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REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

On the application and effectiveness of the Directive on Strategic Environmental Assessment (Directive 2001/42/EC)

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1. INTRODUCTION

Directive 2001/42/EC[1] on the assessment of the effects of certain plans and programmes on the environment ('Strategic Environmental Assessment' – hereinafter the 'SEA – Directive') requires certain public plans and programmes (P&P) to undergo an environmental assessment before they are adopted.

Article 12(3) of the Directive requires the Commission, to send a first report on its application and effectiveness to the European Parliament and the Council before 21 July 2006. With a view to further integrating environmental protection requirements, this report should, if appropriate, be accompanied by proposals for amendment, in particular on the possibility of extending its scope to other areas/sectors and other types of P&P.

Due to delays in transposing the Directive in many Member States (MS) and to the limited experience of its application, the information available on 21 July 2006 was not sufficient to produce a report as planned. (Moreover, this first report had to take into account the experience of the new MS that acceded in 2004 and 2007).

The main sources used for this report are set out in the Annex.

2. TRANSPOSITION OF THE SEA DIRECTIVE

MS had to transpose the SEA Directive into their legislations by 21.7.2004. As of that date, only nine of the 25 MS had actually transposed the Directive.

In December 2004, 15 non-communication infringement procedures were opened for failure to adopt the legislation transposing the SEA Directive. Subsequently, five MS were condemned by the European Court of Justice (ECJ) for failing to transpose it. For the time being, there is no other ECJ case law.

By 2009, all MS have transposed the Directive. The Commission has undertaken a study to check the conformity of its transposition in the MS. Where appropriate, infringement procedures have been or are being launched to address problems of incomplete or incorrect transposition.

[1] OJ L197/30, 21.7.2001 p.30. The word 'strategic' does not appear in the Directive. It is used here for convenience only

3. KEY ISSUES OF THE SEA PROCEDURE

3.1. Basic principles

The P&P covered by the Directive are subject to an environmental assessment during their preparation, and before their adoption. This includes the drawing up of an environmental report in which the likely significant effects on the environment and the reasonable alternatives are identified, and the carrying out of consultations (with the public, the environmental authorities, and with other MS in the case of transboundary impacts). The environmental report and the results of the consultations are taken into account before adoption. Once a P&P is adopted, the environmental authorities and the public are informed and relevant information is made available to them. In order to identify unforeseen adverse effects at an early stage, significant environmental effects of the P&P are to be monitored.

The following P&P, and modifications to them, are covered when prepared and/or adopted by an authority[2] and required pursuant to legislative, regulatory or administrative provisions:

(1) P&P prepared for certain sectors[3] and which set the framework for future development consent in respect of projects under the Environmental Impact Assessment-EIA-Directive[4].

(2) P&P requiring an assessment under the Habitats Directive (92/43/EEC[5]).

(3) P&P setting the framework for development consent in respect of projects (not limited to those listed in the EIA Directive; see (1) above) and determined by "screening"[6] as being likely to have significant environmental effects.

(4) Minor modifications to P&P, and plans and programmes for small areas at local level, only if the screening determines they are likely to have significant environmental effects.

(5) The Directive does not apply to P&P in the following sectors: national defence, civil emergency, financial matters and budget.

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2 The concept of "authority" has been given a large scope in the case law of the ECJ. It covers public authorities, semi public bodies or privatised utility companies which have been made responsible for providing a public service under the control of the State and have, for that purpose, special power. For more details see points 3.12 and 3.13 of the Commission guidance on Implementation of the SEA Directive

3 Agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning, land use

4 Directive 85/337/EEC on the assessment of certain public and private projects on the environment as amended (OJ L 175,5.7.1985, p.40)

5 Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.92, p.7))

6 Through case-by-case examination or by specifying types of P&P or by combining both approaches

3.2. Determination of the scope of application of the Directive

In general, most MS have not encountered problems in determining the scope of application of the SEA Directive. Most of them report that their model is based on a combined approach, whereby the list of P&P to be assessed is supplemented by a case-by-case approach to determine whether an assessment is needed.

3.3. Determination of the scope of the environmental report (Article 5(4))

The scope and the level of detail of the information to be included in the environmental report are determined in conjunction with the environmental authorities. This process is currently referred to as "scoping".

The SEA Directive sets limited requirements for the scope of the environmental report. As a result, MS apply different methods for "scoping", as well as for consultation of the authorities concerned. "Scoping" procedures are mostly developed on a case-by-case basis, since most MS do not prescribe specific methods.

There are differences between MS with regard to which authority decides the outcome of the "scoping" procedure. This is often the responsibility of the planning authority, after having consulted the environmental authority; in other instances, it is left to the environmental authority.

In a few MS, the "scoping" procedure requires consultation of the public, even though this is not an obligation under the Directive.

3.4. Environmental report (Article 5 and Annex I)

The environmental report identifies, describes and evaluates the likely significant effects of the P&P on the environment and reasonable alternatives, taking into account its objectives and geographical scope.

All national transposing legislation lays down a formal requirement to provide a description of the baseline situation. Identification of the correct scale of data and the level of detail of the assessment are the predominant difficulties reported by the MS.

Other difficulties reported by the MS are the lack of good quality information, the time-consuming nature of data collection, the lack of homogenous criteria for the scope and content of the baseline analysis, and the absence of a standard set of environment and sustainability criteria against which to assess P&P.

3.5. Definition of reasonable alternatives (Article 5(1))

Consideration and identification of alternatives in the environmental report is one of the few issues that have given rise to problems in MS. Extensive national guidelines have been developed by some MS in order to provide support for the identification and selection of reasonable alternatives in individual procedures. However, the majority of MS have not defined how this should be done.

Most national legislations do not provide a specific definition of 'reasonable alternatives' or a number of alternatives that must be assessed; the choice of 'reasonable alternatives' is determined by means of a case-by-case assessment and a

decision. All MS report that the 'do-nothing' alternative has to be included in the environmental report on a mandatory basis.

3.6. Consultations (public, and environmental authorities) (Article 6)

Since the SEA Directive does not provide detailed specifications about the procedures for public consultation, a wide range of methods are used: public announcements, publication in official journals or the press, public meetings, internet surveys and questionnaires. In terms of the duration of the public consultation, only a few MS have set fixed time-frames. Most MS allow for consultation periods of at least one month, while others decide on a case-by-case basis.

General experience shows that public consultation, especially when organised at an early stage of planning and when understood as a process, contributes to a higher acceptance of the P&P, and therefore to the early identification and resolution of conflicts.

3.7. Transboundary consultations (Article 7)

Many cases of transboundary consultations are reported and the level of satisfaction appears to be high, with the exception of the language issue.

The cost of translating the documents and the fact that the documentation is not systematically translated are the main concerns reported. NGOs report that, in practice, the consultation does not always take place at an early stage, but when the P&P is already well advanced.

3.8. Monitoring significant environmental effects

Article 10 of the Directive provides for significant environmental effects of the implementation of P&P to be monitored so that unforeseen adverse effects can be identified at an early stage and remedial action can be taken where needed.

Very few MS report that they have established monitoring methods or drawn up national guidance on how to establish monitoring indicators. The lack of appropriate national guidance may raise the question of the effective implementation of the monitoring provision in certain MS.

4. RELATIONSHIP WITH OTHER EU LEGISLATION AND POLICY ISSUES

The SEA Directive has formal and explicit links with the Habitats and EIA Directives, but it is also closely linked to other directives (Water, Nitrates, Waste, Noise and Air Quality Directives[7]) which contain requirements for the establishment

[7] Directive 2000/60 establishing a framework for Community action on water policy (OJ L327, 22.12.2000, p.1). Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p.1). Directive 2006/12/EC on waste, (OJ L 114 27.4.2006 p.9). Directive 2002/49/EC on the assessment and management of environmental noise, (OJ L 189, 18.7.2002, p.12). Directive 2008/50/EC on ambient air quality and cleaner air for Europe, (OJ L 152, 11.6.2008, p.1)

and assessment of P&P in sectors covered by the SEA, and has relationship with the SEA Protocol[8].

Article 11 of the SEA Directive stipulates that MS may provide for coordinated and joint procedures in situations where an obligation to carry out assessments of the effects on the environment arises from both the SEA Directive and other Community legislation.

Only a few MS report the existence of guidance for coordination of the joint procedures for fulfilling the requirements governing assessments under other directives.

4.1. EIA Directive

The two Directives are to a large extent complementary: the SEA is "up-stream" and identifies the best options at an early planning stage, and the EIA is "down-stream" and refers to the projects that are coming through at a later stage. In theory, an overlap of the two processes is unlikely to occur. However, different areas of potential overlaps in the application of the two Directives have been identified[9].

In particular, the boundaries between what constitutes a plan, a programme or a project are not always clear, and there may be some doubts as to whether the 'subject' of the assessment meets the criteria of either or both of the Directives. In this regard, the definitions of some project categories listed in Annex II of the EIA in relation to changes in land use are not clear, and could create confusion with the SEA.

The MS have chosen different approaches to resolve potential shortcomings resulting from overlapping procedures; these approaches range from joint procedures in specific cases to informal coordination between the competent authorities. However, many MS often feel that they do not have sufficient experience to properly identify and assess any overlapping issues.

Due to the lack of experience in the implementation of the SEA Directive, many MS have stressed the need for coordination of both procedures; however, it is still the case that mechanisms and tools are not always properly developed and tested. This could be done by means of Guidance documents to be drawn up in cooperation with MS.

Consideration could be given to *merging the EIA and SEA Directives* in order to clarify their interrelationship and boost their complementarity and efficiency through a holistic environmental assessment process. While this may appear to be an attractive option, very few MS recommended merging the two Directives; they stressed that each process should be completely separate in its own right, because the two Directives are complementary and address different stages and processes.

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8 Protocol on Strategic Environmental Assessment to the UNECE Convention on EIA in Transboundary Context (Kiev, 2003). It was approved by Decision 2008/871/EC, OJ L 308, 19.11.08, p.33

9 - Where large projects are made up of sub-projects or where projects have more than local significance. - Projects that require amendments of land use plans (which will require SEA) before a developer can apply for development consent and undertake the EIA. - P&P which set binding criteria for the subsequent development consent of projects. - Hierarchical linking between SEA and EIA ('tiering')

Taking this and the limited experience in the application of the SEA Directive into account, it does not seem appropriate at the present time to merge the two processes. At this stage, better coordination and coherence can be achieved by correcting the inconsistencies between the provisions of the two Directives and by clarifying the definitions of problematic project categories in the EIA Directive, by amending the latter and/or through the development of Guidance as explained above.

4.2. Habitats Directive and Biodiversity Action Plan[10]

Regarding the **Habitats Directive,** and in particular Article 6(3) thereof providing for a special assessment in certain cases, MS take the view that there are no major problems to report concerning its relationship with Article 11(2) of the SEA Directive, which provides for co-coordinated or joint assessment procedures. Indeed, MS report that they have taken steps to avoid duplication and overlapping, mainly by means of a coordinated approach, which is preferred to a joint[11] approach.

It should be noted, however, that NGOs have raised concerns about this issue.

With regard to the **Biodiversity Action Plan (BAP),** many MS simply feel that the provisions of the SEA are sufficient and take its substance into account.

The 2008 mid-term Report on the implementation of the BAP[12], reveals that the EU is highly unlikely to meet its 2010 target of halting biodiversity decline. The report stresses the need for further progress in ensuring that SEA and EIA are systematically conducted in relation to environmentally sensitive interventions funded by MS and the European Community (EC).

4.3. The SEA Protocol

The Espoo Convention on EIA in a Transboundary Context – to which the EC has acceded - has been supplemented by the SEA Protocol. The SEA Protocol was adopted in Kiev on 21 May 2003 and subsequently signed by 36 States and the European Community. In order for it to enter into force, 16 Signatories need to ratify it (so far, it has been ratified by 10 Signatories).

The SEA Protocol is not limited to *transboundary* impacts from P&P; it is also concerned with impacts from P&P within a Contracting State. Once in force, it will require its Parties to evaluate the environmental effects of certain P&P. The Protocol also addresses policies and legislation, which is not the case of the SEA Directive.

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10 COM(2006)216

11 Coordination of the SEA assessment with the other assessment(s) and joint procedure with one single assessment that meets the requirements of both Directives.

12 COM(2008)864

4.4. Climate change

The lack of a well established methodology to determine impacts has been mentioned as a key problem by many MS. Climate change issues are considered in SEA on a case-by-case basis, and mainly in relation to P&P with a potential significant impact on climate, such as energy or transport P&P. However, a trend to pay more attention to climate change considerations in the other P&P is emerging.

Some MS are developing specific methodologies to measure the potential greenhouse gas emissions of particular P&P; others set a target of "carbon neutrality" (i.e. the implementation of the P&P should not result in an increase of greenhouse gas emissions) or identify impacts on climate change in terms of an expected reduction of greenhouse gas emissions.

Given the lack of specific guidance on consideration of climate change issues in SEA, there should be further development of specific guidelines.

5. PROGRAMMES CO-FINANCED BY THE EC IN 2007-2013 [13]

According to Article 3(9), the SEA Directive did not apply to P&P of the 2000-2006 programming period. For 2007-2013, the SEA Directive was fully applicable according to its Article 2(a) and to the Cohesion, Rural Development and Fisheries Regulations which refer specifically to the need to undertake SEA.

In practice, for most of the Operational Programmes (OPs) adopted in 2007-13, an SEA had to be carried out under the terms of the Directive. This meant that SEAs were not carried out for OPs which did not set up a framework for future development consent of projects, i.e. mainly the ESF programmes. Compliance with the requirements of the SEA Directive was a condition for the approval of the programmes by the Commission.

More specifically, with respect to the *Cohesion Policy OPs*, the SEA experience resulted in the following findings:

- The content of the programmes was clearly influenced by the SEA process, as the environmental requirements had to be taken into account at the planning stage, although it is difficult to establish to what extent this was the case.

- The level of participation by the public in a number of MS was not as high as it might have been. In fact, the tight timetable to adopt the programmes led several planning authorities to carry out the SEA implementation process in a short period of time. On the other hand, it should be noted that Article 11 (partnership) of Regulation 1083/2006 provides for the participation of bodies representing civil society at the programme preparation stages.

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[13] Regulation (EC) n° 1083/2006 laying down general provisions on the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund (OJ L 210, 31.7.2006, p. 25); Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 277, 21.10.2005, p.1) ; Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 358, 31.12.2002, p.59)

- The environmental authorities were consulted and involved in the decision making process, even if in some cases it was difficult to take all their recommendations into account.

- The quality of the environmental reports was uneven, and in some cases relatively poor.

The assessment of the *Rural Development Programmes* led to the following observations in relation to SEA:

- The quality of the SEA varied considerably between MS.

- In most cases, a large number of stakeholders took part in the public consultation, even if in some cases there were insufficient opportunities for public involvement due to inadequate methods of consultation.

Similar observations were made with respect to the OPs financed by the *European Fisheries Fund*.

Overall, despite the uncertainties about the scope of the SEAs' influence on the content of the programmes, it is essential to emphasize the overall positive effect of the first application of the SEA Directive to Community co-funded programmes. Although there is scope for improvement, the implementation of the SEA Directive has led to a better integration of environmental considerations in the content of the programmes. The environmental authorities are better involved in all the phases of the decision-making process.

6. EFFECTIVENESS OF THE DIRECTIVE

The assessment of the effectiveness of the SEA Directive has been based on the degree to which planning and programming procedures and decisions have been influenced by the integration of environmental considerations, and the extent to which P&P were amended as a result of the application of the SEA procedure.

6.1. Impact of the SEA on the planning process

A majority of MS particularly mentioned the contribution of the SEA to an improved organisation and structure of the whole planning procedure, regarding this as a positive element. In particular, the formal requirements of consultation with environmental authorities and the public have led to increased transparency in the planning procedures.

6.2. Impact of SEA on the content of P&P

The majority of the MS reports that, in many cases, SEA changed the content of the P&P. Experiences differ in this regard. It is generally reported that SEA did not change the major goals or the financial allocation among the funding objectives; what it changed were certain funding objectives, schemes or criteria. However, other experiences show that, at the level of the largest national plans, a significant number of the SEA findings had a strong influence on the substance of the plans, including in

the selection of the alternatives or by incorporating important suggestions from the SEA.

A majority of MS also report that the contents of P&P are gradually being modified as a consequence of the iterative process of conducting the SEA, alongside the preparation of the P&P. Specifically, they mention that expensive mitigation measures which were adopted previously may now be superfluous as a direct consequence of the early inclusion of environmental considerations in the P&P.

6.3. Perception of the benefits of SEA

MS have identified a number of benefits of SEA, such as:

- The integration of environmental considerations into decision making and the "greening" of P&P.

- The introduction of participation and consultation of relevant public authorities; this facilitates and strengthens cooperation between different authorities (planning, environment and health).

- The increased transparency in decision making, due to the involvement of several levels of society.

- The contribution of SEA to improved compliance with the requirements of the specific environmental policy concerned.

7. OPPORTUNITIES FOR IMPROVEMENT OF THE DIRECTIVE

In the longer term, consideration may be given to some amendments to take into account the entry into force of the SEA Protocol, extend the scope of the SEA Directive (so as to better address certain issues such as climate change, biodiversity and risks), and reinforce synergies with other pieces of environmental legislation. In this regard, the following recommendations could be considered:

– The entry into force of the *SEA Protocol* may result in changes to the SEA Directive. Potential additional amendments to the SEA Directive could be considered. Some of these amendments could be incorporated as part of the review of the EIA Directive, for instance through amendments to its Annexes.

– The SEA Protocol goes further than the SEA Directive, in that it also encourages potential application to certain *policies and legislative proposals*. The fact that the SEA Directive does not apply to policies which set the framework of P&P makes it necessary to consider the possible inclusion of policies and legislation in the application of the Directive as an option for the future.

– There is a need to *develop capacity* in the MS so as to ensure effective implementation of the SEA Directive. In order to do this, capacity building must be strongly encouraged, in particular through targeted campaigns for the recruitment and training of SEA experts and guidance documents.

– Finally, some MS have highlighted the need for *further guidance*, in particular on the interpretation of certain key concepts of the Directive (screening criteria, identification of alternatives, coordination mechanisms and/or joint procedures for fulfilling the requirements for assessment under other Directives, specific guidance on the link between SEA and EIA). EU guidance on consideration of better integration of climate change and biodiversity issues in SEA could be developed by the Commission in cooperation with the MS.

8. CONCLUSIONS

The overall picture of the application and effectiveness of the SEA Directive across all MS is a varied one in terms of the institutional and legal arrangements of the SEA procedure, and in terms of how MS perceive its role. This diverse picture also determines the way in which MS view the benefits and drawbacks and what measures are likely to improve the implementation and effectiveness of the Directive.

The general findings of this first report suggest that the application of the SEA in MS is in its infancy, and that further experience is needed before deciding on whether the Directive should be amended and, if so, how this should be done. MS seem to prefer stability in the legislative requirements, to allow SEA systems and processes to settle down and provide the opportunity to establish robust ways of using SEAs to improve the planning process. The next evaluation report should be prepared in 2013.

Overall, it can be concluded that the SEA Directive contributes to the systematic and structured consideration of environmental concerns in planning processes and better integration of environmental considerations upstream. In addition, by means of its requirements (environmental report, consultation and information of the authorities and public concerned etc.) it ensures better and harmonized planning procedures, and contributes to transparent and participatory decision making processes.

Annex

Main sources of information

- Study commissioned by the Commission on the report on the application and effectiveness of the SEA Directive http://ec.europa.eu/environment/eia/pdf/study0309.pdf
- MS' responses to the Commission questionnaire on the application and effectiveness of the SEA Directive.
- Study commissioned by the Commission on *"The Relationship between the EIA and the SEA Directives"* (2005) http://ec.europa.eu/environment/eia/pdf/final_report_0508.pdf.
- Handbook on SEA for Cohesion Policy 2007-2013 (2007, GRDP).
- Commission's guidance on the implementation of Directive 2001/42/EC, (2003) http://ec.europa.eu/environment/eia/sea-support.htm
- The Commission's experience of the implementation and enforcement of the SEA Directive and its application to the EU co-financed 2007-2013 Programmes for the period.