The revised EIA Directive – the case of Latvia

This paper assesses possible national legislative modifications resulting from the 2014 amendments of the EIA Directive in Latvia. In this context, two groups of legal requirements are identified: (1) those that comply with the revised EIA Directive and (2) those that consist of the requirements that have to be yet transposed. An analysis is provided in relation to criteria and content of screening and scoping, issue of quality control in the performance of the EIA, as well as concepts that require revision under domestic legislation, i.e. a ‘one-stop shop’ and ‘conflict of interests’. It is concluded that the wider screening evaluation criteria, information to be submitted by the developer and the content of scoping will not cause any major differences in the application of EIA in Latvia. More stringent provisions of quality control in the performance of EIA and suitable application of autonomous EU concepts are prerequisites for a more effective performance of EIA in the future.

Introduction

In Latvia, the law ‘On State Ecological Expertise’ was adopted in 1990, and was substituted by the law ‘On Environmental Impact Assessment’ (the ‘EIA Law’) in 1998. Since then, the EIA domestic legislation has been shaped according to the internationally recognised model of EIA, taking into consideration the development of international environmental law and the forthcoming accession to the EU in 2004. From 2005 to present, the development of domestic EIA legislation can be characterised by careful and cautious transposition of the provisions set at EU level according to the ongoing legal development in the field that resulted in the codified version of the EIA Directive in 2011 (the ‘codified EIA Directive’). The requirements resulting from the amendments in 2014 (the ‘revised Directive’) have already been partially introduced at a national level through the secondary legislation — relevant regulations of the Cabinet of Ministers of the Republic of Latvia (Cabinet of Ministers). The latest versions of these regulations came into force at the beginning of 2015.

Against this backdrop, the main purpose of this paper is to assess the eventual national legislative modifications resulting from the amendments in 2014 in Latvia (compatibility analysis). The paper is divided in four main sections. Firstly, it provides a compact overview of the historical EIA legislative development at a national level. Secondly, it describes the structure of the domestic EIA legislation. Thirdly, and more specifically, legal requirements to comply with the revised EIA Directive, and those that have yet to be transposed are listed and an analysis is provided in three subsections: criteria and content of screening and scoping, issue of quality control in the performance of the EIA, and concepts that require revision under domestic legislation, i.e. ‘one-stop shop’ and ‘conflict of interests’. Finally, conclusions are drawn.

During the preparation of the paper, historical, descriptive, comparative and analytical methods were applied. The paper is primarily based on legal documents analysis and informed by relevant European Commission’s reports and communications, sources of professional literature and case-law examples. The case-law
examples are used only for illustrative purposes and are not analysed in detail. Additional valuable resources of information have been unofficial information obtained from both state and private specialists of the field. Information sources are listed at the end of the paper.

The paper reflects the author’s own personal view on all the aspects touched upon and the given overview does not claim to be an exhaustive list of all legislative changes and issues that might be taken into account. Only main problem areas, as seen by the author, are highlighted.

**A compact overview of historical legislative development of environmental impact assessment at a national level**

Three main development periods of EIA domestic legislation can be distinguished: pre-era of the introduction of modern legal provisions of EIA (prior to 1998), its introduction (1998 - 2004) and improvement period (2005 - today). The first regulation mandating EIA was adopted by the law ‘On State Ecological Expertise’ in 1990 and its core principles were ‘largely based on the so-called State Environmental (Expert) Review system introduced in the USSR in the late 1980s’ (Cherp et al. 2011). Although the legislation of that time contained several inconsistencies, it lasted for quite a long period and created a methodological and institutional foundation for the introduction of ‘westernised’ EIA in Latvia (Vircavs 2005). The EIA Law, the law ‘On Environmental Impact Assessment’, came into force in 1998, and it was later accompanied by relative regulations of the Cabinet of Ministers.

Since the late 1990s, the EIA domestic legislation has been shaped according to the internationally recognised model of EIA for two main reasons:


2. forthcoming accession to the EU in 2004, considering that the EIA Directive had to be transposed as ‘part of the accession requirements to ensure harmonisation of the national legislation with the EU Acquis’ (COWI 2009).

From 2005 to present, the development of domestic legislation can be portrayed as the careful and cautious transposition of the provisions of the EU Directives into EIA Law and relative regulations of the Cabinet of Ministers, rather than according to the principle of minimum harmonisation and following the approximation formula glorified before the accession and involving three elements: transposition of legislation, implementation and enforcement (REC UBA 2008).

**Structure of domestic environmental impact assessment legislation**

Since its coming into force, the EIA Law has been amended 10 times. In addition, the corresponding regulations of the Cabinet of Ministers that detail the general rules of the EIA Law and prescribe more precise procedural steps to be respected during the EIA procedure have been recalled and substituted several times. The most recent are the regulations of the Cabinet of Ministers No. 18 ‘Procedure for assessing impact of intended activity on environment and acceptance of intended activity’ of January 13, 2015 (the ‘EIA Acceptance Regulations No. 18’) and No. 30 ‘Procedure in which State Environmental Service issues technical regulations for Intended activity’ of January 27, 2015 (the ‘Technical Regulations No. 30’). Both regulations contain an informative reference to the codified and the revised EIA Directives and respective provisions resulting from their legal requirements. At the moment, there have not been any legislative changes in the EIA Law itself concerning the amendments.

Similarly to the codified EIA Directive and the practice of other member states, the EIA Law contains two annexes: Annex I (listing projects subjects to the EIA in a compulsory manner – mandatory EIA) and Annex II (containing projects subjects to initial assessment or screening – discretionary EIA). Latvia uses the combined application of several approaches regarding the screening phase, employing case-by-case ad hoc screening, and adopted threshold. Projects falling below adopted thresholds of Annex II are not subject to ad-hoc screening decisions but rather to the provisions of technical regulations.

**Transposition of new requirements**

As mentioned before, the EIA Acceptance Regulations No. 18 and Technical Regulations No. 30 already contain an informative reference to the codified and the revised EIA Directives and respective provisions resulting from the legal requirements of the directives. Although legislative changes in the EIA Law itself concerning the amendments have not been made, in some cases Latvia, having built its EIA minimum requirements on the EIA Directive, has gone beyond them by introducing more stringent provisions (Treaty on the Functioning of the EU, Art. 193; revised EIA Directive, recital 1). In this way, several aspects enunciated in the revised EIA Directive are already included in the EIA Law. For example, in relation to newly set EU-wide time-frames in some stages of the EIA, in Latvia, the screening procedure (from the moment when the developer submits the documents and receives the determination for an EIA) is required to last 40 days (the EIA Law Art. 61(1), (2)), whereas consultation with the public on EIA statement or report 30 days (since the day of its publication) (the EIA Law Art. 17 (4); the EIA Acceptance Regulations No. 18, point 40). In the last case, the time-frame is the same as set by the revised EIA Directive, whereas in the first case, it is considerably shorter – 40 instead of 90 days. In addition, when the EIA is applied, the national legal framework prescribes the mechanism of mandatory scoping and the content of the EIA report has to conform to the requirements set by the law (the EIA Law Art. 17 (3); the EIA Acceptance Regulations No. 18, point 34). Therefore, a new require-
ment for authorities to provide a scoping opinion, where requested by the developer, will not cause any major differences in the legal national framework. In addition, the EIA Law provides the possibility of the competent authority consulting in relation to the EIA report with other state authorities in compliance with their competence (Art. 20 (2)) at the moment, however, this provision is optional for the competent authority only and must be modified) (revised EIA Directive Art. 6 (1), 5 (2)).

**Criteria and content of screening and scoping**

Table 1 lists the main new legal requirements (12 selected) of the revised EIA Directive in relation to criteria and content of screening and scoping, deploying the current state of their transposition into domestic legislation.

Table 1 shows that in total there would be 24 modifications required of the national legal framework of which 11 (about 46 %) are achieved already and 13 (about 54 %) will have to be done by May 16, 2017. Although, in several cases, they are not considered to be very fundamental, some issues, such as climate change adaptation or so-called reverse EIA (Gerzard 2012; Pareno Navajas 2014; Neimane 2015), project design, and subsoil pollution are more substantial new requirements.

However, formal transposition of the requirements in relation to criteria and content of screening and scoping are not those that might pose challenges to practice. Most probably, respecting the deadline, the transposition will be done on time and the respective requirements will be listed during screening and scoping. Another issue is whether they will be addressed properly, which is a question of quality control in the performance of EIA domestically.

**Quality control**

Quality control in EIA is two-sided. Firstly, it refers to the accreditation of competent experts (preparing the reports) (revised EIA Directive, Art. 5 (3) lit. a). Secondly, it is asking for some assurance of sufficient expertise of the competent authority (controlling the reports) (Art. 5 (3) lit. b).

The current legal framework stipulates that the competent authority has the right to involve experts during the stage of the screening (the EIA Acceptance Regulations No. 18, point 11), in the preparation of the programme (scoping; information to be included in the EIA report; the EIA Law, Art. 16 (3); the EIA Acceptance Regulations No. 18, point 30) and the assessment of EIA report and preparation its opinion (the EIA Law, Art. 20 (12); the EIA Acceptance Regulations No. 18, point 53). However, contrary to the situation in Estonia (Peterson & Kalle 2016) the national legal framework does not envisage any particular licensing system for EIA experts or environmental consultancies regarding their technical capabilities, years of experience, and EIA track record. The law is silent on the issue of accreditation of the EIA experts and, in practice, environmental consultancies do not have to comply with any formal accreditation/registration system. If the scenario of implementing some sort of voluntary accreditation is chosen, it will not cause a big change.

With regards to ensuring sufficient expertise of the competent authority, the approach of having one central authority, i.e., Environmental State Bureau (Bureau), which is directly responsible for administration and streamlining both EIA and strategic environmental assessment and what was ‘introduced mostly to ensure the appropriate quality of the EIA report and the EIA procedure itself’ (Ruza 2005) will probably have to be revised. There are two basic reasons for this:

1. Only a few experts are employed by the Bureau and they possess limited skills and competencies, and
2. the changed political, legal and technical context should be considered not only at the EU level, but also at a national scale.

Although the elaboration of the detailed proposals of how to address this problem is beyond the scope of this paper, one of the solutions that could be mentioned is the eventual introduction of the national quality control committee already in place in other member states, e.g. Netherlands, France, Italy and Greece (EC 2012). Most likely, this suggestion will not be perceived with delight, as there are continuous attempts to maintain control of EIA (command and control approach) from the side of the conservative bureaucracy and the evident inability to think ‘outside the box’. It is a high probability that the approach ‘administration as usual’ (by analogy t ‘business as usual’) will continue. Elsewhere, this has been named as ‘deeply rooted bureaucracies’ and the process in which ‘administrators seek to retain personal power and protection’ and ‘stable, paternalistic management styles remain common’ (King & McNabb 2015).

Additional comments can be made on the setting up of an easily accessible electronic central portal, containing the relevant information for the public in accordance with the new requirements of the revised EIA Directive (Art. 6 (5), see also Peterson & Kalle 2016). At the moment, there is the website of the Bureau which contains a lot of information about EIAs but is incomplete. It should be updated and also be made more user-friendly. The information placed on the website partially contains the documents issued by the Bureau and provides links to the conducted EIAs on the websites of the developers or environmental consultancy companies. There is no obligation to keep them ‘visible’; therefore, in several cases after some time these links cease to function and the information is no longer available.

**Revisable concepts**

The revised EIA Directive envisages two new EU law concepts: coordinated and/or joint procedures (informally ‘one-stop shop’) and conflict of interests. As in the case of ‘development consent’, which has been largely analysed in the case-law of the European Court of Justice, the terms of ‘coordinated and/or joint procedures’ and ‘conflict of interests’ are independent la-
<table>
<thead>
<tr>
<th>No.</th>
<th>New legal requirements (Directive 2011 v amendments 2014), separately indicated whether a provision is new or strengthened in relation to previous requirements</th>
<th>Provisions of EIA Directive, 2011, as amended</th>
<th>Screening criteria (also national legal framework against Annex III)</th>
<th>Screening information to be provided by the developer (also national legal framework against Annex II.A)</th>
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<td>1</td>
<td>Monitoring measures (where appropriate) (new)</td>
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</tr>
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<td>2</td>
<td>Climate change (mitigation) (strengthened)</td>
<td>Art. 31(1) c), Annex IV, points 4, 5(t) (scoping)</td>
<td>–</td>
<td>–</td>
<td>✗ (2)</td>
</tr>
<tr>
<td></td>
<td>Climate change adaptation (rather new)</td>
<td>Art. 31(1) c, Annex III, point 1 f (screening criteria); Annex IV, points 4, 5(t) (scoping)</td>
<td>✓ (3)</td>
<td>✓ (4)</td>
<td>✓ (5)</td>
</tr>
<tr>
<td>4</td>
<td>Biodiversity (rather new)</td>
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<td>Art. 31(1) a), Annex III, point 1(g) (screening criteria); Annex IV, points 4, 5(d) (scoping)</td>
<td>✓ (14)</td>
<td>✓ (15)</td>
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<td>8</td>
<td>Baseline scenario – a description of the relevant aspects of the current state of environment (new)</td>
<td>Annex IV, point 3 (scoping)</td>
<td>–</td>
<td>–</td>
<td>✓ (17)</td>
</tr>
<tr>
<td>9</td>
<td>Forecasting methods or evidence – including details of difficulties (technical deficiencies or lack of knowledge) (strengthened)</td>
<td>Annex IV, point 6 (scoping)</td>
<td>–</td>
<td>–</td>
<td>✓ (18)</td>
</tr>
<tr>
<td>10</td>
<td>Demolition works (new)</td>
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<td>✗ (19)</td>
<td>–</td>
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<td>11</td>
<td>Project design (strengthened)</td>
<td>Annex III (1) al (screening criteria); Art. 5(1), Annex IV, point 2 (scoping)</td>
<td>✓ (21)</td>
<td>✓ (22)</td>
<td>✓ (23)</td>
</tr>
<tr>
<td>12</td>
<td>Subsoil pollution (new)</td>
<td>Annex IV, point 1(d) (scoping)</td>
<td>–</td>
<td>–</td>
<td>✓ (24)</td>
</tr>
</tbody>
</table>

Symbols: ✗ - transposed, ✓ - to be transposed, (−) - no transposition needed

Sources: 1) Codified EIA Directive 2011
2) Revised EIA Directive 2014
3) EIA law 2016
4) Cabinet of Ministers of the Republic of Latvia 2015
The heart of the concept of a ‘one-stop shop’ is the application of the coordinated and/or joint procedures to various types of assessments. It is clarified by Article 2 (3) of revised EIA Directive (in correlation with recital 37). The relevant provisions describe two situations of the coordinated and/or joint procedures, i.e., for the assessments that arise from:
1. the EIA Directive and nature directives (Habitats and Birds Directives);

In the first case, the provision unconditionally obliges that member states ‘shall/should ensure’ coordinated and/or joint procedures of the EIA and the assessments of the respective nature directives, using pretext ‘where appropriate’ (still leaving discretion to decide when such procedures need to be applied). In the second case, the coordination/joining of the procedures are the choice of the member state, considering the used wording as ‘should be able’, ‘may provide’ and ‘shall endeavour’. However, in both cases these are rather ‘advisory’ provisions and a ‘nice initiative’ for the future because the revised EIA Directive does not clearly draw the line between the cases when the coordinated and/or joint procedures are compulsory and when the choice to opt for them is purely optional, in particular when looking at the indent 4 of Article 2 (3) Neimane 2014).

In the case of Latvia, although the title of the EIA Law contains a specific reference to EIA, it regulates also SEA and Appropriate Assessment, linking the requirements of the EIA Directive, SEA Directive and Habitats Directive. In addition, Latvia has established a strong formal link between the EIA and Industrial Emissions Directives, as the EIA forms part of the documentation submitted with the Industrial Emission permit application, and must be taken into account when deciding whether to grant the permit. However, neither a single procedure is established nor is there harmonisation of the thresholds and criteria for projects falling under both, the EIA and Industrial Emissions Directives. Moreover, in Latvia an integrated approach to environmental impact analysis is not fully introduced if all directives listed in the revised EIA Directive are taken into account, as the procedural links are not properly functioning between different assessments (in terms of one ‘single assessment’).

Conflict of interests
Art. 6 of the EIA Law stipulates that EIA is co-ordinated and supervised by the Bureau (hereinafter in the text of the EIA Law: competent authority). However, the power of the Bureau is not absolute. Further discussion is needed on the role of other authorities (e.g. local authorities, the Cabinet of Ministers) that are ‘true’ decision-makers because they are responsible for implementing decisions. The Bureau issues its opinion on the EIA report and the discretion of the decision-makers is limited by internal and external boundaries (see Levits 2003a, b) set in the opinion. For example, the municipality is not obliged to agree with the positive opinion of the Bureau (the EIA Law, Art. 22 (2)) and may adopt a different decision. This has been well demonstrated by some ‘Latvian’ (and Danish) pig farm cases where the opposition has been demonstrated directly, e.g. in Kandava municipality (Administrative Regional Court 2013), and also implicitly using other tools of territorial planning like in Alzpute municipality (Constitutional Court 2008; 2013).

Moreover, the issued opinion on the EIA report by the Bureau is not binding per se and cannot be appealed. In other words, this opinion is not an administrative act in the sense of Administrative Procedure Law (Art. 1 (3), 184; see also Višķere & Briele 2008) and does not permit the operational implementation of the project (Supreme Court of the Republic of Latvia 2010, SKA-1064/2010, para. 10; 2012, SKA-139/2012, para. 9). Put differently, it does not practically entitle the developer to proceed with the project (which is the idea of the ‘development consent’ under the revised EIA Directive (Art. 1 (2) lit. cl and settled case-law e.g. CJEU 2006, C-332/04, para. 53; 2006b, C-508/03, para. 100)). The issue whether ‘development consent’ is a single type of consent or a combination of several distinct decisions – ‘multistage consent procedure’ (‘one involving a principal decision and the other involving an implementing decision’, e.g. CJEU 2004, C-201/02, para. 52; see also EC 2015) should be considered in order to evaluate the situations of the conflict of interests and avoid them. These are the cases when the decision-maker is also the developer or closely related to it (cases when the developer is State capital companies, institutions of indirect administration, e.g. port authorities, etc.).

In this context, the issue of transposition of autonomous concepts seems to be the most challenging. In order to ensure the application of such mechanisms in an effective and coordinated manner across the member states and at a national level, the further consolidation of the EU law and the development of guidance documents are needed. Although there is the need to discuss these concepts in the light of domestic legislation in order to define them, fill them in with the appropriate content for the meaningful and coordinated application — otherwise they will remain just wishful thinking.

Conclusions
On the eve of the deadline for the transposition of the new amendments of the EIA Directive, the major part of provisions of the national legal framework are in line with the EU requirements; however, several aspects in relation to criteria and content of screening and scop-
ing do not exist, touched upon marginally, or must be properly re-formulated.

Although the revised EIA Directive widens the screening evaluation criteria, information to be submitted by the developer and the content of scoping, the expectations of significant changes in the practice shall not be overstated and the overall picture and consequences of changes do not seem to be promising. There is a high probability that the approach ‘administration as usual’ will continue its pace. This is related to the conservatism of authorities trying to maintain control of EIA (command and control approach) and their inability to think ‘outside the box’. More stringent provisions of quality control in the performance of the EIA as it regards the preparation of the EIA reports and their control might improve the situation.

Another issue that will need to be widely discussed nationally is the correct application of the autonomous EU concepts to foster synergistic effects between various amendments contemplated by the EU legislator, ensure more meaningful, sound and effective implementation and enforcement of the EIA legislation, and participate in smart, sustainable and inclusive growth regionally.

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Notes

1 Practically, the period might be longer if after the submission of the application the authority requires additional information from the developer. The authority has to make its inquiry in 7 days after having received the application (the EIA Acceptance Regulations No. 18, point 12).

2 Municipalities of Kandava and Aizpute are two of 110 municipalities in Latvia, located in Western side of the country. Kandava is located in distance of approx. 100 from the capital Riga, whereas Aizpute – almost 200 km. The biggest city near by is Liepaja. Both municipalities have similar size and population (648,55 km² and 9 876 inhabitants – Kandava municipality and 640,2 km² and 10 281 inhabitants – Aizpute municipality). See for more detailed information on the municipalities: http://kandava.lv/kandavas_novads1; http://www.aizputesnova ds.lv (both last viewed 10.06.2016).

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Focus article

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