decree in order to transpose the provisions of Directive 2014/52/EU into national legislation and this Governmental Decree entered into force on - and applies since - 10 June 2017.

Due to the late transposition the new provisions do not apply to projects for which environmental authorisation process - the determination process referred to in Art 4(2) of the EIA Directive - was initiated before that date.

With reference to Article 17(1) of the Treaty of the European Union laying down that the Commission shall oversee the application of the Union law, we would kindly ask the Commission to consider our findings explained above and provide us with your feedback on the steps taken to ensure full compliance. In case we can assist you with additional information, please also let us know.

Yours faithfully,

On behalf of Association Justice and Environment, z.s.

Csaba Kiss

Coordinator
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