

SEA Directive: fit for purpose – if you do it right!

Position Paper regarding the regulatory fitness
of the Directive 2001/42/EC

Justice and Environment 2018

Introduction

EU Directive 2001/42/EC¹ also known as the Strategic Environmental Assessment Directive or SEA Directive in short is currently undergoing a regulatory fitness-check (REFIT). This exercise aims at assessing the directive along 5 key criteria: effectiveness, efficiency, relevancy, coherency and EU added value. The key question to be answered by the end of this exercise is – is the Directive fit for purpose?

Justice&Environment as a network of environmental NGOs working on actual national-level application of the SEA Directive across EU finds that the answer to this question can only be “yes”. There is, however, one important caveat – the text of the Directive alone is not able to provide better, more sustainable decisions. It also needs to be properly transposed and implemented by the national legislatures and competent authorities.

As with many framework EU Directives, the implementation of this legal act in practice is not uniform across the Union. At times it may be inevitable, due to varying legal backgrounds and traditions. However, as laid out below, there are good practices regarding key mechanisms found in the Directive that exist and should be widely applied to gain the most of the Directive. Stepping up implementation efforts is therefore the only logical outcome of the current REFIT exercise and planning for it should start without further delays.

¹ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment

1. Effectiveness

Effectiveness of the SEA Directive is related to the issue of how well is the directive contributing to achieving its objectives. As usual, the list of objectives can be found in the preamble of the directive.

Excerpts from the preamble:

(4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes [...]

(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.

In short, the objective of the Directive is to provide a procedural framework for integrating environmental concerns already at the planning and programming level (in addition to more specific project level) in order to ensure that decision-making results in more sustainable and effective solutions and high level of protection of the environment.

By providing a **legal obligation to identify environmental impacts of plans and programs before their adoption (art 4(1)) and take them into account in decision-making (art 8)**, the Directive clearly contributes to these objectives. In addition to providing these two key obligations, the Directive also includes a number of additional mechanisms that help to ensure that more sustainable solutions, contributing to high level of protection of the environment, are identified and considered in planning and programming.

Firstly, the Directive provides for the obligation to **include in the environmental assessment “reasonable alternatives”**, which must be identified, described and evaluated. The requirement to assess and consider alternatives is a key requirement, as without this requirement, SEA could in practice become a tool for validation of pre-made strategic choices, without providing any additional value from environmental and sustainability perspective. Considering a wider range of strategic alternatives also benefits the undertakings, as mentioned in the section 5 of the preamble, by providing clearer strategic framework in which to plan specific projects and related investments.

In addition to consideration of alternatives, the **substantive quality of reports** (accuracy, level of detail, sound use of assessment methodologies) is a key issue to ensure the objectives of the Directive are met. Although the substantive quality of SEAs in practice depends on many factors that fall outside the scope of legal framework there are still several options to ensure better quality of reports by creating the right normative environment:

- 1) Establishing **minimum qualification requirements for SEA experts** (regarding, e.g. education, work experience);
- 2) Introducing a **system of peer review or administrative review** of the reports;
- 3) Requiring **meaningful monitoring and post-assessment of the strategic choices**, which could be used to update plans or programs or feed in to new plans or programs.

Although qualification requirements to experts carrying out the study are not explicitly provided for in the SEA Directive, it is evident from the objectives of the Directive that experts involved need to be

adequately qualified. National laws transposing the Directive have formally established such criteria in many Member States, and could serve as best practices in this regard².

Monitoring of the implementation of plans and programs is foreseen in art 10 of the SEA Directive and provides a good opportunity to ensure that the quality of SEAs increases over time. In practice, the effectiveness of monitoring, of course, also depends on the scope and content of monitoring obligations themselves as well as administrative capacity to analyze the data and propose necessary corrections to strategic decisions.

A key tool to facilitate meaningful consideration of alternatives and ensuring high substantive quality of the SEA reports is **public participation**. Art 6(2) and (4) provide for the obligation to give the public an early and effective opportunity within appropriate time frames to express their opinion of the SEA report. Key aspects that define the overall success of public participation and also its impact on achieving the objectives of the directive are³:

- 1) **The term “public”** should be defined in a wide manner to avoid situations where either affected persons or members of public with useful knowledge are left out of the assessment and related decision-making. In many Member States, the definition of “public” in the transposing act is already broad, but specific guidance on this issue could still be helpful;
- 2) In order to ensure the effectiveness of public participation, it must happen at **early stages of decision-making**. Although the text of the Directive only requires that the public be involved after the report has been drafted, it would be preferable (and in line with the Aarhus Convention, see chapter 4) to involve the public even earlier, at the stage of scoping;
- 3) **Deadlines** for public participation must be set with a view of enabling both reviewing the documents as well as preparing and submitting input. Account must also be taken of the fact that in many instances representatives of the public (e.g. NGOs) must additionally have time for internal deliberations and discussions before submitting their opinions. Although the Directive itself does not provide minimum deadlines, many Member States have established rather short deadlines that would not be adequate in most cases.

2. Efficiency

Efficiency of the SEA Directive is related to its costs and benefits. It should be noted at the outset that this criteria is well suited to be applied to regulations such as the SEA directive. Although the costs related to the assessment can be, in principle, be identified, the benefits of the regulation – maintaining and strengthening ecosystem services or avoiding harmful investments – are difficult to assess in monetary terms.

In any case, it is also vital from the perspective of efficiency that the strategic decision-making as well as its impact assessment are based on **early, careful consideration of a broad range of alternatives and involvement of all relevant stakeholders**, including members of public.

² For examples of requirements to SEA experts, see Justice&Environment comparative legal study „Assessing environmental impacts of plans and programs“ (2018), see p 4, 7, 55-58. Available online at: http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2018/SEA_Directive_Implementation_Study_J_E_26.06.18.pdf

³ On national laws and practice regarding this issue in a number of EU Member States, see also Justice&Environment comparative legal study „Assessing environmental impacts of plans and programs“ (2018), see p 3-4, 6-7, 47-55.

3. Relevancy

As the principle objective of the SEA directive is to ensure high level of environmental protection, the **relevancy of the directive is directly related to the state of the environment**. Despite the progress made in several fronts, e.g. deployment of renewable energy, EU still faces a number of environmental challenges, including, for example:

- Continuing biodiversity loss⁴,
- Persistent harmful levels of air pollution (e.g. limit values for PM continue to be exceeded in large parts of EU)⁵;
- Continuing poor status of European water bodies (only 40 % of surface waters are in good ecological status or potential, and only 38 % are in good chemical status)⁶.

Complex issues such as biodiversity loss, reduction of air pollutants and ensuring good status of water bodies require a strategic approach to reducing and removing pressures on the environment. Simply assessing the impacts of single projects would not be enough to effectively tackle the challenges. Therefore, taking into account the challenges faced by the EU in ensuring biodiversity-rich, safe and healthy environment, the SEA Directive is even more relevant today than at the time of its adoption.

4. Coherency

The SEA Directive is to a large degree coherent with the EU legislation and international treaties. There is, however, one issue that should be kept in mind in transposing and implementing the Directive, related to **public participation at early stages**.

Article 6(4) of the Aarhus Convention⁷, provides that parties to the Convention (which include both the EU as well as its Member States) shall provide for early public participation, **when all options are open and effective public participation can take place**. This article, mostly addressed to specific projects, also applies to plans and programs by virtue of art 7 of the Convention.

It is arguable, whether simply following the minimum requirements established by the art 6(1) of the SEA Directive, would be sufficient to fulfil Member States' obligations under the Convention. According to this provision, public participation is only required after the assessment report has been drafted, which may be too late to ensure effective public participation. In countries, where the SEA procedures also include a scoping stage, i.e. a stage where the scope and methods for the assessment are decided, **public participation must in any case also be granted for the scoping stage**. As "scope" of the assessment inevitably includes the question of which alternatives will be considered, involvement of the public is unavoidable to prevent a situation where some options have been already ruled out before the public is involved in the decision making.

⁴ See EEA Technical Report No 2/2015 „State of nature in the EU“

⁵ See EEA Report No 12/2018 „Air Quality in Europe“

⁶ See EEA Report No No 7/2018 „European waters. Assessment of status and pressures 2018“

⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

5. Providing EU added value

As already brought out under p 3, the challenges that the Directive addresses are complex. Issues such as biodiversity protection, reduction of air pollution or improving status of water bodies have at the same time also a transboundary nature. From this perspective, the SEA Directive is invaluable, as it:

- a) **Provides a common framework for impact assessment**, enabling Member States to share information and best practices;
- b) Includes a specific set of **provisions regarding transboundary impact assessment** (art 7).

It is clear that although some Member States would probably have some form of assessment of environmental impacts of plans and programs even without a common legal framework, it would not be as uniform without the Directive. This would lead to both uneven consideration of environmental impacts across the countries as well as disruption of the information exchange between authorities of different states.

6. Conclusions and way forward

The SEA Directive is a procedural directive, therefore the actual impact of the SEAs on decision-making, and thus to the protection or improvement of state of environment, depend a lot on the actual implementation of the directive as well as input from different stakeholders. Nonetheless, the framework provided by the Directive, if properly implemented, helps to ensure that environmental considerations are taken into due account in drafting and adopting of plans and programs.

The **current legal framework is not an obstacle to reaching the objectives set out in the preamble of the Directive and the overarching objectives EU environmental policy**. Quite the contrary – the Directive as a common framework is much needed to reach the policy goals. However, better implementation of the SEA Directive is needed to ensure biodiversity-rich, safe and healthy environment for European citizens. In particular:

- 1) SEAs should consider a broad range of alternative solutions, not only minor modifications of one strategic option;
- 2) Safeguards need to be established to ensure high level of qualifications of SEA experts;
- 3) In case external experts are used, a review mechanism should be established to ensure the quality of reports;
- 4) Monitoring arrangements must enable substantive post-assessment of the plans and programs;
- 5) Public participation arrangements should be based on wide definition of “public”, and principles of involving the public in an early stage where all options are open as well as providing the public with sufficient time-frames to provide high-quality input.

To ensure better implementation, resting on the above-mentioned principles, a specific action plan needs to be urgently put in place and in motion. Although the aim of this paper is not to elaborate the content of such action plan, it needs to be stressed that it needs to include sharing and implementing of best practices as well as targeted, up-to-date guidance by the European Commission⁸.

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⁸ As regards guidance, it needs to be stressed that this should be as specific as possible, e.g. by providing examples of suitable assessment methodologies. The guidance also needs to be up-to-date, especially for those aspects where science and legal frameworks have been developing rapidly. For example, the current guidance on integrating climate change and biodiversity into SEA was released in 2013, in the times before the landmark Paris agreement and is also out-of-date considering the rapid pace of scientific development in this area.