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ENVIROMENTAL IMPACT ASSESSMENT IN THE CONTEXT OF THE ENVIRONMENTAL LAW AND POLICY OF THE EUROPEAN UNION: EVOLVEMENT AND FUTURE PERSPECTIVES

This paper examines the role of the Environmental Impact Assessment (EIA) as a tool of the EU environmental legislation and an aid to the decision-making process aiming at prioritization of environmental interests over other interests. The EIA Directive has evolved after more than 35 years of implementation while at the same time, EU acquis has grown and new policies have developed along with the broadening of the European integration process. Hence, this contribution provides an overview of the application and effectiveness of the EIA process and of the main challenges that served as indications for further modifications in order to enhance the EIA as an effective instrument of environmental protection. Special emphasis is put on the judicial control imposed by the Court of Justice of the EU in the light of the environmental justice notion and articulation of environmental rights under the EIA Directive(s). The paper concludes with reflections on the environmental considerations raised by the EIA process, arguing that although the full potential of the EIA Directive has yet to be realized, having a separate directive that focuses on the likely environmental effects in the decision-making process ultimately makes a difference.

Keywords: European Union, environmental law, EIA, environmental policy, environmental justice.

1. INTRODUCING THE ENVIRONMENTAL IMPACT ASSESSMENT CONCEPT INTO THE EUROPEAN UNION ENVIRONMENTAL POLICY AND LEGISLATION

European Union (EU) environmental policy and legislation is a reflection of the broadening of European integration as an outcome of the Europeans' willingness to accept and implement EU policy on areas peripheral to the EU's original mandate (Hall, 2007, p.

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277). The main driver behind the development of a comprehensive body of environmental legislation was to prevent member states from misusing national regulations as non-tariff barriers in the internal market (Zito, 2000). With regard to the protection of the environment, the absence of a concrete legal basis in the original Treaty establishing the European Economic Community (EEC) has not prevented EU action in this field (Orlando, 2013, p. 1) and the first measures adopted by the EU in the 1960s and early 1970s were very much influenced by the prominence of the internal market objective. Nonetheless, as some authors say (Rehbinder & Stewart, 1985) the original EEC Treaty did contain some indications that EU competence could potentially extend far beyond the common market objective. In the absence of an express competence in the Treaty, Koppen (2002, p. 106) stated that the Court of Justice of the EU (CJEU) (then European Court of Justice) by its creative and extensive interpretation legitimized the EU internal and external environmental policy as an implied power.

However, European integration regarding the environmental policy went really deep since the Single European Act (1986) introduced an explicit legal basis for environmental legislation at the European level. This conferral represented a milestone in the European integration process as it paved the way for setting the environmental protection as a separate policy area whose requirements must be integrated into other EU policies. Environmental policy was also developed as one of the most important fields in which internal and external activities are often so closely linked that EU internal competence would be limited in effect without its counterpart of external EU action (Thieme, 2001, p. 252). Additionally, this step has also enabled the evolution of the EU environmental *acquis* - from uncoordinated group of measures on a policy level incidental to the objectives of market integration to a sophisticated and detailed system of environmental regulation and multilevel governance where the "Europeanisation" of national legislation is most apparent (Orlando, 2013, p. 2). Subsequent treaties extended explicit EU jurisdiction beyond purely economic matters and articulated the importance of integrating environmental objectives, thus validated the concepts of integration and environmental protection (Hall, 2007, pp. 282-283). The Lisbon Treaty has reaffirmed the EU commitment to environmental protection and sustainable development as an integral goal of the EU and it highlights the internal and external dimensions of EU action in this field. Environmental protection is mentioned in the preamble of the Treaty on the EU[248] with Article 3(3) thereof establishing the sustainable development of EU and a high level of protection and improvement in the quality of the environment as some of its fundamental goals.

Overall, there has been a remarkable growth of interest in environmental issues aiming at better management of policy development in harmony with the environment. At the same time, as some authors stated (Collins & Earnshaw, 1992, p. 213; Hoffman, 2019, p. 342) compliance with the environmental *acquis* is still a significant challenge, if taken into account the infringement cases initiated by the European Commission against member states. The European Commission began to explore instruments of environmental policy that seek to influence the relationship between development and the environment. Along

[248] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

with legislation on nature protection, the environmental impact assessment (EIA) was one of the first pieces of the EU environmental *acquis*. The original EIA Directive[249] was first introduced in 1985, requiring that certain types of projects are subject to an assessment of their environmental effects before consent can be granted if the project is likely to have a significant effect on the environment. Hence, its objective was to provide systematic assessment of the likely environmental impacts of projects in a wide range of sectors. The EIA Directive of 1985 has been amended three times - in 1997[250], in 2003[251] and in 2009[252], in order to align the provisions with the Espoo Convention[253] and Aarhus Convention[254] on public participation in decision-making and access to justice in environmental matters, as well as to broaden its scope on projects related to the transport, capture and storage of carbon dioxide. In 2011 the EIA Directive, together with its three amendments, was codified by the Directive 2011/92/EU[255] which was further amended in 2014 by the Directive 2014/52/EU.[256] The main objective of the 2014 amending Directive is to simplify the rules for assessing the potential effects of projects on the environment, in line with the drive for smarter regulation, as it reduces the administrative burden.

The proper implementation of environmental assessments is one of the most important tools for putting the ”green” principle of EU *acquis* into practice through integration of environmental considerations within the preparation of specific projects. This contribution will examine the role of effective EIA as a tool of EU environmental legislation and as an aid to the decision-making process in terms of its objective concerning the prioritization of environmental interests over other interests. Hence, the starting premise is that having a special legislative instrument that focuses on the environmental impact ultimately makes a difference, but it is important to determine what are the main preconditions and factors that influence its effectiveness. A special emphasis will be put on the judicial control imposed by the CJEU in the light of the environmental justice notion and articulation of environmental rights. These issues are particularly important and relevant given the recent

[249] EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175/40.

[250] Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1997] OJ L 73/5.

[251] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17.

[252] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140/114.

[253] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991.

[254] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

[255] 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 [2011] OJ L 26/1.

[256] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

codification of the EIA Directive and such an approach is needed in order to be able to give predictions whether the EIA is (finally) ready to meet future challenges so as to attain one of the EU's objectives that is high on the agenda: the protection of the environment and the quality of life.

2. ROLE OF THE ENVIRONMENTAL IMPACT ASSESSMENT IN DECISION-MAKING PROCESS: THEORETICAL APPROACH

The philosophy and principles of the EIA can be traced back to a rationalist approach to decision making that emerged in the 1960s (Jay *et al*., 2007, p. 288). This requires a technical evaluation to be made which provides the basis for objective decision making (Owens *et al*., 2004, p. 1943). The 'technical–rational' model has been translated into a whole suite of assessment tools, among which the EIA has arguably become the most widely recognized and practiced one. The Conference on the Human Environment, that was organized within the framework of United Nations' Environment Programme (UNEP) in Stockholm in 1972, declared the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Principle 21 in the Declaration). Even though there was no measure adopted in the field of environmental assessments under international law, certain activities under the stewardship of international organizations such as the Organization for Security and Co-operation in Europe and the United Nations Economic Commission for Europe,[257] were essential drivers for the development of legislation on environmental assessments. General principles of environmental impact assessment in international law can be found in numerous landmark cases such as *Gabčíkovo-Nagymaros Project*[258] stressing the awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis, while the obligation for conducting environmental impact assessment in accordance with international practice played a central role in *Pulp Mills*[259] case. However, the US National Environmental Policy Act (NEPA), which was enacted on 1 January 1970, represented the first formal incorporation of the impact assessment process in a legislative form (O'Riordan & Sewell, 1981, p. 1). The growing interest for integration of the EIA process was dominated by three key societal influences: growth of modern environmental concern, the drive for more rational, scientific and objective environmental decision making and a desire for more public involvement in environmental decision making (Weston, 2004, p. 313).

The EU has long admired American procedures for the EIAand this model was used in drafting the EU directives. In essence, as Glasson *et al*. stated (2005), the EIA is a systematic process that examines the environmental consequences of development actions, in advance, so that the emphasis, compared with many other mechanisms for environmental protection, is on prevention. The EIA does not 'make' decisions, but its findings should be considered

[257] United Nations' Economic Commission for Europe.

[258] *GabCikovo-Nagymaros Project (Hungary-Slovakia) Judgment* I.C. J. Reports 1997, p. 7.

[259] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment* I.C.J. Reports 2010, p. 14.

in policy and decision-making and should be reflected in final choices (Caldwell, 1989). Thus, it should be part of decision-making processes. As a tool to aid decision making, the EIA is widely seen as a proactive environmental safeguard that, together with public participation and consultation, can help to meet the EU's wider environmental concerns and policy principles (Commission of the European Communities, 2003, p. 10). The Directive establishes the EIA as a process that can be summarised as follows: the developer may request the competent authority to say what should be covered by the EIA information (scoping stage); the developer must provide information on the environmental impact of the project (EIA report); the environmental authorities and the public must be informed and consulted; the competent authority decides taking into consideration the results of consultations.[260] The public is informed of the decision afterwards and can challenge the decision before the courts. Depending on the national implementing legislation in the Member State in question, the EIA may be integrated into existing procedures granting consent for projects or established as a separate procedure specifically to comply with the Directive. However, the Directive does not prevent Member States from laying down stricter national rules regarding the scope and procedure for environmental assessments of planned developments within their jurisdiction. When deciding on the merits of a relevant proposed creation, the competent authorities should also take account of the objectives and purposes of the EIA Directive, as set out in the preamble thereto. The assessment of environmental impacts enables a more informed decision which can lead to the prevention or mitigation of adverse environmental consequences. EU environmental legislation is supplemented by the Strategic Environment Assessment Directive 2001/42/EC[261] (SEA Directive) that applies a more general approach towards public plans and programmes from a variety of sectors, while the EIA focuses on a specific project and on the environmental impacts of that project only.

Several categories of implicit policy models differ in the EIA literature (Wood, 2003). One of these, the 'information processing model' assumed that the key to better decision making was the availability of high-quality information, but it tended to undermine the influence of politics in the decision-making process of which the EIA forms part. Other model emphasized the subjective nature of the supposedly rational EIA process on the basis of the subjective standards, values and interests of one or more of the parties concerned that affect the outcome of the EIA (Mostert, 1996, p. 191). In that manner, many key decisions that are to be made within the EIA process are almost certainly not based upon the rational principles of value free objectivity (Weston, 2000, p. 185). The best model probably integrates all of the mentioned factors: the decision-making process itself has a political nature that is influenced by economic and social factors as well; but on the other hand, the availability of high-quality environmental information provides for public participation and ensures that actions are allowed with full awareness of their environmental implications. It depends also on the evolution of norms and values of the

[260] See more at https://ec.europa.eu/environment/eia/eia-legalcontext.htm [31.01.2021].

[261] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30.

stakeholders engaged in the process which factor will prevail. Majority of Europeans consider protection of the environment to be an important objective to them personally and there is overwhelming support for fundamental changes in the society to tackle environmental problems.[262] In that context, most Europeans think that decisions to protect environment should be taken jointly with the EU and agree that the role of EU legislation is very significant. This corresponds with the principle of subsidiarity, which maintains that the EU shall take action to the extent to which the objectives can be attained better at the EU level than at the level of the individual member states. Hence, the momentum for prioritizing the environmental protection over other economic and social interests has already been gained as it has become part of the EU's core values and "European way of life" [263], what remains is to assess the effectiveness of the process. To the extent that most of the environmental laws in the member states originate in EU measures, rather than in national laws, the EU is responsible for the most significant developments in the member states' environmental law and policy (Onida, 2005).

3. APPLICATION AND EFFECTIVENESS REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: STATE OF PLAY

The EIA Directive has evolved after more than 35 years of implementation while at the same time, EU legislation has grown and new policies have developed. The main purpose of the EIA is to identify any significant environmental effects of a major development project, and where possible to design mitigation measures to reduce or remedy those effects, in advance of any decision to authorise the construction of the project. However, to achieve these objectives, the EIA Directive must be applied as consistently as possible across the EU as a whole. Hence, an evaluative framework is required to compare legal processes, the arrangements for their implementation and the practice of enforcing them in the EIA systems. In search for such a model, this paper follows the Sadler's suggestions (1996, p. 39) that there should be three different components of an effectiveness review of the EIA process: a) procedural: does the EIA process conform to established provisions and principles? B) substantive: does the EIA process achieve the objectives set – support wellinformed decision making and result in environmental protection? C) transactive: does the EIA process deliver these outcome[s] at least cost in the minimum time possible – is it effective and efficient?

The criteria and procedures for environmental impact assessment have been reviewed and updated several times. Having in mind the legal nature of the directive as an instrument, assessment of the procedural component will be based on review of the formal compliance with the EIA Directive(s). In terms of its transposition, this Directive has attracted a greater annual number of complaints than the average for all environmental directives, and this

[262] European Commission, Special Eurobarometer 501 Attitudes of European citizens towards the Environment (2019), available at: https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2020/surveyKy/2257 [03.02.2021].

[263] European Commission Priorities 2019-2024: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life_en [05.02.2021].

number has continued to increase each year since 1988 as a final deadline for enacting national EIA legislation. By the end of the transitional period, European Commission[264] reported for most member states very limited degree of formal compliance with the 1985 EIA Directive (Commission of the European Communities, 1993, p. 33). The transposition of the EIA Directive into member states' legal systems has been seriously delayed beyond the approved date for full formal compliance and, three years later (July 1991), the transposition has not been completed in a number of cases. Correct implementation of the EIA Directive by the member states has proven difficult to achieve in practice, while the Commission has adopted an rigorous approach towards this issue in order to ensure that the EIA process conforms to established provisions. Further, it was accepted that even though the burden of proof lies with the Commission to show breach, where the complaint is of inadequate transposition of a directive it is not necessary for the European Commission to demonstrate the harmful effects of the transposing legislation (*Commission v. Ireland*, Case C-392/96).

Given the nature of this Directive, such delays and inaccuracies were probably inevitable. Beyond formal, legal transposition, the application of the provisions in practice by the relevant member states authorities is essential for the efficacy of the intentions behind the Directive. First Commission's Report concluded that although many member states were in the early stages of implementation, their experiences demonstrated that the planning, design and authorization of projects are beginning to be influenced by the EIA process and that environmental benefits are resulting, but the full potential of this has not yet being realized (Commission of the European Communities, 1993, p. 65). Hence, Second Commission's Report noted the increasing extent of formal compliance whereby all member states have transposed the Directive. Moreover, in many cases there has already been a "second generation" of EIA legislation. Some member states used the chance of transposing the Directive to unify and improve their systems for granting development consents while in most cases, the EIA requirements have been integrated into existing procedures. On the side of practical compliance, the numbers of EIAs varies considerably between the member states, depending on the different sizes of the member states, differences in legislation and also differences in the economic development. Overall, the European Commission reviews of the operation of the Directive 85/337/EEC reported low level of consistency in the application of the key EIA procedures such as screening and scoping. Although the EIA was established as a regular feature of project licensing, yet many different EIA systems operated across the EU due to various reasons such as ambiguity and lack of definitions of key terms in combination with the given discretion on establishing screening thresholds for Annex II projects that led to different interpretations and procedures - in some cases thresholds even had a practical effect of excluding whole project types from the EIA, and wide variety of authorisation procedures used for different types of projects in different member states.

These findings also served as indications for the needed modifications in order to enhance the role of the EIA as an effective instrument of environmental protection, that were

[264] European Commission prepares multi-annual reports on the application and effectiveness of the EIA Directive, available on the following link: https://ec.europa.eu/environment/eia/eia-support.htm [05.02.2021].

introduced with the amending EIA Directive 97/11/EC. Apart from the changes introduced as a consequence of the Commission's first report evaluating the effectiveness of the Directive 85/337/EEC, the amendments made by Directive 97/11/EC also reflect the considerable strengthening and clarification given to certain elements of the EIA Directive as advanced by the European Court of Justice (*Commission of the European Communities v Federal Republic of Germany,* Case C-431/92; *Commission of the European Communities v Kingdom of Belgium*, Case C-133/94; *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland*, Case C-72/95; *Commission v.Ireland*, Case C-392/96). Indeed, a major objective of the amending Directive 97/11/EC was, in part, to minimise the differences of application between member states and to harmonise implementation. It appears from the third European Commission report of the EIA Directive in 2003, which reviews the operation of the Directive 85/337/EEC as amended by the Directive 97/11/EC, that the main problem lies with the application and implementation of the Directive and not, for the most part, with the transposition of the legal requirements of the Directive. The most significant difference between the EU Directive and transposition at the member states' level relates to the screening stage, and more specifically, the manner in which Annex I and II have been transposed into national regulations (GHK, 2008, p. 24). Several of the member states appear to have implemented their own 'rules' with regards to the types of projects which require the EIA (GHK, 2008, p. 24).

As the European Commission reported, by 2009 all member states have established comprehensive regulatory frameworks and implement the EIA in a manner which is largely in line with the Directive's requirements while in many cases, implementation of the EIA Directive has created specific national dynamics in a way that member states have gone beyond the minimal requirements - this is the case regarding the key stages of the EIA, such as screening (the determination whether an EIA is required for a specific project) and scoping (the identification of the issues to be covered by the environmental impact statement). On the basis of the recommendation for further improvements and the need for simplification, the EIA Directive was codified in 2011 within the Directive 2011/92. Still, issues concerning practical compliance continued to occur – one example for such practice is described as 'salami slicing' which refers to dividing projects up into two or more separate entities so that each individual element does not require an EIA and thus the project as a whole is not assessed; or the practice of obtaining permission for a project that is below a threshold (and thus not subject to the EIA) and at a later date extending that project or its capacity above the threshold limits (Graggaber & Pistecky, 2012, p. 31).

Nevertheless, the challenge of ensuring that the Directive is implemented effectively and consistently across all member states is a continuous one. The Directive 2014/52 amending the Directive 2011/92 aimed to address certain problems of implementation, reduce unnecessary administrative burdens, simplify the assessment procedure, and reinforce certain levels of environmental protection taking into account emerging challenges such as resource efficiency, climate change, biodiversity and disaster prevention. As the European Commission highlighted in its 2011 and 2012 Annual reports on monitoring the application of EU law, timely transposition is considered essential to ensure the effectiveness of European policies. However, out of the 113 cases of late transposition initiated in 2017,

the European Commission has initiated infringement procedures against 21 Member States for late transposition of Directive 2014/52/EU (Ballesteros, 2018). Moreover, in 2019 the European Commission launched infringement procedures against 17 member states to improve the implementation of the EIA Directive and reported that two member states – Germany and Lithuania still need to complete the transposition of the revised EIA Directive into national law. The CJEU also issued a preliminary ruling regarding the implementation of the EIA Directive in Italy where it stated that, in the event of failure to carry out an environmental impact assessment, member states are required to nullify the unlawful consequences of that failure. As some authors say (Börzel & Buzogány, 2019, pp. 315-341) infringements proceedings concern not only the timely transposition of directives into national law but also cover the incorrect legal implementation or incorrect application of directives as noncompliance with EU legislation.

Fulfilment of the procedural component is a precondition to achieve the objectives set, mainly to support well-informed decision making that results in enhanced environmental protection. Hence, the evidence on the benefits could be more evident once full implementation of the EIA Directive has occurred. In the early days, certain beneficial effects in protecting the environment of member states were noted by providing lead authorities with environmental information to be used in the assessment of individual project proposals, identifying, in advance of project realization, mitigating measures for the impact of the project on the environment and modifications to the project proposal and greater awareness of the impacts of projects on significant biotopes in the Community (Commission of the European Communities, 2003, p. 63). Over the years, it has become apparent that the environmental considerations raised by the EIA process are balanced against other societal and economic considerations in decision making (Commission of the European Communities, 2003, p. 63). What makes the difference, however, is the fact that the separate Directive focuses on and highlights the consideration of likely environmental effects in decision-making. The quality of the information used in the EIA process affects the ability to make valid decisions, while involvement of the public ensures more transparency in environmental decision-making and, consequently, greater social acceptance. There is a general view that the EIA has been a valuable tool in preventing harmful environmental impacts and contributed to increase the understanding of their significance, as well as improving the awareness of the need for sustainable development (GHK, 2008). In addition, the member states that joined the EU in 2004 and 2007 reported that the EIA Directive had contributed directly to consolidating democratic development, by improving public participation and transparency in decision-making (Commission of the European Communities, 2009, p. 4).

The transactive component concerning the effectiveness of the EIA Directive clearly depends on the procedural and substantive component – the formal compliance and the quality of the process. The quality of the decision depends on the consistent transposition and the quality of information provided in the EIA process. Thus, the strength of an effective EIA should be shown in a decision that takes into account and reflects the environmental dimension highlighted in the EIA process. Substantial differences regarding the effectiveness of the EIA Directive exist between different member states, which to a certain extent could

be related to differences in its interpretation and implementation. Finally, even if most benefits of the EIA cannot be expressed financially, there is widespread agreement that the benefits of carrying out an EIA outweigh the costs of preparing an EIA (Oosterhuis, 2007, p.15).

4. ENVIRONMENTAL IMPACT ASSESSMENT AND THE NOTION OF ENVIRONMENTAL JUSTICE: PERSPECTIVE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU[265] is one of the most significant institutions for establishing member states' compliance with the EU law, including the environmental *acquis* as well. Once the EU had established environmental law instruments, CJEU's decisions were shown to be protective of the EU environmental law as an instrument of integration (Baldock & Keane, 1993, pp. 584-605). As the CJEU stated, it must be kept in mind, first of all, that the objective of protecting the environment constitutes one of the essential objectives of the EU and is both fundamental and inter-disciplinary in nature (*Inter-Environnement Wallonie*, Case C-41/11, para. 57). Article 3 para3 of the Treaty on the EU provides that the EU works in particular for a 'high level of protection and improvement of the quality of the environment'.

The notion of environmental justice, based on the need for fair treatment of nature, as far as can be seen, has never been used in EU environmental legislation or, indeed, by the European judiciary represented by the CJEU (Kramer, 2009, p. 195). However, similar to the concept of the environmental impact assessment, the concept of environmental justice first appeared in the United States in the Presidential Executive Order No. 12898 of 1994 entitled 'Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations', requiring the federal administration to address the impact of environmental measures on minority populations and low-income groups (Kramer, 2009, p. 195). One interpretation of the notion of environmental justice increases the attention to social aspects, ethnic or racial discrimination of minority groups in environmental policy matters, while the other puts more focus on the right of citizens to a clean and healthy environment (Kramer, 2009, p. 195). The Sierra Club's 'Environmental Justice Principles' of 2001[266] follow the second approach according to which eight rights are systematized.[267] The CJEU jurisprudence was developed in that regard, not tackling the social aspect of the notion of environmental justice. Neither the European Commission, as the most

[265] Prior to the Lisbon Treaty, the Community Courts comprised the Court of Justice (ECJ), the Court of First Instance (CFI) and judicial panels. Their nomenclature has been changed by the Lisbon Treaty. Pursuant to Article 19 (1), the Court of Justice of the European Union shall consist of the Court of Justice, the General Court and the specialized courts. Given the jurisdiction of these courts established by the Lisbon Treaty, especially in the preliminary ruling process, when it comes to the European Court of Justice or Court of Justice, the General Court is usually included.

[266] Sierra Club, www.sierraclub.org/policy/conservation/justice.asp [15.02.2021].

[267] The eight rights cover (1) the reduction of corporate influence; (2) the right to equal protection and the avoiding of disproportionate charges to certain groups; (3) the right to enjoy natural resources; (4) the rights of indigenous populations; (5) the siting of facilities and infrastructure projects (the right to equity); (6) intergenerational equity; (7) the right to know; (8) the right to participate in decision-making.

common initiator of all environmental cases before the CJEU, nor the national courts, as such cases did not occur at national level, had become aware of that issue (Kramer, 2009, p. 198). For that reason, some authors (Kramer, 2020, p. 1; Petrić, 2019, p. 215) claim that the environmental law has directly or indirectly contributed to environmental injustice in the EU Member States.

Most of the CJEU judgments in the field of the EU environmental law refer to proceedings initiated under the EIA Directive provisions.

Through its jurisprudence, the CJEU has also assessed the rights of individuals on the basis of the EIA Directive. To that end, the CJEU early found that if an obligation is imposed on member states to pursue a particular course of conduct, the effectiveness of the Directive would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration on the question of whether the national legislature had kept within the limits of its discretion set by the Directive when carrying out its transposition or not (*Kraaijeveld and Others,* Case C-72/95, para. 56; *WWF and Others*, Case C-435/97, para. 69; *Linster*, Case C-287/98, para. 32; *Wells*, Case C-201/02, para. 57). Given the content of the EIA Directive, the following analysis will focus on *the right to know* and *the right to participate in decision-making* under the EIA, as well as *access to justice* as inherent to these rights, to examine the readiness of the CJEU to rule primarily in the interest of the environment thus developing certain elements of the concept of environmental justice.

These specific rights with regard to the environment are enshrined in the Aarhus Convention whose provisions form an integral part of the legal order of the EU but are also transposed in the 2003 amending EIA Directive. Nevertheless, as early as 1996 the CJEU (then European Court of Justice) confirmed the principle of access to justice for 'concerned' individuals to invoke provisions of the EIA Directive in national courts (*Kraaijeveld and Others,* Case C-72/95, para. 56). Obligations deriving from the EU legislation are to be treated as the obligations deriving from national legislation. Furthermore, the CJEU also invokes the principle of sincere cooperation in order to underline the role of a national judge which is to ensure the legal protection which persons derive from the direct effect of provisions of EU (then Community) law. Afterwards, the CJEU (then the European Court of Justice) highlighted that one of the underlying principles of the EIA Directive is to promote the access to justice in environmental matters, along the lines of the Aarhus Convention on the access to information, public participation in decision-making and access to justice in environmental matters (*Commission of the European Communities v Ireland*, Case C-427/07, paras. 96-98). In that regard, the CJEU (then European Court of Justice) recognized the availability to the public of practical information on the access to justice as a precondition for exercising the specific rights with regard to the environment, setting the minimum standards for the information to be regarded as ensuring, in a sufficiently clear and precise manner.

The citizens' right to know has, throughout the jurisprudence of the CJEU, played a considerable role (Kramer, 2009, p. 207). To start with, within the EIA case law relating to the Habitats Directive, the CJEU stated (*Holohan v. An Bord Pleanála,* Case C-467/17, paras. 58-59) that Article 5(1) and (3) of the EIA Directive sets an obligation for the developer

to supply information that expressly addresses the significant effects of its project on all species identified in the statement that is supplied pursuant to those provisions. In that regard, under Article 6 (4) of the EIA Directive the opportunities for the public concerned to be granted participation early in the environmental decision-making procedure must be effective, while Article 6 (5) of the EIA Directive expressly leaves to the Member States the task of determining the detailed arrangements both for informing the public and for consulting the public concerned. In *Flausch and Others,* the CJEU agreed with the Advocate General's Opinion on the obligation of the competent authorities who must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure (Case C-208/18, *Flausch and Others*, paras. 26, 31-32, 42 and 44). Finally, the Article 6 of the EIA Directive must be interpreted as precluding a member state from carrying out the procedures for public participation in decision-making that relate to a project at the central level, and not at the local level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with. Hence, the CJEU took implicit notice of certain social aspects such as uneven development of different regions and the need for distributive, procedural and corrective measures in the light of the specific arrangements about informing the public and consulting the public concerned within the right to know.

In view of protecting the environment, CJEU (then European Court of Justice) under Article 9 of the EIA Directive declared that the public is to be informed once the decision to grant or refuse development consent has been taken (*Commission of the European Communities v Kingdom of Spain,* Case C-332/04, paras. 55-59). The purpose of issuing this information is not merely to inform the public but also to enable persons who consider themselves harmed by the project to exercise their right of appeal within the appointed deadlines. This interpretation is supported by the purpose of the EIA Directive.

The outcome of decision-making procedures, but also the trust in the procedure for reaching decisions, depends on who has the opportunity to be part of the decision-making process (Ebbesson, 2009, p. 1). In environmental matters that are directly linked with the human health, such opportunities are of utmost importance and directly linked to human rights law (Ebbesson, 1997, p. 69). The CJEU emphasized that the EIA Directive guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment (*Djurgården-Lilla Värtans Miljöskyddsförening,* Case C-263/08, para. 36). It further clarified that participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure (para. 38). Timing of the consultation process in which the authorities likely to be concerned by the project and the public are invited to give their opinion, is also emphasized, thus providing that such a procedure to be carried out, necessarily, before consent is granted (*Commission of the European Communities v Kingdom of Spain*, Case C-332/04, para 54). In terms of setting conditions on public

participation, the levying of an administrative fee is not in itself incompatible with the purpose of the EIA Directive but it should not pose an obstacle to the exercise of the right of participation conferred by Article 6 of the EIA Directive (*Commission v. Ireland,* Case C-216/05, paras. 37-38, 42-45).

Access to justice is necessary in order to ensure that the environmental standards are respected. The EIA Directive provides for members of the public concerned to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, or acts or omissions which fall within its scope, regardless of the role they might have played in the examination of that request (*Djurgården*, Case C-263/08, paras. 32-39). In order to exercise the access to justice, if requested the competent authority is obliged to communicate the reasons for that decision or the relevant information and accompanying documents (*Solway and Others,* Case C-182/10, para. 64.). The CJEU held that the provision of national law transposing Article 11 of Directive 2011/92 on access to justice may not limit its applicability solely to cases in which the legality of a decision is challenged but also has in no way restricted the pleas on the ground of a total absence of the mandatory environmental impact assessment or pre-assessment (*Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, Case C 115/09, paras. 37; *Gemeinde Altrip and Others,* Case C-72/12, paras. 36-37; *Commission v Germany*, Case C-137/14, paras. 47-48). Within the national procedural autonomy principle, the CJEU found that the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of the EIA Directive on judicial remedies, in line with the 'principle of equivalence' and 'principle of effectiveness' (*Djurgården*, Case C-263/08, paras. 45-47).

However, it must be noted that the EU perspective on access to information and access to justice has evolved through the years. In 1998, in the case *Greenpeace v. Commission* (Case C-321/95P), the CJEU refused to grant standing to the environmental NGO, Greenpeace, on the grounds that the potential consequences of a contested Commission decision, which concerned the European Commission financing of a power station, could only affect the rights of a NGO such as Greenpeace *indirectly*. Greenpeace sought information on whether the European Commission had allocated Community Structural Funds to Spain in 1991 to build power stations on the Canary Islands without first requiring the EIA, as required by the Directive 85/337/EEC. Later, in a number of cases, the CJEU permitted public interest actions to be brought in a form of a quasi *actio popularis* mechanism, following an intermediate approach regarding the admissibility of law-suits before the courts in general and access by non-governmental organisations which promote environmental protection in particular, in cases where there is s 'sufficient interest' or 'impairment of a right' (*Djurgården*, Case C-263/08, paras 42-52; *Bund für Umwelt,* Case C 115/09, paras 45, 59; *IL and Others v Land Nordrhein Westfalen,* Case C-535/18, para 57). The last sentence of the third paragraph of Article 10a [11 as per codification] of the Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environmental law having direct effect (*Bund für Umwelt*, Case C 115/09, para. 48).

It can be noted that the CJEU approach towards the environment was neither particularly creative nor extensive and it did not play its usual role of an 'engine of integration', but its interpretation of environmental rights under the EIA was rather moderate and predictable. It considered the environment as a policy area not different from the rest and limited the protection of the interests within it only to judicial aspect – protecting, defending and enlarging the interests in question (Kramer, 2009, p. 209).

5. CONCLUDING REMARKS

This paper provided an overview on the evolvement of the EIA Directive during more than 35 years of implementation, along with the broadening of the European integration process that resulted in development of the EU *acquis* and introduction of new policies. Main obstacles in terms of ensuring that the EIA Directive is effectively implemented across an enlarged EU were faced in terms of the formal compliance with its provisions. Having the European Commission to assist did not ensure member states' environmental enforcement, however, and implementation by the member states was typically late and imprecise. Nevertheless, the EIA Directive provides the framework and the existing review and infringement mechanisms provide legal support for better transposition or application. While ensuring that the EIA Directive is effectively implemented across the EU, these shortcomings also served as indications of the areas where improvements were needed, to identify the implementation gaps, inconsistencies and ambiguities. Accordingly, different factors contributed for differences in non-compliance, along which are the country-specific variables, such as legal culture and administrative traditions, prioritization of the environmental protection as well as state power and state capacity.

During this time, the EIA procedures have been strengthened and EIA capacity has been improved in many different contexts. The EIA Directive contributes to ensure that environmental considerations are integrated into decision-making for projects, while also empowering citizens and ensuring that they are informed and consulted before decisions are made. There is no doubt that the EIA has made a difference to the patterns of decision-making process through highlighting the environmental interests over other interests, design modifications, institutional learning, and public involvement. The latest codification which again underwent amendments, addresses all these issues sufficiently. Many member states have also developed their own guidance on good practice and on specific project categories and these national experiences can be shared across the EU. It can therefore be concluded that the principal objective of the EIA Directive has been achieved and that the momentum is there to improve its application and effectiveness and to achieve the Directive's ultimate aim which is the protection of the environment and the quality of life.

The design and application of better regulation tools at EU level should be accompanied with a closer collaboration with member states to ensure a consistent application of better regulation principle and stronger, constructive dialogue between the EU institutions, member states and other stakeholders. It is also necessary to ensure that the EIA Directive is adapted to the national, EU and international policy and legal contexts. To the extent that the EIA Directive as most of the environmental laws in the member states originates

in the Union *acquis*, the EU should provide leadership in this process, by increasing the weight given to environmental resources and capacities in the existing EIA systems, while strongly and undoubtedly emphasizing its commitment to environmental protection over other objectives. This approach will also strengthen its role within the internal integration process but also in the external action.

The judicial contribution of the CJEU and national courts is very important in order to develop consistent jurisprudence and thus ensurcoe proper application of the EIA Directive. Along with the European Commission, the CJEU should also step in its usual role as a catalyst of the integration that sets the priorities through its progressive and influential role and to shed the light on the environmental protection.

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