Non-paper on large-scale transboundary projects and the challenges in applying the EIA procedure

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Background

Transboundary environmental impact assessments (EIAs) have been carried out for many years but it has been only recently when certain challenges led to questioning the sufficiency and efficiency of the existing legal provisions. These challenges refer to projects crossing and having significant adverse environmental effects to more than two neighbouring countries. Such countries may have different legal tools in order to carry out the EIAs, or even may not be Parties to the applicable international law, i.e. UNECE Convention on Environmental Impact Assessment in a Transboundary Context (1991 Espoo Convention). In addition, the large-scale projects assume a large number of stakeholders. They can trigger environmental and socio-economic impacts beyond a local, regional and national level and they may require multilateral cooperation. Hence, the authorisation and implementation of large-scale projects having significant transboundary adverse effects create additional challenges which should be addressed in order to ensure compliance with the existing and applicable legal provisions and principles. Indeed, transboundary EIAs are a viable tool to enhance international cooperation, raise awareness of the importance of the environment, and avoid conflicts.

There are a number of legal tools related to transboundary EIA. These include the UNECE Espoo Convention, its Protocol on Strategic Environmental Assessment (SEA); the European Union Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC, Directive 2003/35/EC and Directive 2009/31/EC (EIA Directive), and Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive). Similar and relevant provisions may be found in other bilateral and multilateral agreements.

The purpose of this paper shall be to examine the existing practices in the application of the legal provisions related to transboundary EIAs, with a view to drawing relevant conclusions and suggest appropriate recommendations. In this regard, the paper will focus firstly on the character of the projects, and secondly on the applied EIA procedure for projects which are likely to cause significant adverse transboundary impact. Consequently on the one hand, the paper will consider projects situated in one country but significantly affecting the environment of other countries and thus defined as transboundary, as well as projects stretching across more than one country, whose character makes them transboundary without prejudice to their environmental impacts. On the other hand, the paper will consider certain questions which arise when it comes to the application of EIA procedures in transboundary contexts. For instance, the notification practice, the preparation of the environmental information (environmental report), the public consultations and access to the documents (language capacity), etc.

Since the European Commission neither participates in the EIA and authorization procedures, nor does it grant development consent, for tasks which are assigned by the *acquis* to the competent authorities in the EU Member states this paper will provide where appropriate the Commission's stand in these circumstances.

Pursuant to the applicable EU legislation[1], it is clear that EU Member States will have to carry out the EIA corresponding to their national authorisation procedure according to their national legislation transposing the EIA Directive and their obligations under the Espoo Convention.

[1] Directive 85/337/EC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC, Directive 2003/35/EC and Directive 2009/31/EC (EIA Directive) and the 1991 Espoo Convention.

The European Commission cannot specify or indicate to Member States or to the Parties to the Espoo Convention how to proceed since the development consent is granted by them[2]. The European Commission can only stress the need for the EU Member States to respect the rules resulting from the implementation of the EIA Directive and the Espoo Convention in order to avoid legal implications at EU level (as a result of complaints, petitions to the European Parliament, Commission's own initiatives, etc).

This paper outlines the specifics of the application of the transboundary EIA procedure, at the outset addressing the key definitions for the transboundary EIA procedure such as "transboundary project" and "significant impact". Secondly it draws the attention to the need for co-ordinated approach for notification and transmittal of information. Thirdly, the paper highlights key issues which need to be taken into account during the preparation of the environmental information/environmental report, especially in the cases where the project covers more than two countries. Last but not least the paper points out that the public participation the public participation should be efficiently organized and facilitates the decision-making. The conclusions' section sums up the most important issues from the rest of the sections of the paper.

Field of Application: the EIA Directive and the Espoo Convention

The 1991 Espoo Convention sets the rules for carrying out transboundary environmental impact assessment. The EU has ratified the Espoo Convention and amended the EIA Directive in order to align it with the provisions of the Espoo Convention. Hence, the Convention is part of the EU law and it is binding for the Member States. Pursuant to its provisions, the countries involved should take all appropriate and effective measures to prevent reduce and control significant adverse transboundary environmental impacts from the proposed activities, following an EIA carried out prior to a decision to authorise or undertake these activities.

In the meantime, it should be noted that there are some differences between the EIA Directive and the Espoo Convention with regard to the transboundary EIA procedure. These could be either terminological differences, or particular details in the overall transboundary EIA process. For instance, the EIA Directive, based on the Aarhus Convention, better guarantees the rights of the public to participate in the transboundary EIA procedure and explicitly requires that the comments of the affected state and its public be taken into account before consent is given for the proposed project. Some of these differences are addressed and discussed in the sections below. Nonetheless, as long as these differences do not affect the substance of the EIA procedure, they will not be analysed in-depth.

Definitions of Transboundary Projects

While the EIA Directive provides a definition of the term "*project*"[3], the 1991 Espoo Convention defines the term "*proposed activity*"[4]. The latter comprises not only new or planned

[2] It should be stressed that, in several cases, Member States have introduced obligations which go beyond the minimum requirements laid down by the Directive or the ESPOO Convention (e.g. obligatory "scoping" or public consultation at the "scoping stage").

[3] Article 1(2) of the EIA Directive defines "*projects*" as "*the execution of construction works or of other installations or schemes* or *other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*".

[4] Article 1 (v) Definitions "*Proposed activity*" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure.

activities by also *"any major change to an activity"*. Indeed, the Espoo Convention does not define what a major change is and whether the Convention should be applied in these circumstances will be to a large extent based on a judgment by the competent national authorities. The baseline for this judgment shall be whether the activity, subject to a major change is included in Appendix I to the Espoo Convention. In the meantime the EIA Directive (point 13 of Annex II) considers any change or extension of projects listed in its Annex I and II. This provision is relevant also with regard to projects likely to have significant effects on the environment of another Member State (Article 7).

Despite the terminological difference, there is no difference in substance. Moreover, the practice has proved that in either case it comes to implementation of activities which are likely to have an impact on the environment in a transboundary context. Therefore, for the purposes of this paper when referring to activities likely to cause transboundary impact, the general term *project* will be applied.

Some recent cases, however, have called for consideration of the scope of the project's content. The implementation of certain types of projects (for instance infrastructure projects in the fields of energy and transport) may need additional and associated works to be carried out. These can refer to the development of core stages of proposed infrastructure project (such as laying of a pipeline or overhead electricity lines), and associated ancillary or preparatory works (such as production of pipes for gas pipeline projects and establishment of site offices or logistical centres for storage and deployment of equipment). In these circumstances, two questions arise:

(a) Under which circumstances the associated works are considered as an integral part of the main infrastructure works for the purposes of the applicable EU EIA legislation?

With regard to the former, the practice shows that the associated works should not necessarily be automatically considered as part of the main project. A case-by-case verification/assessment should be rather performed following two cumulative steps.

(1) Firstly, it should be verified whether those associated works are subject individually to the requirements of the EIA Directive, namely by verifying whether they are mentioned in any of project categories listed in the Annex I and II of the EIA Directive. If associated works are listed in one of the project categories of the Annexes, the works fall within the scope of the Directive and thus the effects from their construction and operation should be assessed in the framework of an EIA procedure (Annex I projects) or a screening procedure (Annex II projects). In these cases a separate EIA/screening should thus be carried out for the associated works. It should be stressed that the cumulative effects from the various associated works themselves and the main project should be assessed, taking into account the possible significant adverse transboundary impact.

(2) Secondly, it should also be verified whether such associated works can be considered as an integral part of the main infrastructure project. This assessment should be based on objective factors, such as the purpose, the nature, the characteristics, the location of the associated works and the relation between them and the main project intervention. It can not be excluded that, under certain circumstances, the associated works are inextricably linked to the main project intervention (e.g. when the associated works predetermine the location of the main project intervention, or represent a location-specific part of the construction phase of the main project intervention, or are exclusively and completely intended to serve the main project intervention). As long as the verification/assessment should be based on objective grounds, a "centre of gravity" test needs to be performed. The "centre of gravity" test should check whether the

associated works are central or peripheral to the main works and to what extent they are likely to predetermine the result of the EIA procedure for the main project.

If it appears that the associated works are inextricably linked to the main project, their approval and initiation should be considered as an initiation of the project. Thus, where the main project requires an EIA, the approval and/or physical execution of the associated works prior to the undertaking of an EIA would constitute a breach of the EIA Directive. These works could only start once the EIA for the whole project (main and associated) was carried out. If it appears that the associated works are independent from the main project intervention, they should be subject individually to the requirements of the EIA Directive and could start after the finalisation of their own EIA or screening procedure.

(b) How should the effects of associated works be assessed under the transboundary EIA procedure?

Concerning the latter question, it should be noted that according to Article 5(1) of the EIA Directive and Article 4 of the Espoo Convention, the developer must supply in an appropriate form the information mentioned in Annex IV of the EIA Directive, or Appendix II of the Convention, respectively.

Point 1 of Annex IV of the EIA Directive refers to the description of the project (e.g. a description of the physical characteristics of the **whole** project and the land-use requirements); point 4 of Annex IV specifies that the information to be supplied by the developer includes *"a description (1) of the likely significant effects of the proposed project on the environment resulting from:*

— the existence of the project,

— the use of natural resources,

— the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the developer of the forecasting methods used to assess the effects on the environment". Footnote (1) clarifies that *"this description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project"*.

On the basis of the above, the environmental impact study for the main project should include a description of its likely significant effects, e.g. effects resulting from the use of natural resources or cumulative effects. Thus, an assessment of the environmental effects of associated works (such as use of natural resources) should be included in the environment impact study for the main project. This kind of assessment should be included in the EIA for the main project in cases where the associated works themselves have not been subjected to an EIA, or to a screening procedure.

The difference between point (a) and point (b) refers to the question of whether the development consent for the associated works needs to be preceded by an EIA:

- Where, on the basis of a "centre of gravity" test, the associated works are deemed to be an integral part of the main project, the associated works are deemed to be an integral part of the main project, they should only be approved following the EIA process as a whole.
- Where, on the basis of a "centre of gravity" test, the associated works are *not* deemed to be integral part of the main project, they can be approved independently of the project. However, the EIA for the main project will still need to include information about the

associated works, including cumulative effects, where the associated works contribute to the sum of the project's impacts (for instance the use of natural resources).

In addition to the scenarios outlined above, it is possible that for some kind of projects, the Parties of origin and/or the affected Parties are more than two in number sharing a common boarder. The project's development could be either taking place on the territory of one country but causing adverse significant environmental impact on more countries, or the project could stretch across the territory of more countries. Consequently, there will be one Party of origin and many affected Parties, in the first option, or more than one Party of origin and affected Party, in the second option, Parties. Hence, the impacts of implementing such large-scale projects, where some of the Parties will be at the same time both Parties of origin and affected, could be considered to be long-range. The implementation of these projects may lead to complications with regard to the EIA procedure in terms of determining the significance of the adverse transboundary impact, the necessity to notify the affected countries; the preparation of the environmental report and the public consultation and participation. In these circumstances the practice shows that a close co-operation among concerned countries and the developer should be ensured in order to guarantee the efficiency of the EIA procedure.

Significant impact

The determination of the significance precedes the notification from the country of origin to the affected country. The scale or characteristics of the impacts from the proposed project are the basis for determining their significance. Therefore, the conclusion that an adverse transboundary impact is likely to be significant would be based on judgment taking into consideration various issues. There is no unified approach and it is at national level where different criteria are applied. Indeed, in 1995 the Espoo Secretariat prepared a Report providing guidance for the criteria when defining the significance of the impact[5]. However, it did not lead to common criteria for the Parties of the Convention.

The judgment for the significant impact is usually based on consideration of the environmental conditions, on the one side, and on the other, the administrative practices and the national EIA legislation transposing the EIA Directive and the Espoo Convention. In the end, and according to Article 3 of the Convention, the identification of the transboundary impacts and the determination of the significance set the starting point for launching the transboundary EIA procedure and discussions between the competent authorities in the country of origin, the developer and the affected country.

The Party of origin is given discretion as to undertaking the transboundary EIA procedure when the impact is likely to be significant. However, in addition to the activities explicitly mentioned in Appendix I of the Espoo Convention, there are general criteria for determining the environmental significance of other activities not mentioned so as to bring them under a transboundary EIA procedure. The criteria include the size of the project, its potential environmental effect(s), including whether those effects would have impacts far from where the project is located, however remote that may be; the location of the project, especially whether it is situated near areas of special environmental sensitivity or importance, or whether it is near an international frontier (Article 2 (5) and Appendix III of the Espoo Convention); cumulative effects with other projects.

[5] Specific Methodologies and Criteria to Determine the Significance of Adverse Transboundary Impact, CEP/WG.3/R.6, 20 January 1995, UN ECE.

The determination of the environmental significance of activities should also take into account the precautionary principle. An EIA would be required if it cannot be excluded, on the basis of objective information, that the project will have a significant effects on the environment. It should be recalled that in the context of Directive 92/43/EEC, the ECJ ruled that plans and projects likely to undermine the conservation objectives of Natura 2000 sites must be considered likely to have a significant effect on that site and should be subject to an appropriate assessment in accordance with Article 6(3) of the Directive.

Consequently, once the transboundary impact is either known or assumed likely to be significant, the transboundary EIA procedure should be launched. To this end there are a certain number of steps to be undertaken. These are notification, preparation of environmental information and its exchange; the public consultation, and decision-making.

The notification and transmittal of information

For the projects likely to cause transboundary impacts, the Party of origin should notify the affected party or parties through the designated point of contact. The notification starts the transboundary EIA procedure. Therefore it should be sent as early as possible, and not later than when the public in the Party of origin is informed about the EIA process. Whenever there are Parties to the Espoo Convention which are at the same time Parties of origin and affected Parties, reciprocal notifications should be sent. This would be the case for large scale projects where the affected parties and the parties of origin could be more than one.

The notification should contain information of the proposed activity and outline its potential transboundary impacts. The affected party should inform the Party of origin whether it intends to participate in the EIA process. Consequently, there are two possibililties:

- If the affected Party does not intend to participate in the EIA process, the application is terminated.
- If the affected Party intends to participate in the EIA process the application of the transboundary EIA procedure continues with further exchanges of information.

Concerned Parties should ensure that the general public potentially affected by the proposed project is informed and is given the possibility to comment or object the project. General public comments should be transmitted to the Party of origin. Once the notification (and the transmittal of information) stage is completed, the preparation of the EIA information starts.

The Party or the Parties of origin are obliged to notify the other state(s) if a significant adverse transboundary impact is likely to result from the proposed project within its jurisdiction. The presumption from the text of the Convention is that the projects listed in Appendix I oblige the Party of origin to notify the affected states and trigger transboundary EIA procedure. Nonetheless, the Convention leaves a margin of discretion to the Party of origin to notify one more affected states pursuant to Article 3 of the Convention. In the meantime and where large-scale projects are subject of the transboundary EIA procedure, some of the Parties of origin may decide otherwise, for instance concluding that no littoral state will suffer a significant adverse transboundary impact. Despite that this is only an assumption, it is useful to keep in mind that the implementation of large-scale project requires an interpretation of the existing legal provisions in a way where their application does not circumvent the purposes of the EIA Directive and the Espoo Convention.

Preparation of the environmental information/environmental report

In the cases where the project covers more than one country and it has transboundary significant impact the practice shows that one of the most crucial steps in the EIA procedure is the preparation of the environmental report/environmental information. Under the EIA Directive and the Espoo Convention, environmental impact documentation needs to be prepared under the responsibility of the project's developer. In most cases this documentation is referred to as "*environmental report*".

The experience shows that the most appropriate stage when the exact content of the environmental report should be defined is at the "scoping" stage[6]. Despite the fact that this stage is not compulsory, it is advisable for the national authorities involved to carry it out and prepare scoping documents. It is recommended that the scoping documents identify the significant tranboundary impact and outline the assessment to be carried out. This will be intrinsic part of the environmental information to be submitted to the competent national authorities.

Extensive co-operation between the developer and the competent national authorities will often be required in order to define exactly the content of the report and the fields to be covered. The environmental report for the project should include a description of its likely significant effects, e.g. effects resulting from the use of natural resources or cumulative effects. Thus, an assessment of the environmental effects of associated works (such as use of natural resources) should be included in the environmental impact report for the project. In addition, such an assessment should be included in the EIA report for a project where the associated works themselves have not been subjected to an EIA, or to a screening procedure. Particular attention needs to be paid to nature protection areas for which separate assessments may be needed[7], but those assessments can be integrated in the environmental report.

Consequently, the environmental report is submitted to the authorising national authorities (in the country where the project will be carried out –country/party of origin) who have the responsibility to assess the information provided by the developer, to carry out consultations with the competent environmental authorities and the public in their own territory, and inform accordingly the competent authorities of any other State likely to be significantly affected by the project (affected country). The affected countries, should they have decided after the notification to participate in the transboundary EIA, have in their turn the obligation to initiate the necessary consultations with the authorities and the public concerned in their own territory. These are commonly referred to as transboundary consultations, foreseen both under Article 7 of the EIA Directive and the Espoo Convention.

The EIA information must include, *inter alia*, a description of the proposed project and its purpose; a description of reasonable alternatives in terms of location, technology to be employed, or indeed, total abandonment of the project; a description of both the environment likely to be significantly affected and the potential impact, an estimation of its significance, and alternatives to both; a description of the mitigating measures considered, and an indication of the predictive methods and the assumptions and data of which they are based; and an indication of monitoring and management programmes and any plans for post-project analysis.

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[6] "Scoping" is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted to a competent authority. It is an important feature of an adequate EIA regime, mainly because it is broadly considered to improve the quality of the EIA.

[7] Under Article 6(3)-(4) of the Habitats Directive (92/43/EEC).

With regard to large-scale projects, which are crossing the territory of more than two counties and because of this they are transboundary *per se*, it is of crucial importance to ensure that the environmental information covers and assesses the project as a whole, i.e. *"from A to Z"*. Otherwise, the EIA procedure risks to be circumvented by splitting the project which implementation concerns more than one country into separate projects. This could lead to a failure to take account of the cumulative effects of these several projects which consequent overall assessment and consideration can conclude the existence of significant effects on the environment. Furthermore, the recent case law of the Court of the EU[8] is in the light that the effectiveness of the EIA Directive would be seriously compromised if the competent authorities of a Member State do not consider that part of the project is located in another Member State when deciding whether a project must be subjected to an EIA procedure. In other words, the difficulties raised by large scale projects' implementation and the fact that their development depends on different administrative stages concerning each of the Member States involved, or that their nature usually assumes execution in several stages, must not impede the achievement of the aims of the EIA Directive and the Espoo Convention.

Pursuant to the applicable EU legislation and in the light of the case law, each developer concerned by a project's implementation must carry out an EIA of the project on the territory of the respective EU Member State where the project is implemented. During the EIA procedure the specific effects of that project, including its transboundary nature, should be taken into account. Hence the best practice would be to prepare an integrated environmental report which covers the whole project. Furthermore, the Espoo Convention does provide the legal grounds for the possibility of undertaking, where appropriate, joint EIA (Appendix VI, item (g)). If there are several Parties of origin joint assessment may help avoid extensive EIA documentation. This would be the case especially for large-scale projects, where the Parties of origin would be all countries on which territory the project is going to be developed. However, where it is not possible to ensure bilateral or multilateral cooperation and prepare only the joint EIA report, its preparation might be preceded and accompanied by separate EIA reports concerning each Member State and addressing the EIA procedure on a national level. In the end, the content of the integrated environmental report and/or the national EIA reports should address and discuss also all related works and sub-activities intrinsically linked to the project's implementation and purpose.

By all means the preparation of such an integrated environmental report aims, on the one side, to assess the overall project's impacts, and on the other side, to facilitate the subsequent authorisation (including transboundary consultations) of the project at national level. This approach would ensure a holistic assessment of the effects of the project, including cumulative ones, and avoid the splitting of projects. This report should also assess the likely significant effects from all related works and sub-activities intrinsically linked to the project's implementation and purpose (for example installations and sites to treat, store, etc. the staff necessary for the project's development, new infrastructure developments, necessary solely to serve the project in question; storage facilities, etc.). Last but not least an appropriate non-technical summary of the integrated environmental report needs to be prepared to fulfil the provisions of the EIA legislation.

The content of the integrated environmental report and its non-technical summary have to cover at least the minimum information as indicated in Annex IV of the EIA Directive and Appendix II of the Espoo Convention, including the assessment of alternatives. The latter are an important part of the report's content especially where it concerns large-scale transboundary projects, as the choice of the alternative may influence the entire project's implementation.

[8] C-227/01 (paragraph 53); C-142/07 (paragraph 44) and mainly C-205/08 (paragraphs 45-58).

From the viewpoint of the Espoo Convention's objective of preventing and minimizing negative environmental impacts, the purpose is to prompt the states concerned to find the best possible alternative from the environmental perspective by identifying various alternatives for implementing the proposed activity. However, the Espoo Convention leaves it to the Party of origin to determine which alternative within its jurisdiction is examined. Consideration of reasonable alternatives, including no-action alternative is stipulated in Article 4(1) and Appendix II of the Convention with the qualification *"where appropriate"*. According to most interpretations of this provision, it seems that this is largely left for the contracting states to decide.

The environmental impact documentation needs then to be translated in all the official languages of the countries of origin and the affected countries in order to allow the authorities and the public concerned to be correctly informed and express their views in the national and transboundary consultations under both the EIA Directive and Espoo Convention. For these purposes the designated contact points for the Espoo Convention in the Member States, could also co-ordinate the information exchanges and preparation of the integral environmental report. However, the experience shows that in order to ensure effective transboundary communication, there must be a clearly defined national authority having overall responsibility for coordination of communication with the other concerned stakeholders.

Public Participation: proper information and consultation of the civil society

The Member States concerned in the development of large-scale transboundary projects should take particular care to ensure that public consultations are widely open using all possibilities of communication, e.g. internet, open discussions, workshops, hearings, etc. even if this is not actually foreseen under their national legislation. Furthermore, it is important that the concerned Parties ensure that the public in the affected Parties is informed and provided with possibilities for making comments on or objections to the proposed project, and consequently these are submitted to the competent authority of the Party of origin. Pursuant to Article 4(2) of the Espoo Convention, the concerned Parties must arrange for distribution of the EIA documentation to the authorities and the public in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin. In this light there are two questions to be answered:

(a) Whether the concerned Parties are to carry out those tasks together; or if not

(b) What are the specific responsibilities of the Parties in this case?

The Party of origin will be able to conduct hearings in another country only with that country's consent. Therefore, and considering that, unless the concerned Parties agree otherwise, the tasks should be divided between them and each should carry out those tasks that it is best able to carry out. Consequently, the Party of origin provides information on the project, while the affected Party decides how this information is to be distributed (e.g. Internet, press, etc.). The Parties shall carry out their tasks in accordance with their own legislation and practice.

In most of the cases the public hearings are the main form of public participation. It should be solved then whether the public hearing is held in the Party of origin or in the affected Party. Under bilateral and multilateral arrangements the Party of origin could hold a public hearing in the territory of the affected Party. Another option is to organize a public hearing in the Party of origin. In both cases though, and where necessary, the interpretation services are to be ensured.

The public should be consulted on environmental documentation prepared by the concerned Parties. In case there are several national sets of EIA documentation for the same project, public participation should ensure that all relevant documents are provided for public consideration. These may lead to certain complications regarding the translation of the documents, their presentation to the public, etc. Should there be an integrated or joint environmental report, however, covering the project it its entirety, the public consultation would be to a great extent facilitated. Additions, updates, or integrations of environmental information should be notified to the public in a transparent and obvious manner, in the language of the affected Member State, to avoid the so-called "paper chase".

The Member States should take the measures necessary to ensure the public consultations are in full conformity with the national and EU legislation. It is very likely, however, that EIA procedure concerning large-scale transboundary projects raises challenges in its various stages. For example, though a joint environmental report is prepared it may be submitted by the promoter at the same time in all States concerned, the co-ordination of the process from a time point of view will be dependent on specific national requirements (e.g. the duration of the public consultations). In addition, there could be other issues to be taken into account. There might be a need in some of the Member States to carefully assess the situation with respect to nature protection, something which may take time, while in other Member States such a problem may not be encountered.

Decision-making

The implementation of the large-scale projects raises challenges at the decision-making level. These are interrelated with the issues discussed above. The final decision concerning a project's implementation should take into account the overall significant adverse transboundary effects. There are neither explicit provisions in the EIA Directive, nor in the Espoo Convention regarding the requirements for early co-ordination and organizational steps to be undertaken by the Member States. Despite the absence of detailed provisions, co-ordination is crucial for an appropriate and efficient transboundary EIA procedure and implementation of the particular large-scale transboundary project. Otherwise, there might be certain risks and failures either to ensure compliance with the provisions of the applicable legislation, or the implementation of the project itself. This could be the situation when a Party does not approve a project, or a section of a large-scale project, in its territory because of the impact that this project could generate from outside the Party's territory. In addition, a Member State may also refuse to issue development consent, if it is not satisfied by the EIA procedure in another Member State.

Another possible complication at the stage of the decision-making could be the fact that also countries which are neither Parties to the Espoo Convention, nor EU Member States, are involved in the implementation of a large-scale project together with EU Member States. In these cases it is very likely that the national EIA procedures are very different between the countries concerned. Therefore, the practice proved that a way to facilitate the transboundary EIA procedure in these cases would be a sound timing organization of the different procedures run in the countries concerned, which would not impede the overall transboundary EIA procedure and the development consents to could be issued in a coordinated way in all countries concerned. Yet, if a large-scale project is falling under the jurisdiction of countries with comparable national EIA procedures, it should be feasible to embark on more ambitious co-ordination and organization as regards the transboundary EIA procedure. It might be possible even to issue a joint environmental impact statement, ideally using the strictest national standards to be found among the Parties of origin, as the basis for the quality

requirements for the joint environmental impact statement. Such an approach would facilitate the final decision-making and ensure that in all of the countries concerned the same procedure and timing has been applied.

Conclusion

The development of large-scale projects raises concerns about their transboundary environmental impacts. This poses a challenge to the efficient application of the EIA Directive and the Espoo Convention. The aim of the existing transboundary EIA regime under these two legal instruments has been to ensure achievement of sustainable development and preventing, reducing and offsetting environmental impacts at the national and international level.

However, the Espoo Convention has been initially negotiated to address the typical situation where a project is located close to an international boarder between the Party of origin and an affected Party. In these situations, the Party of origin benefits economically from the proposed project and the affected Party suffers environmental consequences. Therefore, the Convention includes provisions that aim to help the parties find a solution enabling them to organize the transboudary EIA in a mutually beneficial manner. However, the application of the Espoo Convention and Article 7 of the EIA Directive should be ensured also in the cases where large-scale tranboundary projects are under development and have a plurality of origin and affected countries.

The practice gained so far with some projects (for instance the implementation of the Nord Stream project) proves the importance of international cooperation in the cases where the projects are implemented beyond the national jurisdiction of one country. This is especially relevant for the cases where the concerned Parties differ in their legal systems, or there is State not being bound by the provisions of the Espoo Convention. However, the experience proves that the Espoo Convention constitutes a very dynamic and flexible international environment treaty regime. This allows the application and interpretation of the Convention's rules to projects and situations which have not been initially considered when it has been negotiated.

Taking into account that by rule the international law regime is abstract in its character, this provides a reasonable and justified margin for a broader interpretation of the Convention's provisions. From this point of view a straightforward and systematic interpretation of the rules of the Espoo Convention and the EIA Directive should take place. These have to take into consideration the overall objective of the EIA regime – to ensure that before development consent is issued the likely significant transboundary adverse effects of a project are taken into account and reflected into the decision making.