„Krytyka Prawa", tom 12, nr 1/2020, s. 97–114, ISSN 2080-1084, e-ISSN 2450-7938, © 2020 Author.

ANNA HAŁADYJ[1]

Are Polish EIA Experts Still "Competent"? Remarks on the Evolution of the Provisions Regarding Practitioners Involved in the Preparation of Environmental Impact Assessment Reports

Abstract

Environmental impact assessment (EIA) is a tool that allow predicting the environmental effects of a project. Undoubtedly, the basic element of the EIA is the EIA report: and if so, the question arises who is qualified to prepare the report.

The purpose of the study is to present the evolution of the rights of EIA report experts from the 1970s to modern times, presented from the perspective of legal sciences.

The implementation of the amended Directive 2011/92 took place from 1 January 2017 by introducing formal education criteria and / or experience for EIA experts, which were softened by the amendment of 19 July 2019.

In the study, I put forward the thesis that there is a tendency in Polish legislation to lower the requirements for EIA experts, which makes national regulation contrary to the spirit of Directive 2011/92.

Research methods used in the study include primarily the dogmatic approach, the method of consistent interpretation, and – to a lesser extent – the comparative and historical method.

Keywords: EIA report, competent experts, effectiveness of EIA process, evolution of EIA experts' qualifications

[1] Prof. Anna Hałady – Faculty of Law, Canon Law and Administration of John Paul II Catholic University of Lublin, Poland; e-mail: ahaladyj@kul.pl; ORCID: 0000-0002-8827-3657.

 DOI: 10.7206/kp.2080-1084.364

Introduction

Environmental impact assessment (EIA) is an instrument that allows to predict the environmental consequences of a development project.[2] EIA is a set of techniques and methods used to assess the environmental impact of a project, but also a set of guidelines for mitigating the negative effects of the activity, as well as a procedure that provides necessary information and engages the public in the decision-making process regarding further development of the activity.[3] At present, an EIA procedure leads to the issuance of a decision on environmental conditions. Undoubtedly, the most important piece of evidence in administrative proceedings concerning the issuance of a decision on environmental conditions of approval to a project is the EIA report, which provides "a factual basis for an environmental protection authority to decide on the content of the said decision."[4] If so, the question arises who is qualified to prepare the report and what special qualifications should the author (authors) of the report have to prepare an accurate and complete study that will allow an environmental protection authority to assess the environmental impacts of the project.

The question is legitimate given the fact that over the years the issue of the competence of the authors of EIA reports has undergone a substantial evolution culminating in the amendment of 19 July 2019 to the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment.[5] This amendment further relaxes the requirements imposed on the authors of EIA reports (and authors of Strategic Environmental Assessment (SEA) report). Throughout the years, the idea of who can prepare EIA reports has evolved from the institution of practitioners accredited by a minister/provincial governor (voivode), through licensed EIA experts and then a lack of any requirements for EIA report authors (2000–2016), to solutions

2 A. Tyszecki, *Wytyczne do procedury wykonywania ocen oddziaływania na środowisko*, Gdańsk 1996, p. 1.

3 K. Dubel, *Rola ocen odziaływania na środowisko w systemie planowania przestrzennego*, Wrocław 2005, p. 40.

4 Ibidem, p. 45.

5 Act of 19 July 2019 amending the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment and certain other acts, Journal of Laws of the Republic of Poland (further: JLRP) of 2019, item 1712.

introduced in connection with the EU requirement that the reports be prepared by "competent experts". This requirement was laid down in Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014[6] amending Directive 2011/92/EU of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment,[7] which stresses the need to improve the quality of EIA reports, among others, by introducing criteria for persons involved in the preparation of those reports. However, the Directive leaves it to the discretion of the Member States to decide what specific criteria for EIA report authors will be used and how they will be applied, because, in the past, different countries of the EU had different requirements for those persons/bodies, such as accreditation, requirements related to professional competence and expertise (experience and education),[8] voluntary association, and quality labelling, or – as in the case of Poland – no requirements at all.

Poland's past experiences in setting strict criteria for authors of EIA reports – criteria which had been in effect from the 1970s to 2000, and were abandoned without much reflection by laying down new EIA provisions (first, the provisional Act of 2000, and, then, the Act of 27 April 2001 on Environmental Protection Law) – should be critically evaluated against the requirements set by EU law today.

The amended Directive 2011/92 had been implemented in Poland on 1 January 2017 by introducing formal education and/or work experience criteria for EIA report authors, which were later relaxed by the amendment of 19 July 2019.

This shows that there is a tendency in Polish legislation to liberalize national provisions regarding the qualification criteria for EIA report authors. These provisions are only temporarily tightened when the need arises to adopt a (any) standard that meets the requirements of proper implementation, but they do not guarantee improvement in the quality of EIA.

The goal of the present study is to outline the evolution of the qualifications of EIA report authors from the 1970s to the present from the perspective of legal sciences. Aspects of the effectiveness of the EIA process other than those concerning the person who prepares the EIA report are omitted, but readers are encouraged to refer for information on them to the latest literature of the subject,[9] as, according

---

6 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/52/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ L 124, 25.4.2014, pp. 1–18.

7 OJ L 26, 28/01/2012, pp. 1–21.

8 J. Glasson, R. Therivel, *Introduction to the Environmental Impact Assessment*, 5th edition, New York 2019, p. 65.

9 See, for example: R. Therivel, A. González, *Introducing SEA effectiveness*, „Impact Assessment and Project Appraisal", 2019, 37(3–4), pp. 181–187; M. Jones, A. Morrison-Saunders, *Embracing*

to Sommer, effective functioning of EIA procedure also includes issues related to entities performing the assessment (the "subjective scope" of the assessment).[10] In this study, I put forward the thesis that there is a tendency in Polish legislation to lower the requirements for EIA report authors, which puts national provisions in conflict with the spirit of Directive 2011/92.

The research methods used in the study include the dogmatic approach, the consistent interpretation approach, and – to a lesser extent – the comparative and historical approaches.

Accredited EIA practitioners and EIA experts

In legal doctrine, it is assumed that the beginnings of the institution of EIA in Poland are traceable to the provisions of the Nature Conservation Act of 1949, which obliged state authorities to consult the State Council for Nature Conservation on plans or projects that could significantly affect the balance of nature, which was "a functional equivalent of the environmental impact assessment procedure."[11] Similarly, the Water Law Act of 1974 provided that competent authorities could require the applicant to provide an expert opinion on the impact of the planned use of water on the environment. Although those expert opinions differed significantly in their scope and methodology from EIA reports[12], they were, one might say, "EIA reports in embryonic form."[13]

The Act on Environmental Protection and Management (AEPM),[14] in its original wording, provided that the developer or the owner/manager of an existing build-

---

evolutionary change to advance impact assessment (IA), „Impact Assessment and Project Appraisal" 2020, 38(2), pp. 100–103; M. Cashmore, R. Gwilliam, R. Morgan, D. Cobb, A. Bond, *The interminable issue of effectiveness: substantive purposes, outcomes and research challenges in the advancement of environmental impact assessment theory*, „Impact Assessment and Project Appraisal" 2004, 22(4), pp. 295–310; F.P. Retief, T.B. Fischer, R.C. Alberts, C. Roos, D.P. Cilliers, *An administrative justice perspective on improving EIA effectiveness*, „Impact Assessment and Project Appraisal" 2019.

10 J. Jendrośka, *Oceny oddziaływania na środowisko jako instytucja prawna: charakter prawny i struktura regulacji*, [in:] H. Lisicka (ed.), *Prawo i polityka w ochronie środowiska. Studia z okazji 40-leci pracy naukowej Jerzego Sommera*, Wrocław 2006, p. 79.

11 Radecki W., *Nowe przepisy o udostępnianiu informacji o środowisku oraz o ocenach oddziaływania na środowisko, cz. I – Uwagi ogólne, przedmiot regulacji prawnej, zagadnienia organizacyjne*, „Problemy Ekologii" 2001, 1.

12 J. Sommer, *Oceny oddziaływania na środowisko w znowelizowanej ustawie o ochronie i kształtowaniu środowiska*, „Ochrona Środowiska. Prawo i Polityka" 1998, 3, p. 2.

13 Ibidem, p. 244. They are discussed in: A. Barczak, M. Łazor, A. Ogonowska, *Oceny oddziaływania na środowisko w prawie polskim ze wzorami dokumentów i schematami*, Warszawa 2018, p. 38.

14 JLRP of 1980 No. 3, item 6.

ing/complex of buildings could be requested to submit an expert opinion on the impact of the development or the building(s) on the environment (Article 70). An expert opinion like this could only be prepared by state-approved entities registered in the list of the Minister of Administration, Local Economy and Environmental Protection. Entities that could serve as accredited practitioners included institutions of higher education, scientific institutes, research institutes, other entities engaged in scientific research, scientific and scientific-technical associations, and natural persons. With time, when location decisions started to be issued under the Spatial Planning Act of 12 July 1984 for developments exceptionally harmful to the environment and human health, a requirement was introduced that the application for a location decision should be accompanied by an expert opinion regarding the anticipated environmental impact of the project.[15]

In Act of 27 April 1989 amending the Act on Environmental Protection and Management,[16] a new wording was adopted for Article. Pursuant to this new provision, the competent administration body could issue a decision to oblige the developer or the owner/manager of an existing building/complex of buildings to provide an assessment of the impact of the development or building(s) on the environment. A classification of developments was provided in the Order of the Polish Minister of Environmental Protection, Natural Resources and Forestry (EPNRF) on projects exceptionally harmful to the environment and human health, and the requirements for environmental impact assessment reports prepared by experts.[17] Pursuant to this Order, an EIA report was an expert opinion[18] prepared by an accredited practitioner selected by an authority from the list established and kept by the Minister of EPNRF (Article 68 paragraph 5 of the AEPM). In 1993, an "accredited practitioner selected by an authority" became "a licensed expert from the list of experts of the Minister of Environmental Protection, Natural Resources and Forestry."[19] The next amendment to the AEPM (of 29 August 1997[20]) extended the provisions on EIA experts, conferring on the Minister of EPNRF the powers to regulate the

15 A. Haładyj, *Ewolucja sytemu ocen oddziaływania na środowisko planowanych przedsięwzięć w polskim systemie prawnym – aspekty proceduralne*, [in:] L. Preisner (ed.), *Środowiskowe bariery i czynniki rozwoju gospodarczego Polski*, Kraków 2006, p. 93.

16 Act of 27 April 1989 amending the Act on Environmental Protection and Management, JLRP No. 26, item 139.

17 Official Gazette of the Republic of Poland 16, item 126.

18 Z. Bukowski, *Komentarz do art. 46*, [in:] J. Ciechanowicz-McLean, Z. Bukowski, B. Rakoczy, *Prawo ochrony środowiska – komentarz*, Warszawa 2008, p. 131.

19 Act of 3 April 1993 amending the Act on Environmental Protection and Management and the Water Law Act, JLRP of 1993 No. 40, item 183.

20 JLRP 133, item 855.

 DOI: 10.7206/kp.2080-1084.364

rules and procedures for their appointment;[21] under these regulations, the Minister of EPNRF was responsible for determining the qualifications of an expert, issuing a certificate of professional competence, and keeping a list of experts (Article 70a paragraphs 1 and 2 of the AEPM).[22]

The criteria that an applicant had to meet to be entered on the list of state-approved licensed experts included: a university degree, professional experience (at least five years of experience in the particular field), authorship or co-authorship of at least five environmental protection studies (in particular, EIA reports, reports of the effects of the regulations of a zoning plan on the environment; protection plans for nature reserves, national parks and landscape parks; reports and opinions for water law proceedings). Also, candidates who had completed at least five years of service in public administration in a managerial or independent position involving the review of those documents were deemed to meet the requirements for becoming an expert. Expert qualifications could be obtained in the following areas: water law proceedings, nature protection, preparation of reports of the effects of the regulations of a zoning plan on the environment, and preparation of EIA reports. The licensing procedure for EIA experts was initiated at the applicant's written request for registration on the list of licensed experts. The application had to be supported with additional documentation, including a statement that the applicant exercised full public rights and enjoyed unrestricted legal capacity, a copy of a university diploma, a work experience certificate, and a list of relevant studies authored or co-authored by the applicant, with an indication of the year of preparation and place of public access.

An official permission to act as an EIA expert was given to candidates who had passed the qualification procedure, i.e. those who met the formal criteria mentioned above and had passed a written and oral exam testing their ability to apply their expertise and knowledge of legal provisions in practice in the relevant field (to the extent necessary to perform the tasks of an expert). The qualification procedure was conducted by the Qualifying Commission for Licensing of Experts appointed by the Minister of EPNRF. The Commission consisted of specialists in the field of the examination or persons who had knowledge of the legal provisions in this field. The candidates who had passed the exam, were entered on the list of licensed experts kept by the Minister of EPNRF. When the candidate failed the exam and had their

21 The Order of the Minister of Environmental Protection, Natural Resources and Forestry of 16 September 1998 on experts from the list of the Minister of Environmental Protection, Natural Resources and Forestry, JLRP of 1998 No. 122, item 806.

22 As of 1 January 1998, some of the Minister's powers in this area were delegated provincial governors.

application rejected, they could apply again after two years from the date of the decision to refuse the issuance of the license.

It is worth emphasizing that the expert's license could be cancelled "when the Qualifying Commission found that the expert had not performed his tasks with due diligence or in accordance with the principles of modern technical knowledge and applicable regulations". The fact that the regulation in question was in force indicates that the legislator at that time understood that the participation of an EIA expert in the evidence-taking step substantially benefited the quality of evidence, even if there was a risk of bias related to the fact that the expert was being paid by the developer.[23]

The proposition that these provisions should be extended by introducing specific objective requirements regarding the scope of the expert's license and the criteria for registering EIA experts met with criticism in the doctrine of environmental law. Sommer pointed out that regulating in detail the requirements for an EIA expert seemed pointless, because "an expert is not to be authorized to independently perform certain professional activities that might cause danger to the public (as is the case with a construction license), but is to give opinions to be reviewed by a review body against the background of all evidence collected in the case."[24] In his opinion, an additional argument against defining the competences of EIA experts was that the qualifications required of experts were underspecified. Preparation of an EIA report involves an interdisciplinary and comprehensive analysis of the relationship between the projected human activity and the natural environment. This requires competence and practical experience in various fields of expertise, which means that the answer to the question of who can prepare EIA documentation (an EIA report) depends on the character of each particular case. Sommer also argued that since an EIA report must be based on knowledge of multiple scientific disciplines and practical skills, consideration should be given to diversifying the powers of experts in line with their scientific and practical competences. He also postulated that an EIA report should be prepared by a team of authors.[25]

Despite these reservations, it should be noted that, in that period, the person involved in preparing an EIA report had the formal status (see below) and was deemed as a person of public trust.[26] The recognition of EIA report authors as experts, meant they were granted specific procedural rights regulated by the provisions of the Code

---

23 G. Samitowski, *Wymogi w zakresie autorstwa raportu o oddziaływaniu przedsięwzięcia na środowisko – kontrowersje*, „Przegląd Prawa Publicznego" 2012, 11, p. 56.

24 J. Sommer, *Oceny...*, p. 10.

25 Ibidem, p. 13.

26 Ibidem.

 DOI: 10.7206/kp.2080-1084.364

of Administrative Procedure (CAP). The fact that EIA documentation was prepared by an expert signified that it could be treated as formal evidence in administrative proceedings, with the reservation that the body was not bound by the expert's opinion and assessed it freely based on the principles of knowledge, which meant that they could disqualify the opinion completely or partially and adopt a different stance based on their own knowledge and experience[27] (which follows from the CAP's guiding principle of objective truth). The status of an expert also guaranteed the independence of the EIA report author – the CAP provided that an expert could be challenged, and it set out the grounds for challenging an expert in relation to both administrative bodies and other participants in the proceedings. The doctrine approved of this, stating that "Just as an expert witness must not be dependent on the party ordering an EIA report, they must also be independent of public administration bodies."[28]

There is no doubt that the solutions adopted at that time, regarding the appointment of accredited EIA practitioners and, then, EIA experts, were intended to improve the quality of EIA documentation; even so, this control mechanism (typical of a centrally controlled system) was also criticized by the doctrine, which claimed that "the legislator was deceived by the false belief that the extension of administrative control would eliminate any irregularities."[29] This control mechanism was also critically evaluated as being inconsistent and imprecise.[30] In retrospect, however, one cannot overlook the fact that this system introduced extensive and varied criteria (discussed in Section 6 below) for primary administrative control of experts' competences. This system was not free from defects: an expert was entered on the ministerial list for an indefinite period (though the Minister was obliged to revoke the license of an expert who had been convicted, etc.). Experts were not required to improve their competences as part of lifelong training; the AEPM also failed to provide for the establishment (even voluntary establishment) of a trade self-government body of EIA experts, which would allow to scrutinize (but also defend) EIA report authors who have been charged by the Qualifying Commission appointed by the Minister with not having performed their tasks with due diligence or in accordance with the principles of modern technical knowledge or applicable regulations.

---

27 Ibidem, p. 11.

28 Ibidem, p. 13.

29 Ibidem, p. 11.

30 A. Juchnik and M. Pchałek, *Proces inwestycyjny przedsięwzięć liniowych na obszarach cennych przyrodniczo – kontekst prawny*, [in:] *Inwestycje na obszarach chronionych*, Słubice–Garbicz 2007.

Qualifications of EIA report authors in the years 2000–2016

The system of accreditation of EIA experts was abolished by the provisional Act of November 9, 2000 on providing information on the environment and environmental protection and on EIA reports, replaced, as of 1 October 2001, by the Act of 27 April 2001 on Environmental Protection Law.[31] Both of these acts assumed that it was the developer/applicant who was responsible for the format, structure, and content of the EIA report and for making available for consultation the data required by regulations.[32] Scientists specializing in environmental law were unanimous that the elimination of the requirement that EIA reports be prepared by experts meant that there were no longer any subjective restrictions as to who could be an EIA report author,[33] and so an EIA report was no longer an expert opinion, a view that has also become established (though slowly, as pointed out by A. Kosieradzka-Federczyk) in the judicial decisions of administrative courts.[34]

It was assumed in both case-law and the science of environmental law that the fact that the developer prepared the report (or hired an external consultant agency to prepare the report[35]) did not deprive the report of objectivity: "The person (or persons) preparing the report is (are) only required to provide their name and do not have to meet any other criteria, whether in terms of their professional competence or bias toward the applicant.[36] It was also recognized that an EIA report was a private, not an official, document,[37] prepared in connection with and for the purposes of an EIA. This meant that as a private document it did not enjoy the presumption of conformity of its content with the actual state of affairs as do official

31 This did not apply to cases in which a highway or an expressway was to be built in the vicinity of a cultural heritage site/building. In those cases environmental impact on the site/building was assessed by an expert selected from the list of experts kept by the Minister of Culture and Protection of National Heritage (A. Kosieradzka-Federczyk, *Raport o oddziaływaniu przedsięwzięcia na środowisko w orzecznictwie sądów administracyjnych*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, 1, pp. 41).

32 K. Nytko, *Oceny oddziaływania na środowisko*, Białystok 2007, p. 79.

33 J. Jendrośka, *Postępowanie w sprawie oceny oddziaływania na środowisko*, [in:] idem (ed.), *Ustawa – Prawo ochrony środowiska – komentarz*, Wrocław 2001, p. 251.

34 A. Kosieradzka-Federczyk, op. cit., p. 47.

35 J. Sommer, *Procesualne i materialnoprawne elementy decyzji o środowiskowych uwarunkowaniach*, [in:] H. Lisicka (ed.), *Prawo ochrony środowiska i prawo karne. Książka jubileuszowa z okazji 40-lecia pracy naukowej Prof. Wojciecha Radeckiego*, Wrocław 2008, p. 211.

36 Judgment of the Provincial Administrative Court in Warsaw of 9 July 2007, file ref. No. IV SA/Wa 15/07, CBOSA.

37 Judgment of the Supreme Administrative Court of March 21, 2017, II OSK 2316/15, LEX No. 2288614.

documents.[38] The developer was free to hire a consultant of their choice, as the law did not require an EIA report author to demonstrate specialist theoretical or practical knowledge.[39] The author's competence was verified on each occasion by the developer commissioning the report, who had to assess whether the candidate was capable of preparing a reliable and accurate report.[40] A view was even expressed in the literature of the subject that since the person preparing the report was only required to provide their name (as provided for in the Act on Providing Information on the Environment), virtually anyone could prepare an EIA report, including the developer themselves.[41]

With time, the new rules regarding EIA report authors began to be criticized in view of the fact that an EIA report "has special probative value as it provides a comprehensive assessment of a project and an analysis of the technological, legal, organizational and logistic aspects of its functioning in conjunction with one another"[42] and so the author of the report, to be able to prepare a document that is up to the mark, must have specialist knowledge in the field concerned.[43] "It is impossible not to notice a certain imbalance between the requirement that the report, as a basic document for the EIA review body, be prepared with due diligence, contain detailed and complicated technical data, and describe the complex impact of the project on the environment – and the fact that the law does not impose any requirements on those who prepare the report, leaving the choice of an author to the discretion of the developer.[44] It was also acknowledged in administrative case-law that the findings of an EIA report could, in principle, only be challenged by presenting an equally complete analysis of natural conditions[45] (a counter-report), prepared by **specialists who had equally deep expertise as the authors of the EIA report**

38 Judgment of the Provincial Administrative Court in Warsaw of 20 August 2014, VIII SA/Wa 549/14, CBOSA.

39 Judgment of the Provincial Administrative Court in Warsaw of 9 July 2007, IV SA/Wa 15/07.

40 A. Kosieradzka-Federczyk, op. cit., p. 48.

41 J. Śliwa, *Raport oddziaływania na środowisko jako dowód w postępowaniu w sprawie oceny oddziaływania na środowisko*, „Samorząd Terytorialny" 2015, 9, p. 33.

42 Judgment of the Supreme Administrative Court of 11 July 2013, II OSK 639/13, CBOSA.

43 Judgment of the Provincial Administrative Court in Warsaw of 9 July 2007, IV SA/Wa 15/0717.

44 A. Kosieradzka-Federczyk, op. cit., p. 48.

45 As recognized by the Supreme Administrative Court in its judgment of 18 March 2009, II OSK 383/08: "These reservations [about the report] cannot be groundless but should be supported, for example, by an **expert opinion** documenting the defects of the report" [emphasis mine].

(emphasis mine), whose conclusions would be in gross contradiction to those contained in the report submitted by the developer.[46]

However, the position of courts on the expertise of EIA report authors was also criticized – Samitowski argued that "The cited ruling unreasonably questions the applicant's right to decide on the content of the report. [...] Even if the author of the report and the applicant are not the same person/entity, the report still represents the applicant's position as a party to the proceedings. The author of the report does not enjoy any autonomy from the applicant under the proceedings."[47] The fact that the report was prepared (and financed) by the developer, who undoubtedly sought to demonstrate the legitimacy of implementing the proposed variant of the project, was viewed as compromising the objectivity of the report.[48]

The fact that there were no provisions guaranteeing the competences of authors of EIA reports affected the quality of EIA procedures, as did the position of case law that "a review body **is not obliged to examine and establish** [environmental – A.H.] **parameters on the basis of specialist knowledge when it has an opinion it deems reliable and complete** [emphasis mine]. Any allegation that such evidence is assessed only generally could be effective only if specific charges were made in the course of the proceedings as to the statements contained in the report, and the public administration body, based on such report, would not address the issues raised."[49] The belief that the EIA market would self-regulate through competitive mechanisms that would eliminate incompetent consultants,[50] and the desire to move away from central planning, together with the lack of appropriate requirements in Directive 85/337 (the predecessor of Directive 2011/92 applicable at the time) led to obvious distortions. Directive 85/337 did not contain provisions on assessing the adequacy of information provided by the developer, and not every Member State set up procedures to implement this stage of assessment;[51] over time, however, guidelines, instructions, and other reference materials addressed to both EIA report authors and environmental protection bodies, were published to ensure the effectiveness of the entire procedure. However, research conducted in Poland

46 Judgment of the Provincial Administrative Court in Olsztyn of November 7 2017, II SA/Ol 732/17, LEX No. 2407737; judgment of the Provincial Administrative Court in Poznań of 31 May 2017, II SA/Po 199/17, LEX No. 2330125, and judgment of the Supreme Administrative Court of 28 October 2016, II OSK 844/16, LEX No. 2169204.

47 G. Samitowski, op. cit., p. 52.

48 J. Śliwa, op. cit., p. 38.

49 Judgment of the Supreme Administrative Court of 6 February 2013, II OSK 1862/11, CBOSA.

50 J. Sommer, *Oceny*..., p. 11.

51 J. Śliwa, op. cit., p. 39.

shows that the EIA practitioners have very little knowledge of these documents,[52] which translates into a low efficiency of the EIA process.[53]

Competent experts in EU law

Due to the imperfections of EIA reports used in administrative proceedings, as discussed in numerous studies and publications, the European Commission proposed in 2014 an amendment to Directive 2011/92, which introduced (in Article 5 paragraph 3 point a) the requirement that EIA authors be "competent experts". This very lenient provision was a give and take between the proposals of EU bodies involved in the review of existing EIA directives[54] and the positions of the individual Member States, such as Denmark, which opposed the implementation of provisions on accreditation or certification of EIA report authors.[55] Ultimately, it was left to the discretion of the Member States to define what they understood by "EIA report quality", "competence" and "competent expert", taking into account the specific national situation and experiences in this field.[56]

Competent experts – the national regulation

The provisions of the amended Directive (2014/52) were implemented in Poland by the Act of 9 October 2015 amending the Act on Providing Information on the Environment [...],[57] which came into effect as of 1 January 2017. In this Act the legislator laid down the following criteria for EIA practitioners:

---

52 K. Tokarczyk-Dorociak, Ł. Szkudlarek, Sz. Szewrański J. Kazak, A. Haładyj, G. Chrobak, J. van Hoof, *On the Usefulness of Guidelines and Instructions for Environmental Assessment – A qualitative study of the helpfulness perceived by Polish practitioners*, „Impact Assessment and Project Appraisal" 2019, 37(2), pp. 150–164.

53 K. Tokarczyk-Dorociak, J. Kazak, A. Haładyj, Sz. Szewrański, M. Świąder, *Effectiveness of strategic environmental assessment in Poland*, „Impact Assessment and Project Appraisal" 2019, 37(3–4), pp. 279–291.

54 European Commission, DG ENV Study concerning the report on the application and effectiveness of the EIA Directive Final report June 2009, https://ec.europa.eu/environment/archives/eia/pdf/eia_study_june_09.pdf and a previous opinion of Cometee of the regions on Improving The EIA And SEA Directive, 2010, ENVE-V-001, https://ec.europa.eu/environment/eia/pdf/cdr38-2010%20fin%20c.pdf

55 L. Kørnøv, U. Kjellerup, *Observations and reflections upon the Danish transposition of the EIA Directive: Focus on quality and competence enhancement*, „UVP Report" 2016, 3(16), p. 131.

56 Ibidem.

57 JLRP of 2015, item 1936.

Article 74a paragraph 2. "An author of SEA report, an EIA report or a Natura 2000 site impact assessment report – and when the reports are prepared by a team of authors, the leader of the team – should be a person who:
1) has completed, under the provisions on higher education, a first-cycle, a second-cycle, or a long-cycle higher education programme in:
   a) chemical sciences,
   b) biological and earth sciences,
   c) technical sciences in the fields of biotechnology, mining and engineering geology, and environmental engineering,
   d) agricultural, forestry and veterinary sciences;
2) has completed, under the provisions on higher education, a first-cycle, a second-cycle, or a long-cycle university programme and has at least a five-year experience in working in teams preparing SEA/EIA reports, or has participated in the preparation of at least five SEA/EIA reports."

Article 74a paragraph 3. The declaration referred to in Article 51 paragraph 2 point 1f and Article 66 paragraph 1 point 19a shall be made under penalty of perjury. The party submitting the declaration shall include the following clause therein: 'I am aware of criminal liability for making false statements'. This clause shall replace the authority's instruction about criminal liability for making false statements."

Pursuant to these provisions, the competences of experts were established solely on the basis of their education in relevant fields or on the basis of a mixed criterion of education and experience: at least an undergraduate degree in any field of study and five years of professional experience in preparing EIA/SEA reports, or authorship or co-authorship of at least five EIA/SEA reports (not necessarily as a team leader).

The amended act of 19 July 2019 maintained these provisions, but reduced the length of experience required from 5 to 3 years. The legislator provided no grounds for making this change, in the substantiation to the proposed amendment. At the same time the latest case-law acknowledges that since the expert must show demonstrable competence, "an environmental impact assessment report constitutes an expert opinion."[58]

To recapitulate, the above provisions on the qualifications required of EIA practitioners are not cumulative (e.g. team leader: a degree in the field and experience in preparing EIA reports; other co-authors: at least one of the criteria: a degree in the

[58] Judgment of the Provincial Administrative Court in Gliwice of 30 May 2018, II SA/Gl 158/18, CBOSA.

 DOI: 10.7206/kp.2080-1084.364

field plus experience or a degree plus experience). Also they did not require EIA practitioners to document their qualifications, but only to make a declaration under penalty of perjury. The declaration has replaced the need to document one's education and experience, and is now the only and sufficient document confirming an EIA practitioner's competence until this competence is questioned in criminal proceedings. In my opinion, entities engaging an outside consultant to prepare an EIA report, can, under current legislation, request them to provide a copy of their qualifications records – this applies in particular to public finance entities formulating tender specifications.

Discussion

As emphasized in the preamble to Directive 2014/52/EU (recital 33): "Experts involved in the preparation of environmental impact assessment reports should be qualified and competent. Sufficient expertise, in the relevant field of the project concerned, is required for the purpose of its examination by the competent authorities in order to ensure that the information provided by the developer is complete and of a high level of quality." The Directive, however, does not specify who and on what terms should evaluate the expert's qualifications and competence. Because the Commission does not provide any guidelines in this regard, Member States can use a number of different solutions to identify whether an EIA report authors is an expert, i.e. "whether they have the required competences and qualifications". Firstly, the attribute of "expert knowledge" can be associated with professional qualifications as documented by a degree in a relevant field (1). Secondly, an accreditation system can be introduced, in which practitioners are authorized to perform specific activities, most often to prepare an EIA report or to monitor/review it (2).[59] The additional requirements laid down in recital 33 – "in order to ensure that the information provided by the developer is complete and of a high level of quality" – may be associated with professional competence (work experience, professionalism, no criminal record, liability insurance[60]) (3), and independence (no relationship with the developer or the project) (4).

---

59 J. Glasson, R. Therivel, *Introduction to Environmental Impact Assessment*, 5th edition, New York 2019, p. 65.

60 Examples cited from J. Góralski, *Uprawnienia zawodowe niezależnego eksperta w prawie budowlanym w świetle wytycznych prawa unijnego*, [in:] Z. Charnik, J. Posłuszny, L. Żukowski (eds.), *Internacjonalizacja administracji publicznej*, Warszawa 2015, p. 248.

The Polish legislator uses criterion 1, i.e. education (Article 74a paragraph 2 point 1 of the Act on Providing Information on the Environment...), or criterion 1 in conjunction with criterion 3 (a higher education degree and experience in preparing reports), with the proviso that the requirement of professional competence is limited in terms of length of experience (3 years) and number of produced EIA/SEA reports (5 reports). Other possible requirements (described below) are omitted.

Criterion 2, i.e. accreditation, as mentioned before, was in force in Poland from the 1970s until the entry into force of the provisional Act of 2000. When generalizing the measures presented in Section 2 of this study, it should be indicated that the entity granting accreditation may be a public administration body or a committee acting on its behalf (Polish case) but it can also be an independent certification agency (e.g. IEMA in the UK[61]). In an accreditation system, qualifications are usually verified based on documented experience and/or an examination.[62]

In place of an accreditation (and control) system, some countries make a wider use of guidelines and handbooks and put emphasis on continuous improvement of the qualifications of EIA report authors – in Denmark, an EIA training centre has been created at the Danish Centre for Environmental Assessment.[63]

Countries which use the criterion of professional competence, apart from the requirement of professionalism, may require EIA practitioners to document their experience in conducting cases for specific amounts of payment, past orders for EIA reports from specific groups of entities (e.g. public administration), experience in producing studies regarding a given field (e.g. nuclear power), or to produce a certificate of liability insurance. These requirements can be either part of the legislation regarding the system of verification of expert qualifications, or an element of the self-regulation of the market postulated by Sommer, when they are used as criteria for the selection of EIA report authors by private entities or in the preparation of tender specifications. Professional competence and professionalism could also be examined through criteria such as the lack of criminal record for specific offences, or the possession of full public rights, etc.

The criterion of competence can also be applied by verifying data on previous EIA reports produced by the practitioner. In Poland, an entity responsible for conducting an EIA is obliged to send information on the EIA to the database maintained by the General Directorate for Environmental Protection. Jendrośka argues

61 T.B. Fischer, R. Therivel, A. Bond, J. Fothergill, R. Marshall, *The revised EIA Directive – possible implications for practice in England*, „UVP Report" 2016, 30(2), p. 106, cf. also https://www.iema.net/about-us/

62 A. Juchnik, M. Pchałek, op. cit.

63 L. Kørnøv, U. Kjellerup, op. cit., p. 132.

 DOI: 10.7206/kp.2080-1084.364

that the verification of data collection does not have to be regulated by law, e.g. in the United Kingdom this is done by the EIA Centre in Manchester.[64] At the same time, the results of an audit conducted by the Polish Supreme Audit Office (NIK) (which regarded strategic assessments, but also revealed a more general tendency) showed that in the investigated period (from 1 June 2015 to 16 September 2015) only one in ten audited local government bodies met this obligation properly and in full.[65]

The criterion of independence (4) ceased to be applied in the Polish legal system when the provisions on licensed EIA experts were repealed. With the loss of the procedural institution of challenging an expert and in connection with the fact that the developer has been made responsible for the choice of the author of an EIA report, as well as for its content, any idea of independence of the EIA practitioner from the developer has become a fiction. This affects (although, obviously, not in every case) the quality of EIA reports and their content – especially in the context of choosing the preferred variant, describing the scope of impacts, the method of preparing the assessment, or choosing the appropriate technology. EIA practitioners are dependent on developers financially. This means that when a decision on environmental conditions is not granted, they could lose their remuneration or face contractual penalties. Often contracts with EIA report authors are not contracts for specific work signed for the preparation of the report – instead of being hired under a diligent performance contract, EIA practitioners provide comprehensive consultancy services to developers during the entire process of applying for a decision on environmental conditions, under a result contract.

Interestingly, administrative court judgments also propose ways of preventing the shortcomings of the administrative law measures used in this area, recognizing that "The reliability of the opinion by a practitioner who is not an expert appointed by the body, is also enforced under penal law. **A person with special knowledge who prepares expert opinions for commercial purposes is subject to criminal liability for their opinion, regardless of whether they have been commissioned as an expert or a private practitioner** [emphasis mine]. In the latter case, they may be liable for fraud, under Art. 286 paragraph 1 of the Penal Code, for misleading the proceeding body as to the scope of the expert opinion and extorting undue payment for it, and in the event when the accused, not acting as an expert, provides false testimony to serve as evidence in proceedings pending pursuant to the Act, they

64 J. Jendrośka, *Oceny...*, p. 79.

65 Information on the results of the audit "Przeprowadzanie strategicznych ocen oddziaływania na środowisko przez organy jednostek samorządu terytorialnego" ("Strategic environmental impact assessments by local government bodies"), NIK, Warszawa 2016, KSI.410.003.00.2015 Ref. No. 207/2015/P/15/052/KSI, p. 7.

may be liable under Art. 233 paragraph 1 of the Penal Code."[66] This does not change the fact that Polish criminal justice system is weak when it comes to addressing environmental matters and does little to enhance the effectiveness of the EIA process.

Conclusions

To recapitulate, it should be pointed out that the solution which came into effect as of 1 January 2017 was preceded by a draft amendment to the Act on Providing Information on the Environment [...], which introduced ambitious requirements for the accreditation of future EIA practitioners. The draft amendment prepared by the General Directorate for Environmental Protection stipulated that only a candidate who had full legal capacity and at least three years of documented professional experience and who had authored or co-authored five EIA documents, had passed an examination before the qualifying commission, had submitted a statement of no criminal record for crimes specified in the draft, and had paid the registration fee could become an EIA practitioner. The draft assumed that the title of practitioner would remain valid for 5 years; a person who wished to renew it, would have to go through the qualification procedure once again. It would also be possible to rescind the title if the authorised body (EIA practitioner) failed to perform their work with due diligence or in accordance with the principles of modern technical knowledge or applicable regulations. Of note, the draft provided that a motion to the General Director for Environmental Protection for reprimanding an authorised body (an EIA practitioner) or rescinding their title could be submitted by the body conducting the proceedings in which the documents prepared by that entity were used.[67] What was fundamental for the effects of this draft regulation was the assumption that the title would have the nature of a non-mandatory certification of qualifications, i.e., the title would not be a prerequisite for preparing the environmental documentation specified in the draft, but would serve as a guide for developers in choosing consultants to prepare such documentation. The doctrine emphasized that this solution would create an incentive for EIA practitioners to raise their qualifications (in order to obtain the title) and to provide quality services (in order to maintain it), while not imposing any restrictions on their access to the EIA market.[68]

66 Judgment of the Provincial Administrative Court of 31 January 2013, IV SA/Po 505/12, CBOSA.

67 G. Samitowski, op. cit., p. 56.

68 Ibidem, p. 57.

 DOI: 10.7206/kp.2080-1084.364

It is regrettable that the proposed measures have not been adopted, as they would have built a bridge between the solutions used over three decades ago with the contemporary requirements arising from EU regulation. At the same time, however, it should be emphasized that surveys conducted in 2015[69] and 2017[70] in selected EU Member and Candidate States indicate that there has been no significant change in the area of qualification and competence of EIA experts. Nevertheless, criticism of the lack of independence of EIA experts is still widespread. This weakness should be eliminated, i.e. changes to the rules which make experts dependent on developers are still needed. Additionally, in some cases, political pressures should be removed from EIA processes – the assessment should only be informed by scientific expertise.[71]

It should be stated that the measures introduced recently in the Polish law constitute an absolute minimum, and, though they are in accordance with the letter of the EU law, they do not implement the EIA Directive correctly, as they fail to ensure the achievement of the Directive's goal to improve the quality of EIA.

69 Regulation of EIA Procedures: A survey carried out in Member States on how the national laws comply with the requirements of the revised EIA Directive, Justice and the Environment 2016. The questionnaire was addressed to the competent authorities who carry out the EIA process, to the representatives of the public concerned and selected practitioners who prepare EIA documentation. The wording of the questions was identical for all target groups. Replies were received from respondents from Austria, Czech Republic, Estonia, Slovenia and Slovakia. http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2016/EIA_Directive_general_summary.pdf

70 New Directive, Better EIAs? Survey on the Impact of Transposition of the Directive 2014/92/EU in Selected EU Member States Summary Report 2017, Justice and the Environment 2017, http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/EIA_survey_2017_summary_report_final.pdf

71 Ibidem, p. 2.