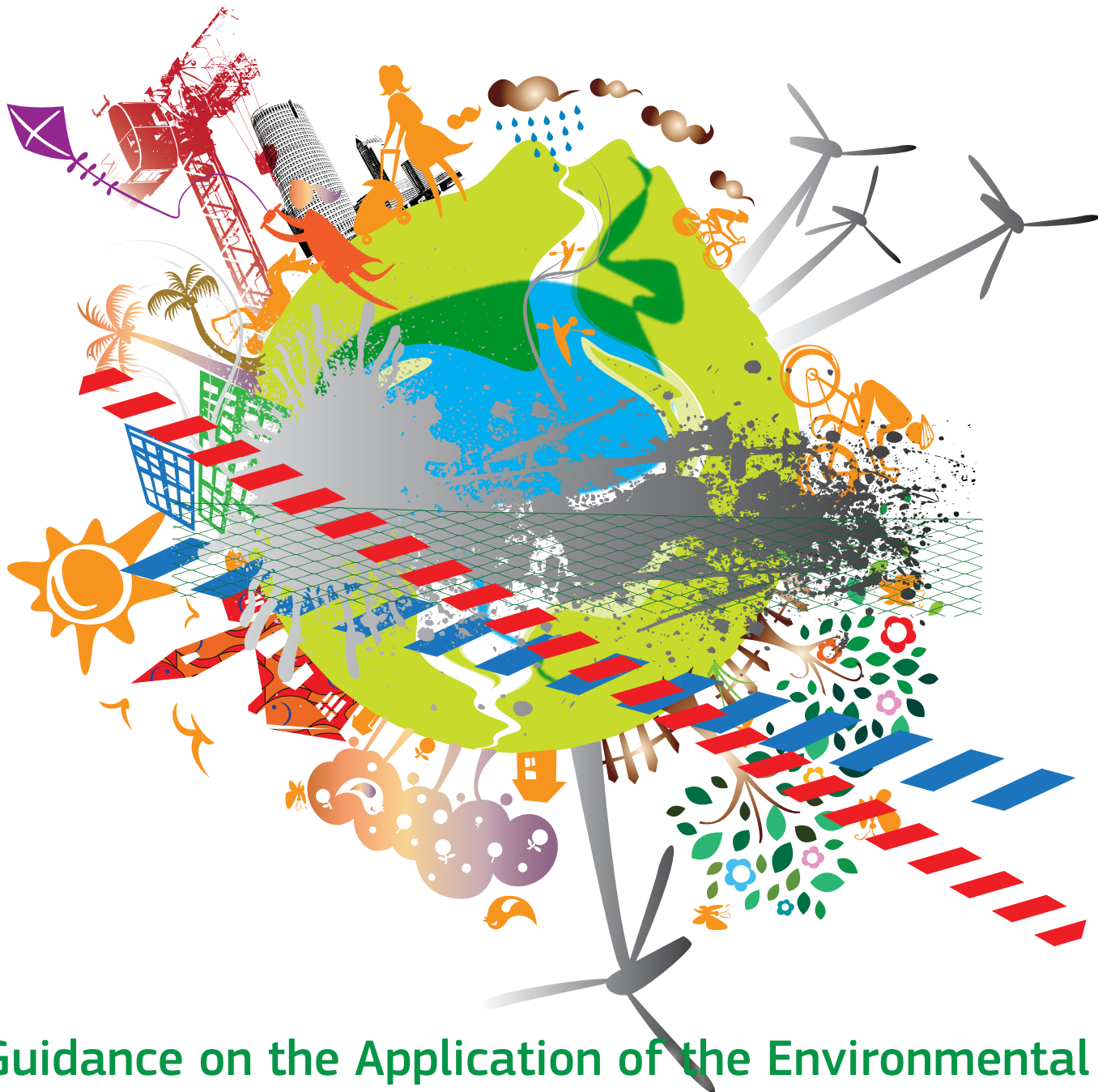




European  
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# Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects

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# Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects

## 1. Introduction

### 1.1 Environmental Impact Assessment in the EU and internationally

Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, known as the **Environmental Impact Assessment (EIA) Directive**, includes special provisions for cases in which a project implemented in one Member State is likely to have significant effects on the environment of another Member State (Article 7). Similarly, the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, known as the **Espoo Convention**, introduces specific rules for conducting an EIA of activities located on the territory of one contracting party, defined as the Party of origin, and likely to cause significant adverse transboundary impact in another contracting party, defined as the affected Party (Article 2).

Environmental impact assessment of transboundary projects has been carried out for many years under the EIA Directive and the Espoo Convention. The most common situation involves two countries - one where the project is situated and another on whose territory it may cause significant environmental effects. In recent years, we have seen more large-scale projects physically located in more than one country (mainly large-scale infrastructure projects, e.g. roads, pipelines, etc.). These 'transboundary' projects cover at least two countries, are likely to have significant environmental effects in each, and involve many stakeholders (national, regional and local authorities, NGOs, the public). The countries responsible for authorising such projects often have different legal systems and EIA procedures and some are not parties to the Espoo Convention. In addition, the environmental and socio-economic impacts of transboundary projects go beyond local, regional and national borders. Multilateral cooperation is therefore usually required.

'Transboundary' projects create challenges for the usual EIA procedures (when applicable) and raise new issues that have to be addressed using the existing legal provisions and instruments described above, i.e. the UNECE Espoo Convention and the EIA Directive.<sup>1</sup> Similar or more detailed provisions may be found in other bilateral and multilateral agreements and legal instruments.<sup>2</sup>

For the time being, there is only limited practical experience applying the EIA procedure to large-scale 'transboundary' projects. It has been gained mainly from the 'Nord Stream'<sup>3</sup> and 'Scanled' gas pipeline projects. However, other similar projects are being prepared, e.g. the 'Nabucco' gas pipeline<sup>4</sup>, the 'Fehmarnbelt Fixed Link'<sup>5</sup>, the 'South Stream' gas pipeline<sup>6</sup>, the

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<sup>1</sup> Other instruments may also be relevant to transboundary projects, but will not be addressed in this guidance document: e.g. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, the Protocol on Strategic Environmental Assessment to the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

<sup>2</sup> For instance, the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, and other regional international Conventions, such as the Convention for the Protection of the marine Environment of the North-East Atlantic (OSPAR).

<sup>3</sup> See <http://www.nord-stream.com>.

<sup>4</sup> See <http://www.nabucco-pipeline.com/portal/page/portal/en>.

<sup>5</sup> See <http://www.femern.com>.

'Brenner Base Tunnel'<sup>7</sup>, etc. In the EU, the European Commission does not participate in EIA and authorization procedures; these responsibilities lie solely with the EU Member States authorities. Similarly EIAs required under the Espoo Convention are carried out under the sole responsibility of the concerned parties; the Convention's Secretariat has only an advisory role.

## 1.2 Purpose of this Guidance

Based on the implementation experience and the good practices identified so far, this document provides guidance for applying of the legal provisions related to EIAs carried out for large-scale 'transboundary projects'. This guidance provides user-friendly and practical information primarily to the competent national authorities, but also to developers, EIA practitioners and other stakeholders. The guidance was prepared by the services of the European Commission and reflects its views.

The overall objective is to facilitate the authorisation and efficient implementation of such projects in the future and avoid unnecessary conflicts and delays. In this regard, **'large-scale transboundary projects' are defined as projects which are implemented in at least two Member States or having at least two Parties of Origin, and which are likely to cause significant effects on the environment or significant adverse transboundary impact.**<sup>8</sup> This guidance document could also be applied to other 'transboundary' projects in general and supplements existing guidance documents, e.g. on applying the Espoo Convention.<sup>9</sup>

Authorising large-scale projects that have significant transboundary adverse effects and subjecting them to EIA may create additional procedural challenges. These need to be addressed in order to ensure compliance with EU environmental legislation and other existing and applicable legal provisions and principles. In these cases, EIAs can be a viable tool for strengthening international cooperation, as they ensure public participation and a transparent decision-making process, raise awareness of the importance of the environment, and address possible conflicting interests. When applying the EIA procedure to large-scale transboundary projects, specific questions may come up on notifying and transmitting information, preparing the environmental documentation, public consultations and access to documents (language capacity), etc. This guidance document outlines the specifics of applying 'transboundary EIA procedure' to large-scale transboundary projects and it underlines the value of coordination at all steps of the process.

The document could be also be relevant to **candidate countries** negotiating their EU accession, potential candidates and countries covered by the **EU neighbourhood policy** and for **EU co-financed projects** where EU Member States are also involved. In general, new investments in a candidate country should comply with the EU environmental legislation, including the EIA Directive and the Espoo Convention. If EU co-financing is involved, full compliance with the environmental *acquis* is required.<sup>10</sup>

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<sup>6</sup> See <http://www.south-stream.info/en/pipeline>.

<sup>7</sup> See <http://www.bbt-se.com/en/home>.

<sup>8</sup> The definition is based on Articles 2(1) and 4 of the EIA Directive and Article 2(3) and (5) of the Espoo Convention, respectively.

<sup>9</sup> See <http://www.unece.org/environmental-policy/treaties/environmental-impact-assessment/publications.html>.

<sup>10</sup> In addition, if co-financing from different International Financial Institutions (IFIs) is envisaged for a project, it is necessary to comply with the requirements of the applicable environmental legislation. It should be stressed that as regards possible European financial assistance, in accordance with the European Principles for Environment, five European Multilateral Financing Institutions (the Council of Europe Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the Nordic Environment Finance Corporation and the Nordic Investment Bank) have committed to only provide financing to projects in enlargement countries that comply with the EU *acquis*.

This guidance document has to be seen in conjunction with **Regulation EU/347/2013 on guidelines for trans-European energy infrastructure**<sup>11</sup> (the new TEN-E Regulation'). It sets out a number of legal requirements designed to streamline, *i.e.*, to speed up and improve, permitting procedures for energy infrastructure projects of common interest (PCI) contained in a Union list established pursuant to the Regulation. The new TEN-E Regulation sets out time limits for permitting procedures (normally 3.5 years from the start of the permit granting process to the issuance of the comprehensive decision) and obliges Member States to designate one single competent authority for permitting of PCIs as well as to choose one of three permitting schemes set out in the new Regulation, with a view to achieving a closer coordination of the permitting procedures. Moreover, under the new TEN-E Regulation, where a project requires decisions to be taken in two or more Member States, the respective competent authorities shall take all necessary steps to efficient and effective cooperation and coordination among themselves. Member States are also required to endeavour to provide for joint procedures, particularly with regard to the assessment of environmental impacts. Some of the measures required under the Regulation may serve as best practice also for the projects covered in this document. Moreover, the new TEN-E Regulation foresees that the Commission produces and issues a guidance document on streamlining environmental assessment procedures within three months from its entry into force. The referred guidance document is under preparation, and will be complementary to this one.

## 2. Applicable legislation and terminology

The 1991 Espoo Convention sets the rules for carrying out environmental impact assessment in a transboundary context. The EU has ratified the Espoo Convention, which makes it an integral part of the EU's legal order and gives it precedence over secondary legislation adopted under the Treaty on the Functioning of the European Union (TFEU). This means that EU legal provisions should be interpreted in accordance with the Espoo Convention.<sup>12</sup> Pursuant to the provisions of the Espoo Convention and in particular Article 2(1), the countries involved should take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts of proposed activities. A transboundary EIA should be carried out before the decision to authorise or undertake these activities is taken.

Article 7 of the EIA Directive introduces similar requirements for secondary EU legislation concerning projects carried out in one Member State but likely to have significant effects on the environment of another. The details of how to implement Article 7 are left up to the Member States. This applies to intra-EU relations if a project has an impact only within the EU territory. If it has broader transboundary impacts, compliance with the Espoo Convention is required in addition to Article 7 of the EIA Directive.

While the EIA Directive provides a definition of the term '**project**'<sup>13</sup>, the 1991 Espoo Convention uses the term '**proposed activity**'.<sup>14</sup> The latter comprises not only new or planned activities but also '*any major change to an activity*'. However, it does not define what a major change is. Whether to apply the Convention or not depends on a decision of the competent

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<sup>11</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, p. 39).

<sup>12</sup> See the Report by the Aarhus Compliance Committee on the Compliance by the EC with its obligations under the Aarhus Convention, ECE/MP.PP/2008/5/Add.10, paragraph 23, 2/5/2008.

<sup>13</sup> 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*'.

<sup>14</sup> 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.

national authorities. Despite the difference in terminology, there is no difference in substance with regard to the transboundary EIA procedure. Moreover, practice shows that both cases refer to implementing activities that are likely to have an impact on the environment in a transboundary context. For the purposes of this guidance document, the terms 'activities' (used under the Espoo Convention) and 'projects' (used under the EIA Directive) are used interchangeably.

### **3. Overview of the steps in a transboundary EIA**

There are 7 key steps in the EIA procedure carried out for large-scale 'transboundary projects':

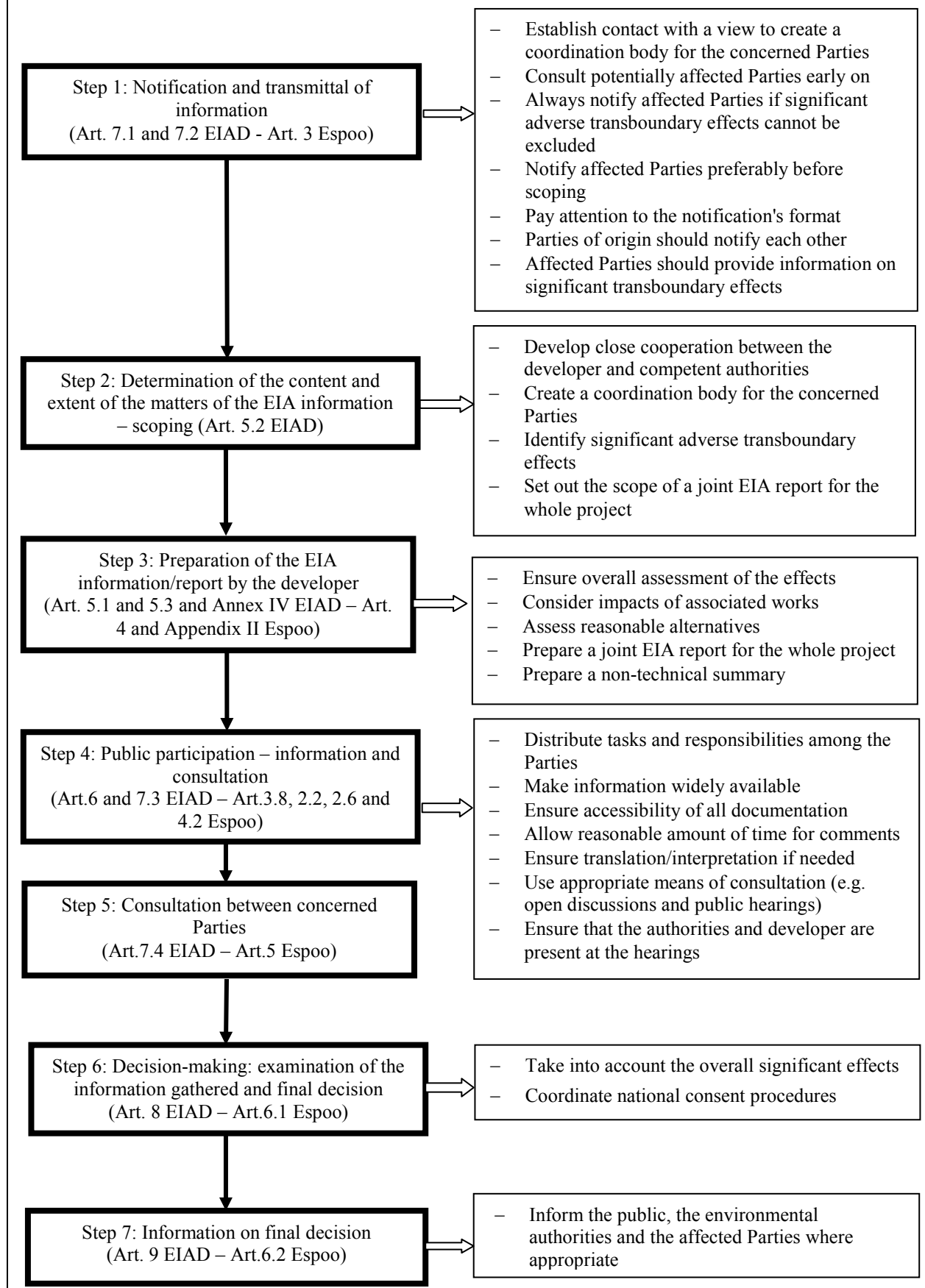
1. Notification and transmittal of information (*Articles 7.1 and 7.2 of the EIAD; Article 3 Espoo*);
2. Determination of the content and extent of the matters of the EIA information – scoping (*Article 5.2 of the EIAD*);
3. Preparation of the EIA information/report by the developer (*Articles 5.1, 5.3 and Annex IV of the EIAD; Article 4 and Appendix II Espoo*);
4. Public participation, dissemination of information and consultation (*Articles 6, 7.3 EIAD, Article 3.8, 2.2, 2.6 and 4.2 Espoo*);
5. Consultation between concerned Parties (*Article 7.4 EIAD, Article 5 Espoo*);
6. Examination of the information gathered and final decision (*Article 8 EIAD, Article 6.1 Espoo*);
7. Dissemination of information on the final decision (*Article 9 EIAD, Article 6.2 Espoo*).

The steps of the EIA transboundary procedure are depicted in Figure 1. The following sections highlight the most relevant steps for large-scale 'transboundary projects' and describe in detail guidance based upon best practice identified so far. For the steps where no guidance is provided, the guidelines on the application of the Espoo Convention should be used.<sup>15</sup>

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<sup>15</sup> See <http://www.unece.org/environmental-policy/treaties/environmental-impact-assessment/publications.html>.

**Figure 1: Flow chart of the transboundary EIA procedure and summary of guidance based upon best practice**



## 4. Notification and transmittal of information (Step 1)

### *Need for notification*

The Espoo Convention requires that the Party of origin notifies affected Parties about projects listed in Appendix I and likely to cause a significant adverse transboundary impact (Article 3(2)). The notification triggers the transboundary EIA procedure. The Espoo Convention's primary aim is to '*prevent, reduce and control significant adverse transboundary environmental impact from proposed activities*' (Article 2(1), but in fact the Party of origin is obliged to notify affected Parties (in accordance with Article 3 of the Espoo Convention) even if there is only a low likelihood of such impact.<sup>16</sup> This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty.<sup>17</sup> This interpretation is based on the precautionary and prevention principles.

According to Article 3(7) of the Espoo Convention<sup>18</sup>, if notification does not take place in accordance with its provisions, a Party that considers that it would be affected by significant adverse transboundary impact of a proposed activity listed in Appendix I can request an exchange of sufficient information. This enables the parties involved to discuss the likelihood of significant adverse transboundary impact.

The right of the potentially affected Party to request notification, pursuant to the provisions of the Espoo Convention, concerns the activities listed in Appendix I of the Convention for which an EIA is mandatory. However, according to Article 7 of the EIA Directive, Member States are entitled to request notification for any project likely to have a significant effect on their environment, regardless of whether it is listed in the EIA Directive's Annex I (where EIA is mandatory) or Annex II (where EIA may be required after "screening"). This gap in the Espoo Convention can cause problems for projects involving non-EU Member States, but there are tools that address and compensate for this difference. For example, bilateral and multilateral agreements between the Parties to the Espoo Convention make communicating and exchanging information easier. The situation may also be helped by many non-EU States having taken or currently taking steps to transpose the EU legislation into their national legal systems.<sup>19</sup>

Consequently, for large-scale transboundary projects, it is advisable for the Parties concerned to apply the precautionary and preventive approach. This includes early consultation with potentially affected Parties as to whether notification is necessary, in order to avoid problems caused by notification occurring at later stage of the procedure.<sup>20</sup>

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<sup>16</sup> This would be in accordance with the *Guidance on the Practical Application of the Espoo Convention*, paragraph 28, as endorsed by Decision III/4 (ECE/MO.EIA/6, annex IV), <http://live.unece.org/fileadmin/DAM/env/documents/2004/eia/decision.III.4.e.pdf>.

<sup>17</sup> Decision IV/2, annex I, paragraph 54, <http://live.unece.org/fileadmin/DAM/env/documents/2008/eia/decision.IV.2.e.pdf>.

<sup>18</sup> Article 3(7) of the Espoo Convention reads: '*When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question*'

<sup>19</sup> This is done under the three current EU policies that involve non-EU Member States: the enlargement policy, the European Neighbourhood Policy (ENP) and the EU-Russia 'strategic partnership'.

<sup>20</sup> ECE/MP.EIA/WG.1/2007/3, paragraph 13.



### *Determination of significance for large-scale transboundary projects*

The significance of the impacts from a large-scale transboundary project should be determined before the country of origin notifies the affected country. An EIA is always required for projects listed in Annex I of the EIA Directive and Appendix I of the Espoo Convention, as their significant environmental effects are presumed.

The impact of projects listed in Annex II of the EIA Directive and projects not mentioned in Appendix I of the Espoo Convention has to be determined before deciding if an EIA is needed (this procedure is usually referred to as 'screening'). Note that the EIA Directive recommends an overall assessment of the effects of projects on the environment, irrespective of whether the project is transboundary in nature.<sup>21</sup>

Appendix III of the Espoo Convention provides general guidance on identifying significant adverse impact based on existing environmental conditions in the location of the proposed project and the scale or characteristics of its likely impacts. A decision stating that significant adverse transboundary impact is likely would be based on various issues. There is no uniform approach; different criteria are applied at national level. In 1995, the Espoo Secretariat prepared guidance on these criteria<sup>22</sup>, but this did not lead to common criteria being adopted by all parties concerned.

Determining an activity's environmental significance should also take the precautionary principle and prevention principles into account.<sup>23</sup> Therefore, an EIA is required if the possibility of a project having significant adverse effects on the environment cannot be excluded based on objective information.<sup>24</sup> If there is any doubt as to the absence of significant adverse environmental effects, an EIA must be carried out. This approach helps achieve the objectives of the Espoo Convention and the EIA Directive. It has already been applied in the context of the Habitats Directive (92/43/EEC), where the Court of Justice of the EU ruled<sup>25</sup> that plans and projects likely to undermine the conservation objectives of Natura 2000 sites must be considered likely to have a significant effect on those site and should be subject to an appropriate assessment in accordance with Article 6(3) of the Directive.

### *Content of the notification*

The formal procedure for applying the Espoo Convention starts when the Party of origin notifies the affected Party or Parties. This is mandatory and done through the designated point of contact (Article 3). The notification stage addresses a number of issues:

- The information provided in the notification should allow the potentially affected Party to make a decision about participating in the EIA procedure.
- The notification should outline the information needed by the public and the authorities in the affected Party to be able to participate in the transboundary EIA process. To achieve this, Article 3(2) of the Espoo Convention requires the notification to contain:
  - information on the proposed activity and its possible transboundary impact;
  - information on the nature of the possible decision;

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<sup>21</sup> C-205/08, *Umweltanwalt von Kärnten*, paragraph 51.

<sup>22</sup> Specific Methodologies and Criteria to Determine the Significance of Adverse Transboundary Impact, CEP/WG.3/R.6, 20 January 1995, UNECE.

<sup>23</sup> The precautionary and prevention principles are the foundations of the high level of protection pursued that the EU environment policy aims at, in accordance with the Article 191(2) TFEU.

<sup>24</sup> See, by analogy, inter alia case C-180/96, paragraphs 50, 105 and 107.

<sup>25</sup> Case C-127/02, paragraphs 39-45.

- an indication of a reasonable timeframe within which a response from the affected Party is required.

What is included in the notification (e.g. identification of the public likely to be affected) influences the scope of the environmental report and may facilitate the transboundary EIA procedure.

- The affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification, and shall indicate whether it intends to participate in the EIA procedure or not (Article 3(3) of the Espoo Convention).
- If the affected Party decides to participate in the EIA procedure, it needs to provide information that can help assess the project's significant transboundary environmental impacts (Article 3(6) of the Espoo Convention).

Recommended good practices are listed below. They supplement the guidelines on notification set out in the Espoo Convention.<sup>26</sup>

#### *Notification timing*

For large-scale transboundary projects, the notification's timing is key to ensuring effective coordination between the Parties concerned, as well as to avoiding disputes. It is recommended that the notification be sent as early as possible, preferably before the 'scoping' stage<sup>27</sup>, if it is being carried out. In any case, the notification should not be sent later than when the public in the Party of origin is informed about the EIA procedure. In addition, it is recommended that **reciprocal notifications** are sent between the Parties of origin. This helps the Parties involved to clarify their roles in the EIA procedure. For the need for exchange of information, it is recommended that the Parties concerned establish contacts in view to create a coordination body composed of competent national authorities (e.g. the designated Espoo Convention contact points in the Member States).

## **5. Preparing the environmental information and report (Steps 2 and 3)**

For large-scale transboundary projects, which are likely to have significant adverse transboundary impacts, preparing the environmental information and report is one of the most important steps of the EIA procedure. Pursuant to the provisions of the EIA Directive and the Espoo Convention, the term 'environmental report' refers to environmental impact documentation. This term is not used in the above legislation, but, in practice, environmental information and documentation often takes the form of a report.

#### *Scope of the environmental report*

Experience shows that the content of the environmental report should be defined is at the '**scoping' stage**. This stage is not compulsory, but it is advisable for the national authorities involved to carry it out and prepare scoping documents in close cooperation with the developer. Doing so is considered good practice. The scoping documents should identify the significant adverse transboundary impact and outline the assessment to be carried out, in particular, *inter alia*, as regards alternatives, cumulative effects, and impacts on climate and biodiversity. This is an intrinsic part of the environmental report.

<sup>26</sup> General guidance on this procedure can be found in the *Guidance on Notification According to the Espoo Convention* (<http://www.unece.org/fileadmin/DAM/env/documents/2009/eia/ece.mp.eia.12.pdf>).

<sup>27</sup> The "Scoping" stage of the EIA procedure determines the content and areas to be covered in the environmental information to be submitted to a competent authority. It is an important feature of effective EIA and is broadly considered to improve its quality.

Certain large scale transboundary projects (e.g. pipelines, dams, etc) may also have significant disaster risk implications that have to be identified and assessed at an early stage. It is advisable that the EIA procedure considers the impact of the project on the exposure, vulnerability and resilience of the population, environment, material assets and economic activities to natural and man-made disasters (earthquakes, landslides, floods, extreme weather events, industrial accidents etc.). Therefore, the environmental report may include an assessment of the natural and man-made disaster risks and risk of accidents and, where appropriate (i.e. if the impacts are significant and adverse), a description of the measures envisaged to prevent and manage such risks, as well as measures regarding preparedness for and response to emergencies.

Close cooperation between the developer and the competent national, and in particular environmental, authorities is often be required to define exactly the content of the report and the areas to be covered. The environmental report should include a description of the project's likely significant effects, e.g. effects resulting from the use of natural resources or cumulative effects. Appendix II of the Espoo Convention and Annex IV of the EIA Directive outline the content of the EIA documentation.<sup>28</sup> Particular attention should be paid to nature protection areas, as well as to projects being developed in aquatic environments for which separate assessments may be needed.<sup>29</sup>

Pursuant to Appendix II of the Espoo Convention and Annex IV of the EIA Directive, the EIA information must include at least the following:

- a description of the proposed project and its purpose;
- a description, where appropriate, of reasonable alternatives (e.g. in terms of location, technology to be employed, etc.) and also the no-action alternative;
- a description of the environment likely to be significantly affected by the proposed project and its alternatives;
- a description of the potential environmental impact of the proposed project and its alternatives and an estimate of its significance;
- a description of the mitigating measures considered and an indication of the predictive methods, assumptions and data on which they are based; and
- an outline of monitoring and management programmes and any plans for post-project analysis.

In addition, when determining the EIA report's scope and level of detail, it should be kept in mind that EIA has a wide scope and broad purpose<sup>30</sup> and it should be carried out in a way that takes into account the specific character and effects of each project.

#### *Overall assessment of the effects of the projects*

For large-scale transboundary projects, the environmental information should cover and assess the project as a whole, i.e. 'from A to Z'.<sup>31</sup> Not doing so would mean failing to take into account

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<sup>28</sup> It is recommended that the developer proposes a harmonised way of collecting and presenting the necessary documentation for the project to be followed by the Parties of origin and the affected Parties. To ensure a co-ordinated approach, the developer needs to produce one set of Terms of References and suggest a uniform way of assessing impacts. The developer is also responsible for providing all necessary information and for participating actively in the public consultation to be carried out in accordance with existing national legislation. Additional challenges may arise if a project is carried out by different developers.

<sup>29</sup> Under Articles 6(3)-(4) and 7 of the Habitats Directive (92/43/EEC) and Article 4(7)-(9) of the Water Framework Directive (2000/60/EC).

<sup>30</sup> Case C-72/95 Kraaijeveld, paragraphs 31-40.

the impacts of the project in its entirety, including indirect and cumulative effects. The Court of Justice of the EU recently confirmed this need for an overall assessment.<sup>32</sup>

In case C-227/01, the Court stressed the need to avoid splitting up a long-distance project into successive shorter sections and preferred an assessment of *'the project as a whole'*. In cases C-2/07 and C-142/07, the Court considered that *'the EIA Directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works'*.

Following the same logic, in case C-205/08, the Court stressed that the effectiveness of the EIA Directive ***would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State'***. The Court stated that *'the EIA Directive adopts an overall assessment of the effects of projects on the environment, irrespective of whether the project might be transboundary in nature'*. In other words, the difficulties experienced by large scale transboundary projects, such as the administrative stages depending on different Member States or their implementation compromising several stages, must not impede achievement of the aims of the EIA Directive and the Espoo Convention.

#### *Preparing national environmental reports and joint environmental reports*

Pursuant to the applicable EU legislation and in light of the abovementioned case law, each developer responsible for a project's implementation must prepare an EIA report for the whole project, to make it possible to assess the project's overall effects.

For large-scale transboundary projects, the developer must comply with the requirements of the national EIA requirements of each country in which the project will be implemented. The developer should prepare individual national EIA reports and a joint environmental report that covers the whole project and assesses its overall effects, in particular cumulative and significant adverse transboundary effects.

The best approach is to first prepare a joint environmental report for the whole project and then prepare the individual national environmental reports. This is because the scoping exercise could identify the scope of each report, in particular of the joint environmental report. The Espoo Convention provides the legal ground for undertaking, where appropriate, a joint EIA, on the basis of existing or new bilateral or multilateral agreements or other arrangements (Article 8 and Appendix VI, item (g)). If there are several Parties of origin, a joint assessment may help avoid extensive EIA documentation and allow for a holistic assessment of the project. This possibility is particularly relevant for large-scale transboundary projects, where all countries in which the project would be developed are considered Parties of origin.

For example, the Member States that implemented the 'Nord Stream' project prepared joint EIA documentation on the project's transboundary impacts. In addition, they submitted to all affected Parties national EIA reports that dealt primarily with the project's national environmental impacts. This was voluntary and done for the purposes of their project's EIA, but it also ensured compliance with the requirements of both the EIA Directive and the Espoo Convention. It is therefore recommended that the joint EIA documentation and report are

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<sup>31</sup> See Annex IV.1 of the EIA Directive.

<sup>32</sup> C-227/01 (paragraph 53); C-142/07 (paragraphs 39 and 44); C-2/07 (paragraphs 42-43) and mainly C-205/08 (paragraphs 45-58).

prepared before any national EIA procedures take place, and that the joint EIA report assesses the whole project and its overall effects, including cumulative effects. This approach always requires bilateral and multilateral cooperation.

A joint environmental report aims to assess a project's overall impact and to facilitate its subsequent authorisation at national level (including transboundary consultations). It ensures a holistic assessment of the project's effects, including cumulative ones, and avoids splitting the project. It can be useful in cases where projects are carried out by several developers, as it includes the likely significant effects of all related activities, sub-activities and any other activities linked to the project's implementation and purpose. These could include, for example, assessment of treatment installations and sites, the staff necessary for the project's development, new infrastructure needed only for this project; storage facilities, etc.<sup>33</sup>

It is also recommended that the joint environmental report covers **specific assessments** and information required under EU or national legislation on other issues, such as nature protection (with focus on transboundary Natura 2000 sites likely to be affected) or water protection (with focus on transboundary water bodies likely to be affected). Preparing a joint environmental report will avoid duplication and improve the environmental assessment's quality.

The joint environmental report should include, where appropriate, an assessment of **reasonable alternatives** (for example, location or technology used, and the no-action alternative)<sup>34</sup>. The reasonable alternatives are an important part of the report's content, especially for large-scale transboundary projects, as the choices made will influence the project's implementation and the significance of its environmental impacts. It is important that the Parties of origin agree on the alignment of the project as a whole and avoid unilateral alignments that do not fit together. Given that the objective of the Espoo Convention is to prevent and minimise negative environmental impacts, the Parties concerned should select the best possible environmental alternative from among the ones identified. It is important that the no-action alternative be fully addressed, so that the evolution of the environment in the absence of the project is considered.

Lastly, a **non-technical summary** of the joint environmental documentation and report needs to be prepared to fulfil the requirements of the EIA legislation. It should outline (in non-technical language) the findings included in the joint EIA report. Given that the EIA documentation for large-scale transboundary projects is likely to be voluminous (e.g. in the 'Nord Stream' case, the EIA report was about 2500 pages), preparing a non-technical summary is of vital importance for the effectiveness of the process.

#### *Quality of the environmental report*

The environmental report is submitted to the competent national authorities of the Parties of origin, who are responsible for assessing the information provided by the developer, consulting the relevant environmental authorities and the public on their territory, and informing the competent authorities of any other Party likely to be significantly affected by the project. If they decide to take part in the transboundary EIA, the affected Parties are obliged to launch a consultation of the authorities and public on their territory, with the Parties of origin. This is commonly referred to as 'transboundary participation of the public and the competent national authorities' and is envisaged both under Article 7 of the EIA Directive and Article 4 of the Espoo Convention.

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<sup>33</sup> See case C-215/06, paragraphs 102-110. Please also refer to the interpretation of how to apply the EIA Directive to ancillary or associated works suggested by the Commission's services [http://ec.europa.eu/environment/eia/pdf/Note - Interpretation of Directive 85-337-EEC.pdf](http://ec.europa.eu/environment/eia/pdf/Note_-_Interpretation_of_Directive_85-337-EEC.pdf)

<sup>34</sup> See Appendix II (b), Espoo Convention and Annex IV (3) to the EIA Directive

### *Translation of the EIA documentation and exchange of information*

In order to ensure viable public participation, it is recommended that the relevant environmental impact documentation is translated into all the official languages of the Parties of origin and affected Parties. This will enable the authorities and public concerned to be well-informed and to express their views during the national and transboundary consultations.<sup>35</sup> There is an obvious need to coordinate the information exchanged and prepare the joint environmental report. It is recommended that the Member States concerned create a coordination body composed of competent national authorities (e.g. the designated Espoo Convention contact points in the Member States).

## **6. Consultation and Public Participation (Steps 4 and 5)**

It is important that the Parties concerned ensure that the public of the Parties of origin and the affected Parties is informed and provided with possibilities of commenting on or objecting to the proposed project. These should be submitted to the competent authority in the Party of origin.<sup>36</sup> The Parties concerned are responsible for distributing the EIA documentation to the authorities and public in areas likely to be affected and for submitting any comments to the competent authority in the Party of origin. They should do this within a reasonable timeframe and before the final decision on the proposed project/activity is made.<sup>37</sup> It is recommended that the Member States involved in decision-making for large-scale transboundary projects take particular care to ensure that public consultations are widely open by using appropriate means of communication, e.g. the internet, press, notice boards, open discussions, workshops, and hearings.

At this stage of the transboundary EIA procedure, there are two issues to be addressed by the Parties concerned. The first issue relates to the distribution of tasks and whether the Parties are to work together, or not. If the Parties do not carry out the tasks together, then they need to decide on how to define their specific responsibilities<sup>38</sup>.

The Party of origin will only be able to conduct hearings in another country if this country agrees. The Parties concerned are free to decide, but it is recommended that the tasks are divided between them and that each Party should be responsible for the tasks that it is best able to carry out. Following this logic, the Party of origin would provide information on the project and the affected Party would decide how this information should be distributed (e.g. on the internet, via press, etc.). The Parties should carry out their tasks in accordance with their own legislation and practice.

In most cases, public hearings are the main form of public consultation. Several conditions need to be met to guarantee that the consultation is effective:

- There needs to be agreement on whether a public hearing should be held in the Party of origin, in the affected Party or in both. On the basis of bilateral and multilateral agreements or ad hoc arrangements, the Party of origin could hold a public hearing on

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<sup>35</sup> See the *Opinions of the Implementation Committee (2001-2010)*, UNECE 2011, paragraph 53: [http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/Opinions\\_of\\_IC\\_2001-2010/Implementation\\_Committee\\_opinions\\_to\\_2010.e.pdf](http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/Opinions_of_IC_2001-2010/Implementation_Committee_opinions_to_2010.e.pdf).

<sup>36</sup> This is an obligation under Article 3(8) of the Espoo Convention and Article 7(3) and (5) of the EIA Directive.

<sup>37</sup> This is required by Article 4(2) of the Espoo Convention and Article 7(2) and (5) of the EIA Directive.

<sup>38</sup> In the context of the Brenner Base Tunnel, the Brenner Base Tunnel Societas Europaea set up for the project played an important role during the transboundary consultations providing the basis for consultations and discussions for both responsible environmental authorities. Such public consultations took place in Vipiteno/Sterzing in 2004. A mixed commission for transnational environmental impacts was established as well. Before the completion of the preliminary design study for the project, the governments of Italy and Austria decided to carry out two separate EIAs, as the EIA processes are different.

the territory of the affected Party. Another option would be to organise a public hearing in the Party of origin, if all Parties concerned agree.

- Translation and interpretation services are to be ensured in all cases where they are necessary.
- The relevant authorities, the developer and the team of experts who prepared the EIA documentation should all be present.

The public should be consulted on the environmental documentation prepared by the developer. The national environmental documentation and reports prepared in each of the Parties of origin for the same project and the joint environmental report should be provided for public consideration. Note that this may lead to certain complications, such as translating the documents, presenting them to the public, etc. The public should be notified of any updates or additions to the environmental information in a transparent way, in the language of the affected Party. The existence of a joint environmental report (with the required non-technical summary) that covers the project in its entirety would help the public consultation immensely.

If the Parties concerned do not have bilateral or multilateral agreements that cover organising the consultation and public participation issues, they should agree on the timing of and means for carrying out consultations under Article 5 of the Espoo Convention at the start of the ‘transboundary’ EIA procedure.

## 7. Decision-making (Step 6)

The challenge for making the final decision on implementing a project lies in taking into account the overall significant adverse transboundary effects while keeping in mind the specificities of each case. Neither the EIA Directive nor the Espoo Convention explicitly require early coordination and neither specifies the organisational steps that Member States and countries concerned need to take before issuing the final decision/development consent/construction permit. But, despite the absence of detailed provisions, coordination is needed to avoid risks and ensure compliance with the applicable legislation. It is also necessary for ensuring that the project is implemented, as it could happen that a Party does not approve a project or a section of a large-scale project on its territory because of the impact that it could have from outside the Party’s territory or jurisdiction.

Other possible complications at the decision-making stage could stem from situations in which countries that are not Parties to the Espoo Convention are involved in implementing large-scale transboundary projects together with EU Member States (or parties to the Espoo Convention that are not EU Member States). In these cases, it is very likely that national EIA and development consent procedures in the countries concerned would differ. Experience shows that coordination and working together are good ways of making these transboundary EIA procedures simpler and ensuring that development consent is issued in a coordinated way in all the countries concerned.

If a large-scale project falls under the jurisdiction of countries with comparable national EIA procedures, it should be feasible to be more ambitious in coordinating and organising the transboundary EIA procedure. It might even be possible to issue a joint environmental impact statement, ideally using the highest national standards from among those of the Parties of origin. This would facilitate the final decision-making and ensure that the same procedure and timing is applied in all countries concerned. This interpretation is consistent with the Espoo Convention, which contains several provisions for developing joint assessment and decision-making procedures. For instance, under Article 2(1), the Parties are required to act either **individually or jointly**, in order to prevent, reduce and control significant adverse

transboundary environmental impact from proposed activities. In other Articles, creating joint bodies is encouraged (Articles 3(6), 4(2), 5, second paragraph, Appendix VI.g).

For its scope of application, the new TEN-E Regulation takes up the above-referenced suggestions and provides a model legal framework for an enhanced administrative and procedural co-ordination of permitting procedures. Member States have to designate one single competent authority for permitting of PCIs as well as choose one of three permitting schemes set out in the new Regulation, with a view to achieving a closer co-ordination of the permitting procedures. Moreover, where a project requires decisions to be taken in two or more Member States, the respective competent authorities are required to take all necessary steps to efficient and effective cooperation and coordination among themselves. Member States shall in particular endeavour to provide for joint procedures, particularly with regard to the assessment of environmental impacts.

Note that, pursuant to the provisions of all applicable EU legislation, including the Aarhus Convention, the public can participate in the decision-making process and has access to justice in environmental matters<sup>39</sup> linked to transboundary large-scale projects. Members of the public can initiate administrative and judicial procedures if private persons or public authorities act in ways that disregard relevant EU legislation.

## **8. Conclusion**

Experience gained so far, for example from the ‘Nord Stream’ project, shows how important international cooperation and coordination is for large-scale transboundary projects.

Preparing a joint environmental report and a non-technical summary should assess the environmental impact of the entire project. This can also ensure a more enhanced administrative co-ordination of the relevant permitting authorities and accelerate the permitting procedures, in line with the requirements for cross-border co-operation set out in the new TEN-E Regulation for energy infrastructure PCIs. Despite the fact that both the EIA Directive and the Espoo Convention address the typical situation of a project located close to the border between one Member State/Party of origin and another Member State/affected Party, their provisions also apply to situations in which the project is implemented in more than one Member State or has more than one Party of origin. This is why the EIA legislation enables the Member States/Parties concerned to find a solution and organise a ‘transboundary’ EIA and do so in a mutually beneficial manner.

For large-scale transboundary projects, a straightforward and systematic interpretation of the rules of the Espoo Convention and the EIA Directive (where applicable together with the new TEN-E Regulation) is best. It has to consider the overall objective of EIA, namely ensuring that likely significant adverse effects of transboundary projects are assessed before development consent is issued and that they are integrated into project planning and taken into account in decision-making. This is why joint EIA documentation should be prepared before any national EIAs are carried out. This approach ensures that projects are not split along artificial lines and that their overall cumulative effect is taken into account. Finally, in light of the latest case law of the Court of Justice of the EU, it is up to the competent authorities to ensure that the overall assessment of a project’s effects on the environment is carried out.

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<sup>39</sup> Article 3(9) of the Aarhus Convention reads ‘*Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.*’







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