

EIA and SEA

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Issues addressed

- **Nature of SEA and of its relation to EIA**
 - SEA and EIA common goals
 - SEA legislative basis on EU level
 - SEA and EIA similarities and differences
- **Selected areas of SEA and EIA relationship**
 - overlaps and hierarchical linking
 - screening
 - assessment of cumulative effects
 - evaluation of alternatives
 - public participation and access to justice
- **Conclusions and recommendations – key issues of continual approach**

SEA and EIA common goals

- General common goal - to ensure that environmental (sustainability) aspects are considered in / integrated into PP adopting / decision-making – all significant effects assessed – prevent the affected area from „overburdening” (beyond the limits of sustainability)
- Number of similar specific goals in the Preambles of SEA and EIA directives:
 - common principles and procedural requirements for assessment of environmental effects
 - inclusion of relevant environmental information in decision making (environmental reports)
 - consultation/participation of public needed for ensuring comprehensive information
- SEA directive explicitly expresses need to coordinate its requirements with other assessments according to EU legislation; similar recital in Preamble of proposed EIA directive amendment

SEA legislative basis on EU level

- Directive 2001/42/EC – constitutes SEA as process in which the likely significant effects on the environment of implementing plans and programmes, prepared by public authorities (and at times private bodies) are identified, described and evaluated
- Plans and programmes subject to SEA - prepared/adopted by an authority, required by law
- Mandatory SEA – plans/programmes on stated areas, which set framework for development consent of projects listed in Annex I and II of EIA directive, or likely to have effect on areas protected by the Habitats Directive
- Other plans and programmes – if likely to have significant environmental effects
- SEA shall take place during preparation/before adoption of plan or programme – mainly preparation of environmental report

SEA and EIA similarities

- Determination of scope – SEA directive referring to EIA directive annexes concerning subject of assessment
- Significant effect on the environment as basic general criteria for plans and programmes / projects to be subject to assessment
- Required information about the object of assessment (e.g. overview, objectives, estimate of expected residues and emissions, relationship with other relevant plans / projects - cumulative impacts, etc.
- Required information about existing environmental situation in affected area
- Required information about mitigation measures and monitoring
- Public participation and consultation of authorities

SEA and EIA differences

- **Object definition** - EIA directive more specific, SEA directive definition of plans and programmes more reliant on interpretation;
- **Screening** – SEA reasons for not requiring assessment while EIA reasons for project to be subject to assessment (x proposed amendment – reasons for both)
- **Environmental Report** – SEA asks for description of “reasonable alternatives“, EIA only for outline of alternatives studied by the developer (x proposed amendment – competent authority shall determine “reasonable alternatives“ to be described in the report)
- **Public participation / consultation** – EIA more specific; SEA theoretically at earlier stage (draft) – taken into account during preparation of plan or programme
- **Access to review procedures** – only EIA

SEA and EIA overlaps

- **Direct overlaps – either SEA or EIA can/shall apply**
 - small scale (local) plans and programmes “, e.g. urban development,
 - plans establishing road and infrastructure schemes - collections of projects”
 - specific amendments plans and programmes
 - plans and programmes effectively approving projects
- **Hierarchical linking (tiering) – plans/programmes subject to SEA setting framework for development consent of projects subject to EIA – subsequent assessment – from strategic (broader relationships) to specific impacts of the project**
- **National approaches to SEA – EIA relationship**
 - independent procedures (both or only one conducted)
 - parallel (combined) or coordinated procedures
 - joint procedures (single procedure meeting requirements of both)
 - replacement of EIA by SEA or *vice versa* in some cases

http://ec.europa.eu/environment/eia/pdf/final_report_0508.pdf
- **Problems of not coordinated approach – repeated assessment, no strategic assessment prior to adoption of the PP, fact that EIA carried out prior to SEA used for neglecting strategic alternatives etc.**

ECJ (CJEU) case law

- General relevance of ECJ case law on EIA for both processes – limited discretion of MS if SEA/EIA will be carried out – the objective of assessing likely significant effects must be met (C-72/95, C-113/94, C-392/96 etc.); also applicable on screening
- Where appropriate, requirements of both directives must be met; joint or coordinated procedures not required:

2. Article 11(1) and (2) of Directive 2001/42 must be interpreted as meaning that an environmental assessment carried out under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, ..., does not dispense with the obligation to carry out such an assessment under Directive 2001/42. However, it is for the referring court to assess whether an assessment which has been carried out pursuant to Directive 85/337, ..., may be considered to be the result of a coordinated or joint procedure and whether it already complies with all the requirements of Directive 2001/42. If that were to be the case, there would then no longer be an obligation to carry out a new assessment pursuant to Directive 2001/42.

3. Article 11(2) of Directive 2001/42 must be interpreted as not placing Member States under an obligation to provide, in national law, for joint or coordinated procedures in accordance with the requirements of Directive 2001/42 and Directive 85/337, as amended.

(C-295/10, Valčiukienė and others)

ECJ (CJEU) case law

An action programme adopted pursuant to Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources is in principle a plan or programme covered by Article 3(2)(a) of Directive 2001/42/EC ... since it constitutes a 'plan' or 'programme' within the meaning of Article 2(a) of the latter directive and contains measures compliance with which is a requirement for issue of the consent that may be granted for carrying out projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997.

(joined cases C-105/09 and C-110/09, Terre Wallone ABSL)

Article 3(5) of 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, read in conjunction with Article 3(4) thereof, must be interpreted as precluding national legislation such as that at issue in the main proceedings, pursuant to which breach of a qualitative condition, imposed by the implementing provision of that directive to exempt the adoption of a particular type of building plan from an environmental assessment under that directive, is irrelevant to the legal validity of that plan.

(C-463/13)

Opinion of Advocate General

176. Whether certain reports on the basis of other provisions satisfy the requirements of the SEA Directive is a question which must be examined by the national courts, having regard to the specific features of each individual case. Such reports must satisfy both the substantive and the procedural requirements of the SEA Directive. Because the EIA Directive and SEA Directive are largely parallel, this is possible, in principle, where both assessments have the same scope, i.e. if the project and the plan are largely congruent.

177. In the light of the comments regarding the EIA Directive, (64) however, it should be pointed out that any deficiencies in the assessment under that directive should, in all likelihood, also be regarded as deficiencies in an environmental assessment under the SEA Directive. ...

178. The answer to the ninth question is therefore that for the purpose of Article 11(2) of the SEA Directive, if a plan simultaneously falls within the scope of that directive and within that of the Water Framework Directive and the EIA Directive which also require the environmental effects of that scheme to be assessed, no autonomous strategic environmental assessment need be conducted if the assessments which have been drawn up on the basis of the Water Framework Directive and the EIA Directive satisfy the requirements of the SEA Directive substantively and with respect to the procedure followed.

(C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias and Others)

Screening criteria

- In both SEA and EIA, significant effects on the environment as basic screening criteria
- Plans/programmes more likely to avoid SEA – less concrete characteristics for non-mandatory PPs; “pre/screening” criteria (required by law)
- Principles of ECJ case law on EIA shall apply also on SEA:
49. A decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of the EIA Directive. (C-87/02, Commission v. Italy)
- Common goals of both SEA and EIA shall be taken into account when deciding if a plan /programme is subject to SEA – sufficient information about the impacts of the projects
- More important if a plan /programme is binding (sets framework) for a project, than if it is strictly speaking required by law”

Assessment of cumulative effects

- Both SEA and EIA directives require assessment of cumulative effects (SEA also explicitly “synergistic”)
- 2 main aspects
 - description of all potential accumulations in the affected area (SEA)
 - sufficiently detailed description of specific effects (EIA)
- Principles of ECJ case law EIA shall apply :
 - 78. ... *assessment must also include an analysis of the cumulative effects on the environment which that project may produce if considered jointly with other projects, in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment of the project in question.* (C-404/09, Commission v. Spain)
 - 36. ... *the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/377* (C-275/09, Brussels Hoofdstedelijk Gewest)
- Need for joint application of both SEA and EIA approaches to identify and describe cumulative effects sufficiently and in proper order (examples of misusing the reversal of order)

Evaluation of alternatives

- SEA requires evaluation of “reasonable alternatives“, EIA only outline of alternatives studied by the developer (x proposed EIA amendment)
- SEA appropriate for evaluation of strategic (corridor etc.) alternatives
- In practice, SEA not specific enough to ensure that the concrete most environmentally friendly alternative will be even considered; EIA not general enough to take the strategic alternatives into account
- Reverse order of EIA and SEA misused in some cases
- In “ideally” tiered system of SEA and EIA, all reasonable strategic alternatives would either be evaluated at SEA stage, or, if for any case not (fully), this obligation would be “transferred” to EIA; in EIA, the specific most appropriate alternative would be find

Public participation and access to justice

- Both SEA and EIA require public participation (consultations); EIA much more specific – e.g. no obligation to base the decision on the opinions expressed by the public in SEA
- Need of coordinated approach consistent with general requirement of continuity – e.g. if strategic alternatives of “EIA project” assessed in SEA with direct influence of the final decision, EIA requirements for public participation shall be fully met in SEA
- Similar applies to access to review procedures (justice) – not regulated by SEA – what was decided at SEA stage shall be at some stage subject to review
- Parallel in the case law of the ACCC:

51. The requirement for “early public participation, when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. (EU ACCC/C/2006/17)

60. .. the fact that the SEA statement cannot be reviewed separately does not amount to non-compliance with the requirements of article 9, paragraphs 2 and 3, of the Convention, provided that members of the public can actually challenge the SEA statement together with the decision adopting the subsequent plan or programme (Bulgaria ACCC/C/2011/58)

Conclusions and recommendations

- Basic conclusions
 - similarities and overlaps in many aspects of SEA and EIA x some unjustified differences
 - in many cases, gradual / subsequent assessment is a best way for meeting common goals of SEA and EIA (specification of outcomes, updated information)
- Previously presented recommendations
 - coordinated (parallel, joint) procedures for SEA and EIA
 - coordinated content of the assessment and decision-making (alter.)
 - meet requirements of both directives when applying only SEA or EIA
 - consider the likely significant effects at the most appropriate level
 - review of legislation on both EU and MS level – possible consolidation – SEA as “umbrella” for environmental assessment

Conclusions and recommendations

- Technical aspects of recommendations not most important
– MS should be left free in this aspect
- Any SEA and EIA regulation should be based on idea of common goal(s), need of coordinated application of both SEA and EIA approaches and efficiency of the process of assessment as a whole (e.g. SEA screening should take into account the need for correctly justified decision about specific project, need to assess its cumulative effects etc.; EIA shall not be misused for not assessing strategic alternatives, etc.)
- In most cases “tiered” system seems more appropriate than joint procedures (possibility of specification / “refining” of the evaluation)
- On EU level, more important than merging the directives into one is amending both existing directives (namely SEA) so that the above goals are achieved – SEA should be regulated as first part of the process of assessing and permitting projects with likely significant impacts wherever appropriate – practically in all cases where cumulative effects can be expected and strategic alternatives exist.

Thank you for your attention

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(<http://www.justiceandenvironment.org/publications>) .