

ECOWAS Directive on Gender Assessments in Energy Projects

GWNET/CESC Gender - Energy Policy Webinar

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Introduction to Sullivan & Cromwell LLP

- Global law firm with more than 875 lawyers in 13 offices globally, headquartered in New York
- Project development & finance practice focuses on energy and infrastructure projects, including renewable energy, oil & gas/LNG, mining, and transportation
 - Focus on large projects in developing countries with complex financings
 - Focus on representing project developers as well as lenders and governments
- Have been assisting ECREEE pro bono in the drafting of the Directive and Model Regulation and its implementation

Overview of the Directive

- Requires Member States to adopt appropriate domestic law to ensure that a gender assessment and gender management plan are prepared before approval to develop an energy project is granted
 - Member States have flexibility on how the domestic law is adopted and how approvals of the assessments and management plans are granted
 - Member States must comply within two years

Objectives of the Directive

1. Ensure that the interests of women and men are taken into account in the development of projects
2. Recognize and mitigate to the extent feasible any potential adverse and discriminatory impacts on women or men deriving from projects
3. Improve transparency in planning and implementation processes to promote and increase the participation and capacity of women and men
4. Encourage the development of harmonized policy and legal regulatory frameworks in each Member State and for ECOWAS institutions

Precedents

- No directly relevant legal precedents we were aware of
- Consulted gender policy requirements of some development banks/aid organizations
- Used European Union directives on environmental impact assessment as a precedent, along with ECOWAS directives, regulations and policies on natural resources, energy and gender

Legal Basis for the Directive

- Regional and international conventions and policies commit Member States to preventing gender discrimination and promoting sustainable development and the equitable distribution of economic gains and access to energy, including:
 - ECOWAS Treaty
 - United Nations Declaration of Human Rights of 1948
 - African Charter on Human and Peoples' Rights of 1981
 - United Nations Nairobi Forward Looking Strategies of 1985
 - Convention of 1979 and Optional Protocol of 1999 on the Elimination of All Forms of Discrimination against Women
 - Protocol to the African Charter on the Rights of Women in Africa of 2003
 - African Union Agenda 2063 Framework of 2015

Directive vs. Regulation

- *Directive*: Directives are binding on Member States as to the result, but leave the Member States free to choose the means of achieving that result (e.g., how to implement the directive and how to enforce it domestically)
- *Regulation*: Under the ECOWAS Treaty, Regulations have general application and all their provisions are enforceable and directly applicable in the Member States

Scope

- The Directive is designed to apply only to energy projects
- The Directive covers requirements for Gender Assessments, mitigation of Gendered Impacts and related reporting requirements
- However, Member States can expand it and choose:
 1. To apply the Directive more broadly to other infrastructure or development projects
 2. To require other measures to promote gender equality, such as affirmative action procurement or education and training support

Requirement for Gender Assessment and Gender Management Plan

Article 3

- States shall adopt legislation to ensure developers conduct a Gender Assessment and prepare a Gender Management Plan before receiving project approval on Projects likely to have significant Gendered Impact
- States must establish criteria for determining which Projects need an Assessment, such as:
 - the number of people:
 - whose land is taken or repurposed;
 - whose livelihood is altered;
 - who will be employed by the Project; and/or
 - who stand to gain access to energy products and services; and/or
 - the cost or size of the Project

Gender Assessment Reports

Article 5

- Member States shall adopt legislation creating procedures for conducting Gender Assessments and reporting on the results
- The Directive specifies the minimum information that should be included in such assessments and reports to ensure that they effectively identify a Project's Gendered Impact

Gender Management Plans

Article 6

- Member States shall establish procedures for Developers to prepare Gender Management Plans that describe how the Developer will avoid, reduce and remedy a Project's significant adverse Gendered Impacts
- Developers are required to mitigate a Project's impact to the extent feasible
- States shall also establish procedures for the government's review of the Plans that Developers submit

Gender Performance Monitoring Reports

Article 7

- Member States shall require Developers to prepare Gender Performance Monitoring Reports to maintain continued permission to develop their Project
- The reports shall address, among other subjects, material changes in the Project's Gendered Impact and a status update on mitigation activities
- States shall adopt legislation providing that if there is a material adverse change in the Project's Gendered Impact, the Developer must submit an amended Assessment Report

Review and Approval of Reports and Plans by the Competent Authority - Article 8

- The Competent Authority shall ensure it has sufficient expertise to evaluate Developers' reports and plans
- The Authority shall have the power to:
 - Require Developers to avoid or mitigate a Project's significant adverse Gendered Impacts
 - Provide Development Consent if the Authority and the Developer determine that no mitigation measures are feasible
- Competent Authorities shall establish reasonable timeframes for review, public consultation and approval stages

Public Consultation

Article 9

- The Directive promotes transparency in development by ensuring public awareness of the impact of new projects
- The public shall be informed of the request for development consent and the fact that a Gender Assessment will be conducted
- The public shall have the opportunity to participate in the gender assessment decision-making procedures
- The Competent Authorities shall consider public input in granting or denying Development Consent

Integration with Other Procedures (EIA)

Article 10

- Member States may integrate the requirements and procedures of the Gender Assessment Directive into existing requirements and procedures for Development Consent to Projects
- In particular, States may choose to integrate this Directive into existing procedures for assessing Projects' environmental and social impact (EIA/ESIA)

Duties of Developers

Article 11

- Developers must follow domestic laws and regulations with respect to gender-related concerns and strive to ensure their Projects promote ECOWAS' goal of sustainable development
- Developers are expected to conduct Gender Assessments and complete and follow Gender Management Plans consistent with the Directive's requirements, regardless of whether the Member State has implemented the Directive in its domestic law

Competent Authorities

Article 14

- The Competent Authority is the governmental body or agency that monitors the Directive's application
- The Authority can be newly created or can be one or more existing government agencies
- Member States shall enact laws that empower the Competent Authority to require Developers to comply with the Directive

Cross-border Cooperation

Article 15

- If a Project will be implemented or have a Gendered Impact in multiple States, Member States shall require that Developers submit their reports to each affected state
- For such cross-border projects, each State's Competent Authorities shall consult with each other and agree upon the procedures and timeline for review, public consultation and the ultimate decision on whether to approve it



Fees; Penalties; Enforcement; Judicial Review

Articles 16, 17, 18

- **Fees:** Competent Authorities shall be authorized to collect fees necessary to offset the cost of their operations
- **Penalties:** Member States shall set penalties for infringement of rules implemented under the Directive, and the Competent Authority shall be able to sue Developers for failure to fulfill their obligations
- **Judicial Review:** Developers shall have access to judicial review of the procedural and substantive decisions made by a Member State pursuant to this Directive



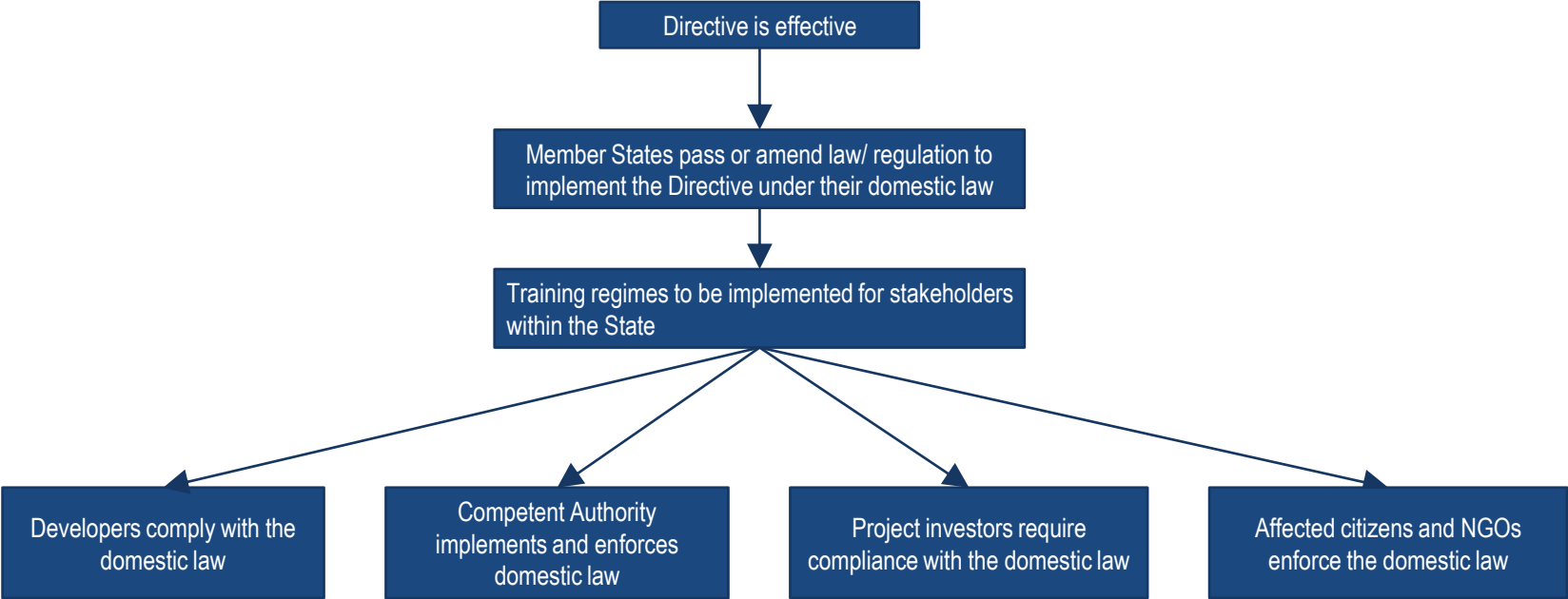
Settlement of Disputes

Article 23

- The Directive adopts a dispute settlement system similar to that found in the existing Mining Directive
- The Member States shall endeavor to settle amicably any dispute concerning this Directive
- Such disputes may also be brought before the ECOWAS Community Court of Justice
- Citizens of any Member State have the right, subject to certain limitations, to bring a claim at the Community Court of Justice when they believe that their rights under the Directive have been violated



Steps to Implement the Directive



Practical Considerations in Implementing the Directive

- Member States' administrative capacity and agency(ies) best suited to serve as Competent Authority
- Initial budgeting for Competent Authority to start administering the a Gender Assessment regime, and the fees required to cover administration costs
- Availability of private sector experts to complete Gender Assessments on behalf of developers
- Availability of expertise within Member States to review complete Assessments and ensure ongoing monitoring
- Training needs

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