Common Position on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment – COM(2012) 628 final of 26.10.2012

By European Historic Houses (EHH), European Landowners' Organization (ELO), European Property Federation (EPF), The European Group of Valuers' Associations (TEGoVA) and Union Internationale de la Propriété Immobilière (UIPI)
(description of each in Annex with European Commission Register of Interest Representatives identification number)

11 February 2013

SUMMARY

One of the cornerstones of the European project is to provide a framework for a sustainable and competitive European economy. Nowhere are these two key elements of EU policy more important and intertwined than in the Environmental Impact Assessment Directive. The Proposal for an amending Directive is a great opportunity to further this. Unfortunately, as the Proposal currently stands, both the environment and the economy will fall victim to legislation that gives EU imprimatur to failed national bureaucratic procedures, limits the capacity of local authorities to adapt their decisions to individual cases and local circumstance, and fosters litigation.

We refer in particular to:

- a new list of developer reporting obligations every detail of which is to be covered in all cases, even when there is no relevance to the project at hand;
- deadlines for competent authority response to developers and for conclusion of EIAs that can put the whole project and its financing on hold for up to a year;
- obligations on developers to assess all alternatives to their projects and not just those relative to the significant impacts, entailing a process of never-ending impact assessment of limitless alternatives;
- developers and competent authorities prohibited from using qualified in-house environmental assessors simply because they are not accredited;
- in the event of development consent for a project with significant adverse environmental effects, imposition of monitoring of adverse effects in all cases without exception and with no discretion to competent authorities even when the adverse effects are not susceptible to mitigation.

DETAILED OBSERVATIONS

Article 1, paragraph 4(a) amending EIAD Article 4, paragraphs 3 and 4

Commission Proposal	Suggested amendment
3. For projects listed in Annex II, the developer shall provide information on the characteristics of the project, its potential impact on the environment and the measures envisaged in order to avoid and reduce significant effects. The detailed list of information to be provided is specified in Annex II.A.	3. For projects listed in Annex II, the developer shall provide information on the characteristics of the project, its potential impact on the environment and the measures envisaged in order to avoid and reduce significant effects ***by taking into account the relevant parts of*** ~~. T~~ ***t***he detailed list of information ~~to be provided is~~ specified in Annex II.A.
4. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the competent authority shall take account of selection criteria related to the characteristics and location of the project and its potential impact on the environment. The detailed list of selection criteria to be used is specified in Annex III.	4. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the competent authority shall take account of ***the relevant*** selection criteria related to the characteristics and location of the project and its potential impact on the environment. The detailed list of selection criteria to be ~~used~~ ***taken into account*** is specified in Annex III.

Justification

There are many cases in which not all the information listed in Annex II.A is relevant to a particular project. There is no reason to impose the complete list on the developer in those cases. The same applies for the competent authority and Annex III. This is the logic of the existing Directive, and our suggested amendments simply reinstate vocabulary judiciously used in the existing Directive:

Directive 2011/92/EU, Article 4(3)

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the ***relevant*** selection criteria set out in Annex III shall be ***taken into account***.

Article 1, paragraph 4(b) adding paragraph 6 to EIAD Article 4

Commission Proposal	Suggested amendment
6. The competent authority shall make its decision pursuant to paragraph 2 within three months from the request for development consent and provided that the developer has submitted all the requisite information.	6. The competent authority shall make its decision pursuant to paragraph 2 within three months from the request for development consent and provided that the developer has submitted all the requisite information.

Depending on the nature, complexity, location and size of the proposed project, the competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its determination is expected.	Depending on the nature, complexity, location and size of the proposed project, the competent authority may ***exceptionally*** extend that deadline by ~~a further 3~~ ***one*** month~~s~~; in that case, the competent authority shall inform the developer ***in writing*** of the reasons justifying the extension and of the date when its determination is expected.

Justification

Exceptional extension by ***one*** month

Under the Commission's Proposal, competent authorities will have complete discretion to hold up projects for ***six months*** – half a year during which the entire project including the financing aspects are kept on hold. This is more than enough to kill many projects.

In the UK, the deadline is ***three weeks***. EU law should contribute to the efficient organisation of national and local administrations, not serve to legitimise unnecessary bureaucracy.

Above all, EU policy should be coherent. Environmental policy should contribute to *and benefit from* EU Economic Governance's modernisation of public administration and not the opposite. The EIAD concerns environmental protection policy which is deeply intertwined with national administrative procedures. The modernising of national public administration is one of the central pillars of EU Economic Governance, crucial to improving the performance of the European economy. The Commission Annual Growth Surveys of 2012 and 2013 place heavy emphasis on "reducing unnecessary regulations and permits, and introducing simpler and quicker procedures" (AGS 2012, p. 13, 1st indent) and "ensuring that exchanges between administrations and enterprises as well as citizens can be done digitally, in order to increase administrative efficiency, transparency and the quality of service." (2nd indent; similar wording on both counts in AGS 2013, pp. 12-13).

This is a singular opportunity to further Economic Governance via the revision of EIAD by promoting the modernisation of development consent procedures. The Commission may have thought that by placing a time cap – no matter how high – it was improving on the existing Directive that has no cap at all. On the contrary, we believe that by laying down in law such lengthy caps, the Directive would give EU imprimatur to the most slovenly administrative cultures, to the detriment of both business and the environment.

NB: This situation is rendered even worse in the context of the Directive's cumulative deadlines, the even less justifiable deadlines set at EIA completion stage adding another six months to the process. *See comment below on Article 1, paragraph 8 (new Article 8(3)).*

The competent authority's justification of the extension ***in writing***

In certain new member states, developers are summoned by the authorities and informed orally of their fate, the authorities' minutes of these meetings being unavailable. This provision in the Directive would contribute to good governance in parts of the Union.

Article 1, paragraph 5, replacing EIAD Article 5 paragraphs 1, 2 and 3 by:

Commission Proposal	Suggested amendment
1. Where an environmental impact assessment must be carried out in accordance with Articles 5 to 10, the developer shall prepare an environmental report. The environmental report shall be based on the determination pursuant to paragraph 2 of this Article and include the information that may reasonably be required for making informed decisions on the environmental impacts of the proposed project, taking into account current knowledge and methods of assessment, the characteristics, technical capacity and location of the project, the characteristics of the potential impact, alternatives to the proposed project and the extent to which certain matters (including the evaluation of alternatives) are more appropriately assessed at different levels including the planning level, or on the basis of other assessment requirements. The detailed list of information to be provided in the environmental report is specified in Annex IV.	1. Where an environmental impact assessment must be carried out in accordance with Articles 5 to 10, the developer shall prepare an environmental report. The environmental report shall be based on the determination pursuant to paragraph 2 of this Article and include the information that may reasonably be required for making informed decisions on the environmental impacts of the proposed project, taking into account current knowledge and methods of assessment, the characteristics, technical capacity and location of the project, the characteristics of the potential impact, alternatives to the proposed project ***relative to the significant impacts*** and the extent to which certain matters (including the evaluation of alternatives) are more appropriately assessed at different levels including the planning level, or on the basis of other assessment requirements. The detailed list of information to be provided in the environmental report is specified in Annex IV.
2. The competent authority, after having consulted the authorities referred to in Article 6(1) and the developer, shall determine the scope and level of detail of the information to be included by the developer in the environmental report, in accordance with paragraph 1 of this Article. In particular, it shall determine: (a) the decisions and opinions to be obtained; (b) the authorities and the public likely to be concerned; (c) the individual stages of the procedure and their duration; (d) reasonable alternatives relevant to the proposed project and its specific characteristics; (e) the environmental features referred to in Article 3 likely to be significantly affected; (f) the information to be submitted relevant to the specific characteristics of a particular project or type of project; (g) the information and knowledge available and obtained at other levels of decision-	2. The competent authority, after having consulted the authorities referred to in Article 6(1) and the developer, shall determine the scope and level of detail of the information to be included by the developer in the environmental report, in accordance with paragraph 1 of this Article. In particular, it shall determine: (a) the decisions and opinions to be obtained; (b) the authorities and the public likely to be concerned; (c) the individual stages of the procedure and their duration; (d) reasonable alternatives relevant to the proposed project and its specific characteristics; (e) the environmental features referred to in Article 3 likely to be significantly affected; (f) the information to be submitted relevant to the specific characteristics of a particular project or type of project; (g) the information and knowledge available and obtained at other levels of decision-

making or through other Union legislation, and the methods of assessment to be used. The competent authority may also seek assistance from accredited and technically competent experts referred to in paragraph 3 of this Article. Subsequent requests to the developer for additional information may only be made if these are justified by new circumstances and duly explained by the competent authority.	making or through other Union legislation, and the methods of assessment to be used. The competent authority may also seek assistance from ***qualified and/or accredited*** ~~accredited and technically competent~~ experts referred to in paragraph 3 of this Article. Subsequent requests to the developer for additional information may only be made if these are justified by new circumstances and duly explained by the competent authority.
3. To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1): (a) the developer shall ensure that the environmental report is prepared by accredited and technically competent experts or (b) the competent authority shall ensure that the environmental report is verified by accredited and technically competent experts and/or committees of national experts.	3. To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1): (a) the developer shall ensure that the environmental report is prepared by ***qualified and/or accredited*** ~~accredited and technically competent~~ experts or (b) the competent authority shall ensure that the environmental report is verified by ***qualified and/or accredited*** ~~accredited and technically competent~~ experts and/or committees of national experts.
Where accredited and technically competent experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report. The detailed arrangements for the use and selection of accredited and technically competent experts (for example qualifications required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States."	Where ***qualified and/or accredited*** ~~accredited and technically competent~~ experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report. The detailed arrangements for the use and selection of ***qualified and/or accredited*** ~~accredited and technically competent~~ experts (for example qualifications required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States."

Justification

1.: Developer assessment of project alternatives ***relative to the significant impacts***
The alternatives to the project to be presented by the developer should only be relative to the significant impacts of the project, not in general to the whole project itself.

We believe that the approach proposed by the Commission will deflect the focus from the actual building and the significant impacts which are the ones all these environmental management rules and guidance should focus on. Any change to the environment has impacts. We believe that this approach will lead to a never-ending impact assessment process because the alternatives can be limitless.

For example, shopping centre developers do a lot of concept design and choose between several sites, but it is not reasonable to assess them all from a complete environmental perspective. This would take time and cost money and in the end does not really focus on what is important from an environmental perspective *which is to try to minimise and compensate for the main and significant changes* – not all changes, since it is impossible to account for some things, for instance the landscape.

Furthermore, the proposed obligation under the Directive to review all alternatives not just for design options but also for site options, would vastly increase opportunities for challenge in the Courts of the more litigation-prone member states. Yet helping to obviate litigation should be a key part of the EU competitiveness agenda.

2. & 3.: Use of ***qualified and/or accredited*** experts by the developer and the competent authority

Some developers and competent authorities have a large in-house capacity of staff competent for environmental reporting who are not necessarily accredited. Imposing accredited experts in all cases nurtures various perverse economic effects such as fostering accreditation industry growth and inciting consultants to over-advise developer or competent authority clients on what ought to be scoped in, and how much detail should be included, rather than taking a pragmatic view of what is necessary to make an informed decision.

Existing EU energy efficiency law wisely provides for this flexibility:

Directive 2010/31/EU on the energy performance of buildings, Article 17

> "Member States shall ensure that the energy performance certification of buildings and the inspection of heating systems and air-conditioning systems are carried out in an independent manner by qualified ***and/or*** accredited experts, whether operating in a self-employed capacity or employed by public bodies or private enterprises."

Directive 2012/27/EU on energy efficiency, Article 8

> "1. Member States shall promote the availability to all final customers of high quality energy audits which are cost-effective and:
>
> a) carried out in an independent manner by qualified ***and/or*** accredited experts according to qualification criteria; or
>
> b) implemented and supervised by independent authorities under national legislation."

The body of EU law should be consistent and coherent and none of its components should be an obstacle to cost-effective solutions.

Article 1, paragraph 8 replacing EIAD Article 8

Commission Proposal	Suggested amendment
…	…
2. If the consultations and the information gathered pursuant to Articles 5, 6 and 7 conclude that a project will have significant adverse environmental effects, the competent authority, as early as possible and in close cooperation with the authorities referred to in Article 6(1) and the developer, shall consider whether the environmental report referred to in Article 5(1) should be revised and the project modified to avoid or reduce these adverse effects and whether additional mitigation or compensation measures are needed.	2. If the consultations and the information gathered pursuant to Articles 5, 6 and 7 conclude that a project will have significant adverse environmental effects, the competent authority, as early as possible and in close cooperation with the authorities referred to in Article 6(1) and the developer, shall consider whether the environmental report referred to in Article 5(1) should be revised and the project modified to avoid or reduce these adverse effects and whether additional mitigation or compensation measures are needed.
If the competent authority decides to grant development consent, it shall ensure that the development consent includes measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects.	If the competent authority decides to grant development consent, it shall ~~ensure that~~ ***consider whether*** the development consent ***should*** include~~s~~ measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects.
The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the proposed project and the significance of its environmental effects.	The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the proposed project and the significance of its environmental effects.
Existing monitoring arrangements resulting from other Union legislation may be used if appropriate.	Existing monitoring arrangements resulting from other Union legislation may be used if appropriate.
3. When all necessary information gathered pursuant to Articles 5, 6 and 7 has been provided to the competent authority, including, where relevant, specific assessments required under other Union legislation, and the consultations referred to in Articles 6 and 7 have been completed, the competent authority shall conclude its environmental impact assessment of the project within three months.	3. When all necessary information gathered pursuant to Articles 5, 6 and 7 has been provided to the competent authority, including, where relevant, specific assessments required under other Union legislation, and the consultations referred to in Articles 6 and 7 have been completed, the competent authority shall conclude its environmental impact assessment of the project within ~~three~~ ***one*** month~~s~~.
Depending on the nature, complexity, location and size of the proposed project, the	Depending on the nature, complexity, location and size of the proposed project, the

competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its decision is expected.	competent authority may ***exceptionally*** extend that deadline by a further ~~3~~ months~~;~~ in that case, the competent authority shall inform the developer ***in writing*** of the reasons justifying the extension and of the date when its decision is expected.

Justification

2., 2nd par.: In the event of development consent for a project with significant adverse environmental effects, ***consideration of monitoring according to case***

Monitoring should not be imposed across the board by EU law, as it is very necessary in many cases but not all, and competent authorities should retain the power to exercise flexibility where warranted by the specific local situation.

For example, if deforestation has been authorised in order to create housing, there may be significant adverse environmental effects, but the decision is made and the housing built. There is therefore no practical use in monitoring this irreversible situation.

3., paras. 1 & 2: One month, and exceptionally one more month, for the competent authority to conclude the EIA

This is to be considered in the context of all the Directive's cumulative deadlines. The dangers for projects and for their financing that we highlighted [Article 1, paragraph 4(b)] concerning the earlier stages of the process are worsened by the deadlines set at EIA completion stage which now add six months to the previous six months – one year in which the whole project and its financial engineering are kept on hold!

Such immense delays are even less justified at this stage at which the competent authority has already been through the whole process. In some countries, the time needed by the competent authority at this stage is *ten days*. EU law should not serve to legitimise the most damaging bureaucratic delays.

3., par. 2: The competent authority's justification of the extension ***in writing***

Our previous explanation [Article 1, paragraph 4(b)] of the usefulness of this amendment to counter bad governance by authorities in certain new member states is equally valid here.

ANNEX

About the Parties to the Common Position

Name followed by Commission Register of Interest Representatives identification number

European Historic Houses Association: 917571610585-76
An umbrella organisation for national historic houses associations, promoting the interests of Europe's privately-owned historic houses, parks and gardens and their contents. The organisation promotes European cooperation in the conservation of historic houses which are most of the time SME's. The Association brings together 18 national members and represents more than 50,000 historic houses in Europe and supports actively its members' interests on several European issues such as culture and education, VAT, energy and environment, tourism, and security. www.europeanhistorichouses.org

European Landowners' Organization 36063991244-88
Created in 1972, ELO promotes a prosperous and attractive European Countryside. ELO is a unique federation of national associations from the EU27 and beyond which represents the interests of landowners, land managers, rural entrepreneurs and family businesses. It targets its actions on land use and housing, via seven major areas of European importance: environment, renewable energy, agriculture and rural development, status of private property and companies, forest, enlargement and trade. www.elo.org

European Property Federation 36120303854-92
EPF represents all aspects of property ownership and investment: residential landlords, housing companies, commercial property investment and development companies, shopping centres and the property interests of the institutional investors (banks, insurance companies, pension funds). Its members own property assets valued at € 1.5 trillion, providing and managing buildings for the residential or service and industry tenants that occupy them. www.epf-fepi.com

The European Group of Valuers' Associations
TEGoVA is the European umbrella organisation of national valuers' associations, covering 48 professional bodies from 28 countries comprising specialist consultancies, major private sector companies and government departments both local and national. Its main objectives are the creation and spreading of harmonised standards for valuation practice, for education and qualification as well as for corporate governance and for ethics for valuers. It speaks with a common voice on valuation to European legislators and policy makers. www.tegova.org

Union Internationale de la Propriété Immobilière (UIPI) 57946843667-42
UIPI is an international not-for-profit association founded in 1923 that defends the interests of private individual property owners in Europe. Through its 27 national member organisations, the UIPI represents about 5 million private homeowners & landlords, owning 15 to 20 million dwellings in 25 European countries. The UIPI is involved in many issues, including general housing; taxation and inheritance concerns; technical matters and new regulations such as energy saving in buildings; the private rented agenda; as well as universal consumer rights and social responsibilities. The UIPI also supports property restitution and defends the fundamental human right to own property. www.uipi.com