EUROPEAN
COMMISSION

Brussels, 15.5.2017
COM(2017) 234 final

REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

under Article 12(3) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment

1. Introduction

This second implementation report[1] on Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ('Strategic Environmental Assessment Directive', or 'SEAD')[2] presents the experience gained in applying the SEAD between 2007 and 2014. The report is based on Article 12(3) of the SEAD and assesses the implementation of the Directive in this period.[3]The findings of this report will feed into an evaluation of the SEAD that will be carried out as part of the Commission's Regulatory Fitness and Performance (REFIT) programme.[4]

The SEAD implements the principle of environmental integration and protection laid down in Articles 11 and 191 of the Treaty on the Functioning of the European Union. It provides for a high level of protection of the environment and helps integrate environmental considerations into the preparation and adoption of certain plans and programmes. To this end, the Directive requires an environmental assessment of plans and programmes which are likely to have significant effects on the environment.

The SEAD does not lay down any measurable environmental standards. It is essentially a process directive, which establishes certain steps that Member States must follow when identifying and assessing environmental effects. The strategic environmental assessment (SEA) process is about helping policy makers take well-informed decisions, based on objective information and the results of consultation with the public/stakeholders and relevant authorities. The application of the key requirements of the SEAD and its relationship with other Directives are described in Sections 2 and 3 respectively.

2. Implementation status

2.1. Legal and administrative arrangements in the Member States

All Member States have transposed the SEAD. The legislative framework transposing the SEAD varies across the Member States and depends on their administrative structure and arrangements. Some Member States transposed the SEAD through specific national legislation, while others have integrated its requirements into existing provisions, including those transposing the Environmental Impact Assessment Directive ('EIA Directive').[5] Since 2007, more than half of Member States have amended their national legislation transposing the SEAD to ensure their national provisions comply with the Directive and to resolve cases of incorrect application.

[1] The first report was presented on 14.9.2009 (COM(2009) 469).

[2] OJ L 197/30, 21.7.2001, p. 30. The word 'strategic' does not appear in the SEAD but this is the most common and established reference to this Directive.

[3] More information can be found in the supporting study [http://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf]

[4] http://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-making-eu-law-simpler-and-less-costly_en.

[5] OJ L 26, 28.1.2012, p. 1.

The specific administrative features of each Member State have influenced the organisational arrangements they have established to transpose and implement the Directive. Usually the authority that develops and adopts the plans and programmes is also in charge of carrying out the SEA procedure. In most Member States, the Ministry of the Environment or an environmental agency is considered to be the *'concerned authority with specific environmental responsibilities'* (Article 6(3) SEAD). In some Member States, the environmental authorities have more responsibilities and are in charge of driving the SEA procedure. Some Member States have designated a body to supervise and check the quality of the documentation and the outcomes of the SEA procedure.

The Member States enjoy wide discretion in decision-making (Article 8) and the arrangements for providing information on the decision once the SEA procedure is complete (Article 9). In some Member States, the environmental authorities are entitled to issue an administrative act (such as a decision). The decision could be either binding on the content of the plans and programmes or merely be issued as a non-binding act.

2.2. Scope of application of the SEA Directive

In general, Member States have transposed and implemented the SEAD in line with its objectives and requirements, and have not encountered challenges in determining the scope of application of the Directive. The EU Court of Justice (CJEU) has delivered a comprehensive case-law relating to the SEAD, and thus facilitated its application. The CJEU has confirmed the broad interpretation of the terms and provisions of the Directive.[6] For example:

- ***'Plan and programme' subject to a SEA (Article 2)***

The SEAD does not define the terms 'plans and programmes' but rather qualifies them. In the first judgment[7] examining the scope of the SEAD, the CJEU clarified that the mere fact that plans and programmes are adopted in the form of a law does not exclude them from the scope of the Directive[8]. Further to this, plans and programmes that are required under national or regulatory provisions determining the competent authorities and the procedure, but adoption of which is not compulsory, may still be subject to the SEAD if they meet the relevant criteria set in the Directive.[9] Where there is any doubt, the distinction between plans and programmes and other measures should be drawn by referring to the specific objective laid down in Article 1 of the SEAD, namely that plans and programmes which are likely to have significant effects on the environment are subject to an environmental assessment.[10]

As regards the definition of plans and programmes, nearly half of Member States have transposed Article 3(2) of the SEAD word for word. Most of them have adjusted the type or name of the sectoral planning to take specific national arrangements into account.

[6] C-567/10, ECLI:EU:C:2012:159, p. 37, and C-473/14, ECLI:EU:C:2015:582, p. 50.

[7] C-105/09 and C-110/09, ECLI:EU:C:2010:355.

[8] Idem, p. 41.

[9] C-567/10, p. 31.

[10] C-41/11, ECLI:EU:C:2012:103, p. 40 and C-567/10, p. 30.

- ***'Setting the framework' (Article 3(2))***

Plans and programmes for which a SEA is required should set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive. Almost all Member States have transposed the term 'setting the framework' word for word, often developing it in a legislative act or in guidance documents. CJEU case-law has confirmed that this term must reflect the objective of the SEAD taking into account the environmental effects of any decision that lays down requirements for the future development consent of projects.[11] It can therefore be said that plans and programmes set a framework for decisions which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or allocating resources.

- ***Screening***

Article 3(4) and (5) of the SEAD establishes the process of determining whether plans and programmes are likely to have significant environmental effects and thus require a SEA. Member States have to take into account the significance criteria set out in Annex II to the SEAD. Most Member States have transposed Annex II word for word and apply a case-by-case screening approach. However, the margin of discretion in screening certain plans and programmes is limited by the overall objective of the Directive[12], namely to ensure a high level of environmental protection.

2.3. Scoping (Article 5(4))

The scope and level of detail of the information to be covered in the environmental report is referred to as 'scoping'. Member States enjoy wide discretion in organising the scoping phase of a SEA, limited by the sole obligation to consult the authorities with specific environmental responsibilities.

In some Member States the preparation of the scoping report is mandatory. The content and the level of detail of the information presented in the scoping report can vary between Member States, and some stipulate its content in national legislation.

The public authorities in the different Member States have a different role in the scoping. The environmental authorities should, as a minimum requirement, be consulted in the scoping stage. However, in some Member States they also approve the scoping documentation.

2.4. Environmental report (Article 5 and Annex I)

Annex I of the SEAD provides the minimum content of the environmental report. Member States should ensure that this report is of sufficient quality. Nearly half of Member States have extended the scope of Annex I in their national legislation. For example, some Member States require the environmental report to include an assessment of certain economic and social factors that may be relevant in implementing the plan. Other Member States explicitly require the results of the public consultations to be included in the environmental report. Regarding the content of the non-technical summary of the report, almost all Member States have transposed the relevant provision of the Directive word for word.

[11] C-105/09 and C-110/09, ECLI:EU:C:2010:120, p. 60

[12] C-295/10, ECLI:EU:C:2011:608, p. 47.

Member States have encountered two types of challenges in preparing the environmental report:

i. the availability and quality of the data;

ii. the technical knowledge and experience of the experts preparing the report and the authorities in charge of its quality review.

- ***Baseline information***

Some Member States have transposed the requirements of Annex I(b) word for word; others have developed guidance documents to facilitate the gathering of baseline information. Nearly two thirds of Member States have reported that the relevance, availability and level of detail of the data to be collected pose a difficulty when gathering the baseline information, for example such related to climate change vulnerability assessments.[13] Experience shows that the quality of baseline information is better for small-scale plans and programmes due to their location-specific character.

- ***Reasonable alternatives (Article 5(1))***

The SEAD does not define the term 'reasonable alternatives', nor does Member States' transposing national legislation. Many Member States have prepared national guidance documents to make it easier to identify and select the reasonable alternatives in the SEA procedure. There is no common approach to define the types and the number of alternatives to be assessed. This depends on the objectives, the geographical scope and the content of each set of plans and programmes. However, the three most common categories of alternatives for Member States are:

i. *locational alternatives;*

ii. *qualitative and quantitative alternatives* (changing the scale or size of the intervention in the environment);

iii. *technical alternatives* (related to the design of the future projects to be developed on a selected site).

Member States always consider the *'zero alternative'*[14] in the environmental report but the implementation approach varies. Some Member States take this as one of the 'reasonable alternatives', while others consider it a self-standing part of the environmental report, and not necessarily linked to the reasonable alternatives, but rather to the baseline information.

To ensure compliance in implementing and applying the SEAD, the alternatives that are assessed have to be reasonable taking into account the objectives and the geographical scope of the plans and programmes before setting up their final content. As Member States have also noted, due to the specifics when preparing plans and programmes, identifying the

[13] The Commission services developed a guidance on integrating climate change and biodiversity into Strategic Environmental Assessment [http://ec.europa.eu/environment/eia/pdf/SEA%20Guidance.pdf].

[14] Annex I(b) of the SEAD states that the environmental report must include information about the likely evolution of the state of the environment without implementing the plan or programme. This is often called the *'zero alternative'*.

reasonable alternatives could be a challenge. For example, it is challenging to identify and assess reasonable alternatives at the planning stage either because the plans and programmes strategically address a particular matter, or because of the general content of the plans and programmes.

2.5. Consultation (Article 6)

Member States have considerable discretion in organising the process of informing and consulting the public and the relevant authorities in the different stages of the SEA procedure. They should ensure an early and effective consultation procedure takes place and it is also in line with the requirements of the Aarhus Convention.[15]

- ***Timeframes***

The SEAD does not specify the timeframes for the consultation procedure, but rather requires the consultation to be carried out in the 'appropriate timeframes' (Article 6(2)). Usually the timeframes for consulting the environmental authorities are the same as those for consulting the public. The CJEU[16] has confirmed that national legislation can prescribe timeframes, provided they do not preclude the effective opportunities of the public and the authorities to express their opinion.

- ***Making screening/scoping information available to the public***

All Member States inform the public about the outcomes of the screening procedure. This information is usually announced on the website dedicated to the specific plans and programmes, or the website of the environmental authorities, especially if they take the final decision. The screening decision is also published in newspapers, official journals, etc.

In some Member States the public is involved at the scoping stage, through receiving information, and having the opportunity to provide written comments or participate in the scoping consultations.

- ***Consulting the authorities concerned (Article 6(3))***

All Member States consult the authorities on the environmental report and the draft plans and programmes. In some Member States the environmental authority plays the role of an intermediary between the authority developing the plans and programmes and all other authorities to be consulted in the SEA procedure. The environmental authority also ensures the quality of the environmental report.

The CJEU[17] has clarified that it is necessary to ensure a functional separation within the authority responsible for the consultation on environmental matters. This is to ensure that an administrative entity internal to the authority has the real autonomy needed to give an objective opinion on the plan and programme subject to the SEA procedure.

[15] UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

[16] C-474/10, ECLI:EU:C:2011:681, p. 50.

[17] C-474/10, ECLI:EU:C:2011:681, p. 42.

- ***Consulting the public on the environmental report***

In most Member States the environmental report is made public at the same time as the draft plans and programmes. This gives the public sufficient time to express an opinion and contribute to the development of the environmental report before the plans and programmes are formally adopted. The Member States usually publish an announcement about the public consultation on the internet. The announcement notes the title of the plan and programme, the responsible authorities, and the place where all documents related to the draft plans and programmes, including the environmental report and its non-technical summary, are available for public consultation. In some Member States the consultation requirements are more stringent than the Directive and include the organisation of a meeting or public hearing to consult the public.

The public consultation is a key step in the procedure and aims to improve the transparency, efficiency and effectiveness of the planning process. In this way it facilitates and improves the overall perception and social acceptance of the plan and programme, before it is adopted and implemented.

- ***Transboundary consultations (Article 7)***

All but two Member States have noted experience in carrying out transboundary SEA consultations, either as an affected party, or as a party of origin, or both. In most Member States, the environmental authorities are responsible for organising these consultations.

Member States have reported that the main hindrances in the transboundary SEA consultation are the cost of translating documents, the quality of the translated documentation and the often short timeframes.

2.6. Monitoring significant environmental effects (Article 10)

Monitoring allows the results of the environmental assessment to be compared with the outcomes from the implementation of plans and programmes, in particular the significant environmental effects. The SEAD does not prescribe the exact arrangements for monitoring the significant environmental effects, the frequency of the monitoring, its methodology or the bodies in charge of monitoring.

Member States have noted that the monitoring depends on the plans and programmes, and that there are certain types of plans and programmes for which monitoring reports are regularly prepared. However, most Member States were not able to provide information about the frequency of the monitoring. Monitoring can be based on standard monitoring indicators, sometimes set in the national legislation, or be on a case-by-case basis. For the SEAD, and where applicable, Member States tend to use the environmental monitoring arrangements set up in other Directives, such as the Water Framework Directive,[18] the Habitats Directive,[19] and the Industrial Emissions Directive.[20]

[18] OJ L 327, 22.12.2000, p. 1.

[19] OJ L 206, 22.7.92, p. 7.

[20] OJ L 334, 17.12.2010, p. 17.

3. Relationship with other EU legislation and policy areas

The SEAD has explicit links with the EIA Directive and the Habitats Directive. It is also closely linked to other Directives that prescribe the adoption of certain plans and programmes covered by the scope of the SEAD (such as the Nitrates, Waste, Noise, and Flood Risk Directives).[21] To avoid duplication, Article 11 of the SEAD stipulates that the Member States may provide for coordinated and/or joint procedures where there is an obligation under both the SEAD and other EU legislation to assess the effects on the environment.

3.1. EIA Directive

Article 11(2) provides that the strategic environmental assessment procedure must be performed without prejudice to any requirements under the EIA Directive, or any other EU legislation. CJEU case law[22] has acknowledged that the environmental assessment carried out under the EIA Directive is without prejudice to the specific requirements of the SEAD and therefore cannot dispense with the obligation to carry out an environmental assessment under the SEAD if needed to comply with the environmental aspects specific to that Directive. Moreover, the CJEU has confirmed that the EIA and SEA procedures differ for a number of reasons. Therefore, it is necessary to comply with the requirements of both Directives concurrently.[23]

Practice shows that the boundaries between the two procedures are not always distinct and tend to overlap, in particular as regards plans, programmes or projects related to land use and/or spatial planning. This is because these kinds of plans, programmes or projects can show the characteristics both of plans and programmes and a project. Meanwhile, land use and/or spatial plans are the most frequent plans and programmes subjected to the SEA procedure. In such assessment procedures, it is important to ensure compliance with both the SEAD and the EIA Directive, especially where the Member States have opted for coordinated procedures.

The coordinated or joint procedures are subject to Member States' discretion[24] and only 10 Member States have opted for joint or coordinated procedures in their national legislation.

3.2. Habitats Directive

Many Member States take the view that there are no risks in duplicating the appropriate assessment under Article 6(3) of the Habitats Directive with the SEA. This is because of the different scope of and interplay between the two procedures. The CJEU has clarified that the SEAD would apply on its own merits should the preconditions requiring an assessment under the Habitats Directive be met in respect to plans and programmes.[25]

[21] OJ L 375, 31.12.1991, p. 1; OJ L 312, 22.11.2008; OJ L 189, 18.7.2002, p. 12; OJ L 288, 6.11.2007, p. 27.

[22] C-295/10, p. 58-63.

[23] Idem, paragraph 61-63.

[24] Idem, paragraph 65.

[25] C-177/11, EU:C:2012:378, p. 19-24.

4. Plans and programmes co-financed by the European Structural and Investment Funds (2014-2020)

Article 3(9) of the SEAD provides that plans and programmes co-financed by the EU fall under the scope of the Directive. The Common Provisions Regulation[26] and the fund-specific Regulations govern for the 2014-2020 programming period the five relevant European Structural and Investment Funds[27] (ESIF). The SEAD was applied to most of the ESIF co-financed programmes for 2014-2020, as they set up a framework for future consent of projects.

The Common Provisions Regulation has improved the application of the SEAD in two ways. Firstly, under Article 55(4) of the Regulation *'the evaluation must incorporate, where appropriate, the requirements for the Strategic Environmental Assessment'.* The Commission has prepared guidance documents[28] to facilitate the ex ante evaluation. The guidance documents provide that the SEA has to be carried out early in the preparation of plans and programmes and must be completed before they are adopted.

Secondly, the Common Provisions Regulation introduced ex ante conditionalities as a new feature of the 2014-2020 programming period. The purpose of the ex ante conditionalities is to ensure that the necessary prerequisites for effective and efficient use of EU co-funds are in place and to ensure the effective application of the EIA and SEA Directives. The general ex ante conditionalities include arrangements that ensure the effective application of the SEAD. Few Member States had to amend their national legislation. Consequently, the regulatory framework related to environmental decision-making process has been clarified and the knowledge and skills of the authorities applying the SEAD has been strengthened. The Regulation also introduced a thematic ex ante conditionality for the transport sector, requiring comprehensive master plans and programmes for transport investment, which comply with the legal requirement of the SEAD.

Almost all Member States have fulfilled the general ex ante conditionalities as regards the SEAD. Most Member States have noted that the general and multi-sectoral nature of the ESIF programmes has complicated the SEA procedure, which often had to be accelerated. Member States have pointed out that the information available on the likely significant effects of plans and programmes is rather general at the time of preparing and adopting their plans and programmes. This has been a particular obstacle when assessing the impacts of the cross-border programmes. Few Member States developed specific guidance documents for carrying out SEAs for the ESIF plans and programmes. Most Member States relied on the guidance provided by the Commission.

[26] OJ L 347, 20.12.2013, p. 320.

[27] ESI funds include the ERDF, the CF, the ESF, the EAFRD, and the EMFF.

[28] Guidance document on ex ante evaluation (ERDF, CF, ESF)[http://ec.europa.eu/regional_policy/sources/docoffic/2014/working/ex_ante_en.pdf]; Guidelines for the ex-ante evaluation of 2014-2020 EMFF OPs [http://ec.europa.eu/fisheries/sites/fisheries/files/guidelines-ex-ante-evaluation-2014-2020-emff-ops_en.pdf]; Synthesis of the ex-ante evaluations of RDPs 2014-2020 [http://ec.europa.eu/agriculture/sites/agriculture/files/evaluation/rural-development-reports/2015/ex_ante_rdp_synthesis_2014_2020/fulltext_en.pdf].

5. Effectiveness of the SEA Directive

The effectiveness of implementing the SEAD can be assessed as a function of its potential to influence both the planning process and the final content of plans and programmes. All Member States have acknowledged that the SEA procedure has influenced the planning process at least to a certain degree, and that it improved the quality of plans and programmes. There is also a common and shared understanding among the Member States and practitioners that the procedure is more effective if there is the political will to effectively influence the planning process. This ensures that environmental considerations are fully integrated within the planning and decision-making process.

Many Member States have noted that the SEA procedure is more likely to influence small scale and regional plans and programmes (e.g. land use) rather than national plans and programmes for which the strategic decisions are often taken at political level and there is little margin for these to be reviewed after the SEA procedure. For example, most Member States have acknowledged that the proper consideration of the alternatives can influence the content of plans and programmes, but in practice the alternatives focus mainly on reducing or mitigating the negative impacts. However, such measures can also effectively ensure environmental protection.

Many Member States have acknowledged the role of the public consultation in enhancing the transparency and credibility of the assessment. This is important because the results of the assessment have to be taken into account in the final decision when adopting the plans and programmes. However, after 10 years of implementing the SEAD, the Member States have noted that the extent to which the results of the SEA procedure are considered in the final decision of plans and programmes often depends on the decision-making specifics, and can vary from a committed reflection of the results of the assessment to a simple procedural box-ticking requirement.

6. Conclusions

In 2007-2014, Member States did not raise major implementation concerns. The CJEU has delivered case law clarifying the requirements of the SEAD. Member States have strengthened the implementation of the Directive and gained more experience in applying it. Where necessary, Member States amended their national legislation to ensure compliance with the Directive.

The degree to which the SEAD is implemented in the Member States depends on the different administrative and legal arrangements supporting its application. Some of the application challenges relate to different elements of the SEA procedure (such as the quality and availability of the information used in the environmental report). This is particularly relevant for plans and programmes that address a broad scope of issues (e.g. national or sectoral). There are still uncertainties about some key concepts such as ‘reasonable alternatives’. While some of these issues could be resolved by means of guidance documents, the interplay between the EIA and SEA procedures appears to be a challenge, particularly for plans and programmes which have the characteristics of a project.

All Member States should pursue their implementation efforts to ensure compliance with the SEAD. Where necessary, they should also take proactive initiatives, such as guidance documents, training, information sharing, and establishing environmental information databases. Based on this report, the Commission will consider in the upcoming evaluation

how to increase the positive impacts of the SEAD and better demonstrate its EU added value, effectiveness and efficiency.