

Co-operation with national judges in the field of
environmental law under the European Commission
Framework Contract ENV.E.2/FRA/2016/0043

Training module

**HOW TO HANDLE COURT PROCEEDINGS INVOKING NON-COMPLIANCE
WITH EU ENVIRONMENTAL ASSESSMENT LAW
FOCUS ON ENVIRONMENTAL IMPACT ASSESSMENT (EIA) & STRATEGIC
ENVIRONMENTAL ASSESSMENT (SEA)**

22-24 October 2018

Sofia, Bulgaria

Organised by Academy of European Law



Scope and screening under the SEA Directive

Peter VAJDA
Senior Environmental Expert
Energy Community Secretariat, Vienna



Topics

- Introduction
- Scope of the SEA Directive
- Definition of plan and programme subject to SEA
- Screening procedure and criteria
- EC Guidance on integrating climate change and biodiversity into SEA
- CJEU case law



Introduction

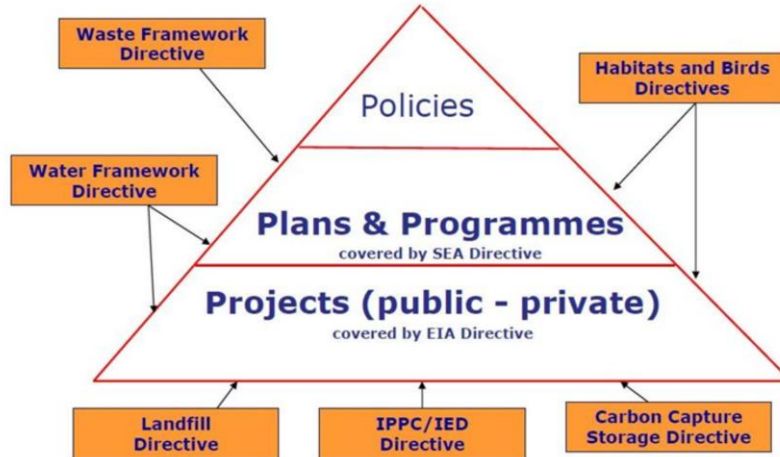
Environment

- **Directive 2011/92/EU (EIA)** - after entry into force (updated in 2016, with amendments of 2014/52/EU included as of 1 January 2019)
- Directive 1999/32/EC (SiF) - as of 1 January 2012 (updated)
- Directive 2001/80/EC (LCP) - as of 1 January 2018
- Art. 4(2) Directive 79/409/EEC (Wild Birds) - after entry into force
- Construction and operation of new generating plants - Chapter III and Annex V of Directive 2010/75/EU (IED), 1 Jan 2018
- No binding acquis on climate yet, MMR Recommendation
- Since 2016 → **Directive 2001/42/EC (SEA)**, 2004/35/EC (ELD)



Introduction

Environmental Assessments



Source: Presentation of the European Commission at the 11th meeting of the Energy Community Environmental Task Force, June 2016



Art. 5(2) - Where requested by the developer, the competent authority, taking into account the information provided by the developer in particular on the specific characteristics of the project, including its location and technical capacity, and its likely impact on the environment, shall issue an opinion on the scope and level of detail of the information to be included by the developer in the environmental impact assessment report in accordance with paragraph 1 of this Article. The competent authority shall consult the authorities referred to in Article 6(1) before it gives its opinion.

Member States may also require the competent authorities to give an opinion as referred to in the first subparagraph, irrespective of whether the developer so requests.

Scoping is an important stage that takes place early in the EIA process. It provides an opportunity for both Developers and the Competent Authority to determine those key environmental impacts and issues of concern that are likely to be of the utmost importance to the Project proposal's decision making and eliminates those that are less of a concern. In other words, Scoping defines the EIA Report's content and ensures that the environmental assessment is focused on the Project's most significant effects on the factors listed in Article 3 of the Directive, and that time and money are not spent on unnecessary examinations. It also reduces the likelihood that competent authorities will need to request additional information from Developers after the Environmental Report has been prepared and submitted.

Mandatory scoping in: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Bulgaria, and Romania.

Why there is a need for an SEA after all?

- To provide for a high level of protection of the environment.
- To contribute to the integration of environmental considerations into the preparation of public plans and programmes with a view to promoting sustainable development.
- Plans, programmes and projects which are likely to have significant effects on the environment are subject to an assessment.



Definition of plan and programme

- Art. 2(a) SEAD:
- 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
 - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
 - which are required by legislative, regulatory or administrative provisions



Scope of the SEA Directive

- Which plans or programmes does the Directive apply to?
- Plans prepared and/or *adopted* by an authority at national, regional or local level AND *required* by legislative, regulatory or administrative provisions.
- Exemptions:
 - plans & programmes the sole purpose of which is to serve national defence or civil emergency;
 - financial or budget plans/programmes



Scope of the SEA Directive

- Plans and programmes that always require SEA are those:
 - ✓ prepared for agriculture, forestry, fisheries, energy, industry, transport, waste/water management, telecommunications, tourism, town & country planning or land use AND which set the framework for future development consent of projects listed in the EIA Directive (Art. 3(2))
 - ✓ which have been determined to require an assessment under Articles 6 or 7 of the Habitats Directive.
 - ✓ Plans and programmes co-financed by the EU
 - ✓ Modifications of plans and programmes.

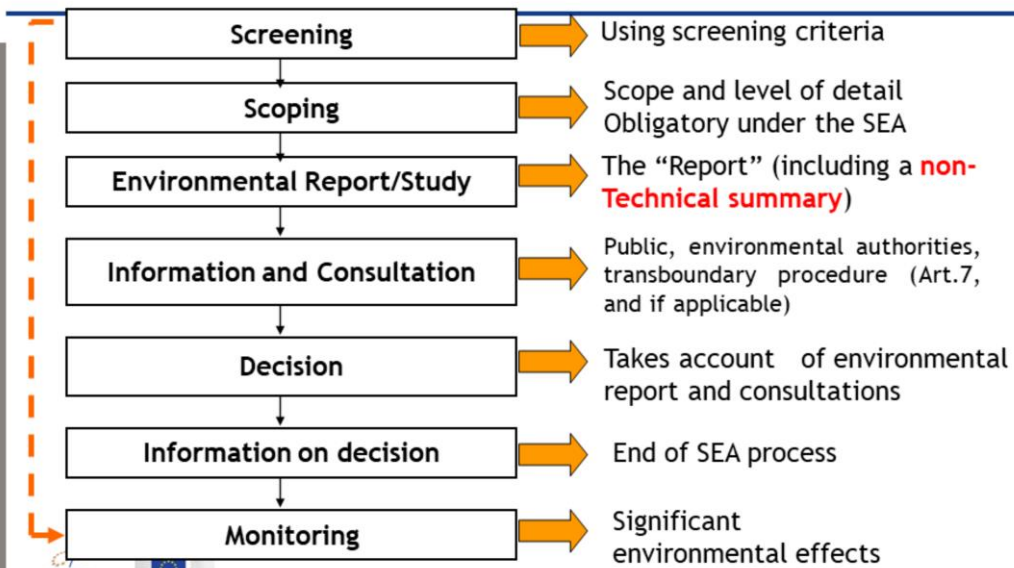


Non-exhaustive list of plans and programmes required by EU legislation

- Action Programmes - Nitrates Directive (91/676/EEC)
- River Basin Management Plans (RBMPs) - Water Framework Directive (2000/60/EC)
- Flood Risk Management Plans (FRMPs) - Floods Directive (2007/60/EC)
- Programmes of measures - Marine Strategy Framework Directive (2008/56/EC)
- Waste management plans - Waste Framework Directive (2008/98/EC)
- Transitional National Plans (TNPs) - Industrial Emissions Directive (2010/75/EU)



The SEA process



Screening under the SEA Directive

- An assessment to determine, if a plan or programme is likely to have significant environmental impacts.
- Plans and programmes that must be screened:
 - ✓ Plans and programmes using small areas at local level
 - ✓ Minor modifications to plans and programmes
 - ✓ Plans and programmes setting the framework for future “non-EIA projects” and “non-sector” plans and programmes (not covered by Art. 3(2))
- Case-by-case decision / specifying types of plans and programmes / combined approach
- Screening criteria → Annex II
- Environmental authorities referred to in Art. 6(3) to be consulted during screening



Criteria for determining the likely significance of effects referred to in Article 3(5)

1. The characteristics of plans and programmes, having regard, in particular, to
 - the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,
 - the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
 - the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
 - environmental problems relevant to the plan or programme,
 - the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).
2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to
 - the probability, duration, frequency and reversibility of the effects,
 - the cumulative nature of the effects,
 - the transboundary nature of the effects,
 - the risks to human health or the environment (e.g. due to accidents),
 - the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
 - the value and vulnerability of the area likely to be affected due to:
 - special natural characteristics or cultural heritage,
 - exceeded environmental quality standards or limit values,
 - intensive land-use,
 - the effects on areas or landscapes which have a recognised national, Community or international protection status.

Scoping under the SEA Directive

- Mandatory under Art. 5(2)
- Information that may reasonably be required
- Taking into account
 - ✓ current knowledge and methods of assessment,
 - ✓ the contents and
 - ✓ level of detail in the plan or programme
 - ✓ its stage in the decision-making process and
 - ✓ the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.



The environmental report

- Art. 5(1), (2) and (3)
- Must identify, describe and evaluate, inter alia:
 - ✓ the likely significant environmental effects of implementing the plan or programme;
 - ✓ reasonable alternatives + relationship with other plans/programmes
 - ✓ environmental protection objectives, how they were taken into account
 - ✓ mitigation
 - ✓ monitoring measures
 - ✓ non-technical summary (important)



Information and consultation

- Environmental authorities
 - ✓ in screening
 - ✓ in scoping
 - ✓ on the draft plan/programme and the environmental report
- The public
 - ✓ on the draft plan/programme and the environmental report
- Transboundary consultations
 - ✓ on the draft plan/programme and the environmental report



Decision

- Art. 8 SEAD
- The competent authorities have to take account of the:
 - ✓ environmental report
 - ✓ opinions expressed pursuant to the consultation (public, environmental authorities)
 - ✓ results of any transboundary consultation



Information on the decision

- Art. 9 SEAD
- Information about final decision has to be provided to the public, environmental authorities, other countries (if a transboundary consultation took place):
 - ✓ Adopted plan/programme;
 - ✓ Statement summarising how the environmental report and the results of consultations have been taken into account + reasons for choosing between alternatives;
 - ✓ Monitoring measures



Monitoring

- Member States have to monitor the significant environmental effects of the implementation of the plan/programme in order to:
 - ✓ identify at an early stage unforeseen adverse effects;
 - ✓ be able to undertake remedial action.
- Existing monitoring arrangements may be used.
- Monitoring measures must be covered in the SEA Report.



Integration of the SEA procedure in the planning process

- Art. 4 of the SEAD
- SEA should be carried out:
 - ✓ During the preparation of plans/programmes;
 - ✓ Before their adoption.
- SEA may be integrated in existing planning procedures for the adoption of plan and programmes or in new ones for the requirements of the Directive.



Guidance

- <http://ec.europa.eu/environment/eia/sea-support.htm>
- Commission's Guidance on the implementation of the SEAD
- Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment (March 2013)
- REFIT evaluation (Regulatory Fitness and Performance Programme)
 - ✓ Effectiveness (Have the objectives been met?)
 - ✓ Efficiency (Were the costs involved reasonable?)
 - ✓ Coherence (Does the policy complement other actions or are there contradictions?)
 - ✓ Relevance (Is EU action still necessary?)
 - ✓ EU added value (Can or could similar changes have been achieved at national/regional level?)



CJEU case law - objective of the SEAD

- the fundamental objective of the SEAD is, where plans and programmes are likely to have significant effects on the environment, to require an environmental assessment to be carried out at the time they are prepared and before they are adopted (C-105/09 & C-110/09 Terre wallonne and Inter-Environnement Wallonie, paragraph 32, C-295/10, Valčiukienė and Others, paragraph 37, C-567/10, Inter-Environnement Bruxelles, paragraph 20, C-41/11 Inter-Environnement Wallonie and Terre wallonne, paragraph 40, C-463/11, L v M, paragraph 31, C-444/15 Associazione Italia Nostra Onlus, paragraph 47)
- In light of the fundamental objective of the SEAD, national courts have to ensure that in actions brought before them, this objective is met. (C-41/11 Inter-Environnement Wallonie and Terre wallonne, paragraph 47)



CJEU case law - objective of the SEAD

- The SEAD lays down minimum rules concerning the preparation of the environmental report, the carrying out of consultations, the taking into account of the results of the environmental assessment and the communication of information on the decision adopted at the end of the assessment. (C-105/09 & C-110/09 Terre wallonne and Inter-Environnement Wallonie, paragraph 33, C-567/10, Inter-Environnement Bruxelles, paragraph 21, C-41/11 Inter-Environnement Wallonie and Terre wallonne, paragraph 41)



Plans and programmes under the Nitrates Directive – TW and IEW

CJEU case law - interpretation of definitions

- Given the objective of Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (C-290/15, D'Oultremont and Others, paragraph 40)
- "plans and programmes" - cumulative condition of preparation and/or adoption by an authority and required by legislative, regulatory or administrative provisions (idem, paragraph 41)
- plans or programmes must concern planning for a given area covering, in the wider sense, regional and district planning in general (idem, paragraph 45)
- 'plans and programmes' can cover normative acts adopted by law or regulation (idem, paragraph 52)



D'Oultremont – wind farms in Wallonia

CJEU case law - interpretation of definitions

- Partial or total repeal of a plan or programme - the ECJ has linked this to the requirement of broad interpretation of the definitions of the SEAD broadly and concluded that it is possible that the partial or total repeal of a plan or programme is likely to have significant effects on the environment, since it may involve a modification of the planning envisaged in the territories concerned (C-567/10 Inter-Environnement Bruxelles and Others, paragraphs 36-38, C-473/14, Dimos Kropias Attikis, paragraph 44)



CJEU case law - plans and programmes for a single project

- Article 3(2)(a) must be interpreted as meaning that it also covers a plan which, in only one sector, sets the framework for a project which has only one subject of economic activity.
(C-295/10, Valčiukienė and Others, paragraphs 39, 40, and 41)



CJEU case law - cases in the pipeline

- C-160/17 Thybaut and Others → whether legal acts that allow deviation from certain land-use planning rules in a given area shall be considered “plans and programmes” under Art. 2(a) of the SEAD
- AG opinion (25 Jan 2018) → yes
- Judgment (7 June 2018) → yes

- C-671/16 Inter-Environnement Bruxelles and Others → town planning in the EU quartier of Brussels
- AG opinion (25 Jan 2018) → When assessing whether a plan or a programme within the meaning of Article 2(a) of the SEAD exists, it is necessary to ascertain whether the specifications in the measure in question are likely to have significant effects on the environment / judgment (7 June 2018) confirms



Thybaut – judgement is out, confirmed AG opinion, bc of the possibility of derogation

IEW – judgement is there, **regional town planning regulations, such as those at issue in the main proceedings, laying down certain requirements for the completion of building projects, fall under the definition of ‘plans and programmes’ which are likely to have significant environmental effects within the meaning of that directive and must, consequently, be subjected to an environmental impact assessment.**

Thank you for your attention!

