

## **J&E Workplan 2007**

### **SEA (Strategic Environmental Impact Assessment) in infrastructure projects**

#### **Positions Paper**

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#### **1. Objectives of J&E SEA research 2007**

Justice & Environment (J&E) is a network of public interest environmental law organisations based in the European Union member states and South Eastern Europe. J&E aims to use law to protect people, the environment and nature. Our primary approach to reach our objectives is to improve implementation and enforcement of the European and national legislation.

In 2007 transposition and implementation of SEA Directive (“Strategic Environmental Impact Assessment”, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes to the environment) was one of the major activity fields of J&E. The major activity of J&E was to compile a series of case studies and legal analyses on both transposition and application of the Directive. Two studies per country were carried out in Austria, Czech Republic, Estonia, Hungary and Slovenia. The scope of the studies was on the one hand a transposition analysis on crucial aspects of the Directive and on the other hand case studies on the implementation of the Directive.

#### **2. Crucial aspects of SEA**

SEA should serve as a complementary element to EIA-procedure (Environmental Impact Assessment, Directive 85/337/EC) at an early planning stage. Whereas EIA is a project based and detailed assessment, SEA is a planning instrument with a strategic background at a stage where all planning options are open. In 2006 J&E carried out comprehensive studies on EIA-Directive implementation. Major problems were identified with regard to public participation and lack of project alternative assessments as well as poor application of the legislation.

SEA should, among others, overcome central problems of EIA proceedings. An EIA is a project based instrument that assesses the environmental impacts of specific projects in a detailed way. One of the main problems of EIA is that projects have to be far developed when the assessment is carried out. At this stage it is hard to “change” the project in a significant way like choosing alternative tracks for a road since this would lead to complete re-planning of the project to collect and assess new data.

SEA Directive was subject to hard and long discussions in the European legislation procedure. When the Directive was adopted in 2001 many important aspects of an SEA ended up in unclear, vague and or missing provisions. The resistance against the instrument remained persistent with regard to implementation of the directive.

The directive was to be transposed until July 2004. Most member states have been reluctant and late with regard to transposition and implementation even though the timeframe for enact national legislation was three years.

### **3. Main findings of J&E studies 2007**

- It is striking that though the directive entered into force in 2004, there is little practical experience with its application until summer 2007.
- It can be included that SEA in infrastructure projects has no or little practical impact on the planning decision. Political or developer's decisions on a certain plan or programme are taken at time far prior to SEA procedure. SEA serves only as a formal procedure just before the formal adoption of a plan.
- Most countries transposed SEA directive as vague and weak as the directive wording is. There are not sufficient procedural rules and guidance for authorities to apply transposition laws in accordance with the directive. A directive is addressed to the member states. Member states are responsible to transpose European directives in a way that authorities have sufficient clarity on how to apply the directive. This is not the case in selected countries.
- Major implementation problems occur with regard to alternative assessments, one of the crucial aspects of an SEA. Whereas in some countries transposition laws appear in correspondence with the directive, in other member states they are not. In practice alternative assessments are either not carried out at all or not sufficiently. The analysis of significant effects
- Though most countries foresee opportunities for the public to make comments on draft plans, comments of the public are not or not seriously taken into account as provided by the directive.
- The same counts for taking into account the results of SEA in the actual planning decision. In most cases the final planning decision is taken immediately after SEA procedure was finished. Considering planning periods of many years for large scale projects, it is obvious not only from that perspective that SEA has no actual impact on the planning decision.
- In most cases plan initiators and decision makers respectively approve the plan in the form it was proposed prior to SEA.
- Access to Justice is against SEA and planning decisions are limited if there are any. This appears to contradict the public rights on effective remedies with regard to decisions they are concerned. In line with the interpretation of the Aarhus Convention Compliance Committee planning the decisions are subject to Article 7 of the Aarhus Convention and must be open for Access to Justice as to Article 9 paragraph 3 of the Convention.

### **4. Policy recommendations**

The European Commission should enhance its activities with regard to implementation of SEA directive. Major problems occur in application, not in transposition. Capacity building and guidance would be a major tool to overcome the problems.

Best practise examples of different member states should be collected and serves as a pattern for member states with implementation problems.

The European Commission should thoroughly assess complaints of the public with regard to poor application of the directive in order to raise implementation pressure to the member states.

Member States should provide for clear procedural rules and guidance on the application of SEA. SEA procedure has to be carried out at a stage when all planning options are factually, and not only theoretically open.

It has to be safeguarded that public participation and results of SEA, in particular alternative assessments, are taken into account in an effective manner, as the directive provides for.

The lack of access to justice with regard to SEA planning decisions reduces compliance pressure of authorities. Granting access to justice for the public concerned is not only an obligation provided by European law and the Aarhus Convention, but would also improve implementation of the directive.

An amendment of SEA directive could solve many of the above mentioned problems by clarifying unclear formulated issues and would lead to common standards in application of the instrument in all 27 member states.

## **5. Conclusions**

Vague formulations in the directive and reluctance as well as possibly lack of resources and know how in member states to improve SEA rules lead to weak transposition acts and poor application of SEA provisions in member states. Public authorities lack guidance and clear rules in order to correctly apply the directive. There is an obvious discrepancy between the actual, political planning decisions and the formal adoption of plan. In many cases SEA is carried out years after the political decision of a transport plan. Comments of the public and results of alternative assessments and environmental reports developed during SEA procedure appear irrelevant with regard to the formal adoption of respective plans.

The disappointing implementation is not only in non conformity with the obligations of the member states provided by the law, but does not lead to added value for the environment or to later EIA proceedings. As long as EIA proceedings are the only opportunity for the public concerned to participate in decision making process with the possibility to challenge legality of substantive and procedural decisions, EIA will not be relaxed from pressure regarding basic issues like alternative assessments and early and effective consideration of environmental impacts.

SEA needs more than pure transposition of legal provisions. A change in planning cycle and an environmental assessment and public participation in an early planning stage are crucial to make the instrument work. We therefore call upon member states and the European Commission to enhance activities in order to make the instrument SEA work.