

J&E Workplan 2007: SEA in transport sector
Legal analysis on SEA implementation with regard to
infrastructure projects
Hungary – EMLA

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1. General information on transposition of SEA Directive in transport sector

a. Names of acts

The transposition of the SEA Directive into Hungarian legislation has been carried out by the following pieces of legislation:

1. Act No. 53 of 1995 on the General Rules of the Protection of the Environment (Environmental Protection Act)
2. Government Decree No. 2 of 2005 on the Environmental Assessment of Certain Plans and Programmes (SEA Decree)

b. Transposition in time?

Under the SEA Directive the transposition procedures had to be completed before 21 July 2004. The modification of the Environmental Protection Act was formally finished on time (in force since 16 July 2004), but the SEA Decree with the substantial provisions was issued only in January 2005 (in force since 19 January 2005). The European Union directive has been incorporated into the Hungarian law therefore half year later, than prescribed.

c. Overall framework of SEA in legal system

- i. (for example relationship to EIA-proceeding, regional planning, other planning proceedings, other informal planning activities)*

The provisions of the environmental assessment according to SEA Directive have been adopted into the Environmental Protection Act under the title of '*Integration of environmental protection into legislation and different state decisions*'. The here defined 'analysis' of acts and decisions concerning environment is part of the Environmental Protection Act from its entry into force (19 December 1995), however, it has never become in practice an existing and significant legal institution. (The National Environmental Committee should offer an opinion on all legislative drafts and decisions in frame of the 'analysis', but in practice the legislative organs do not share these drafts with the Committee.) Plans and programmes likely to have significant effects under the SEA Directive do not fall into the scope of the above mentioned 'analysis'.

The SEA Decree contains the comprehensive regulation regarding environmental assessment and environmental report of plans and programmes regulated in SEA Directive. The Decree combines both approaches mentioned in the Directive's Art. 3.5 in order to determine whether plans or programmes are likely to have significant environmental effects. Namely there are mandatory cases with a list of special types of plans and programmes (Annex 1, see e.g. town and country development programme, local construction regulation) and there is case-by-case examination.

Under the SEA Decree, among the conditions of when an SEA is mandatory for a plan or programme, besides being listed in Annex 1, there are the followings. According to Art. 1.2 Point ba) those plans and programmes must compulsorily undergo an environmental assessment that “*are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in the annex of the respective law on EIA but without any restrictions relating to the size or the location of the projects.*” and under Art. 1.2 Point bb): “*may have a significant harmful effect on a Natura 2000 site*”.

The only exception to this obligation to perform an SEA is when the plan or programme in question determines the use of small areas at local level or is a minor modification, in which case they should be subject to SEA only where the preparer of the plan or programme determines that they are likely to have significant effects on the environment. Therefore these so called minor cases constitute the subjects of case-by-case examination.

Annex 1 of the SEA Decree is listing by name nine plans or programmes. Only one of them concern the transport sector, namely the ‘*National, local public road network development plan*’, but regarding the SEA proceedings in transport sector there are no special rules.

d. Other remarks

- i. (for example no transposition necessary due to limited scope of SEA Directive)*

Under the SEA Decree, the environmental assessment is part of the elaboration, conciliation and adoption procedure of plans and programmes. The environmental report is a single part of the project-documentation. In accordance with the purpose of the SEA Directive to avoid duplication of assessments the SEA Decree is – probably too much – committed to make this procedure as insignificant as possible. Regarding that, the Decree does not constitute clear requirement to present feasible alternatives.

Further remarkable aspect of the Hungarian SEA Decree is that at the beginning of the elaboration of the plan or programme, the preparer or the authority responsible for elaboration is entitled to decide whether an environmental assessment is necessary or not. Namely, either the plan or programme falls under the general obligation to perform an SEA or it falls into the category of minor cases and requires a concrete decision.

2. Reasonable alternative assessment and significant effects (Article 5/1, Annex 1 (f) and (h))

a. Transposition

- i. List in detail transposition provisions on Article 5/1 and Annex 1**
- ii. All provisions transposed?**

The preparer of the plan or programme in order to determine the concrete content and details of environmental report is obliged to collect non-formal administrative opinions by competent authorities under the SEA Decree Art. 7.1. To support the professional opinions of competent authorities, the preparer must share information about the concerned project.

The group of information to be shared (listed in the Decree Art. 7.2 and 4.3) is much narrower than Annex 1 of the SEA Directive would require. The SEA Directive in Annex 1 requires the following aspects to be presented b) the relevant aspects of the current state of the environment ... c) the environmental characteristics of areas likely to be significantly

affected; and d) any existing environmental problems ... The Hungarian SEA Decree under Art. 7.2 Point b) only requests an “*introduction of the situation, in particular information of a particular environmental importance*”.

On the other hand, at the decision-making on the concrete content and details of an environmental report under Art. 7.4 of the SEA Decree, the preparer has to take into account the general mandatory requirements of environmental assessment under Annex 4 and the opinions of competent authorities. The aforementioned Annex 4 on general mandatory requirements of environmental assessment contains a detailed list of compulsory elements, which meets the requirements listed in Annex 1 of the SEA Directive. Due to this reference to Annex 4 it does not establish incorrect transposition, but it does not ensure the same level of protection as the Directive. It is only the preparer, who is obliged to take into account all information with environmental relevance and the concerned and competent authorities have only partial information by making their opinion on the plan or programme.

b. Analyse framework, quality and application of

- i. “**reasonable alternatives**” (*what kind of alternatives are covered, for example different locations, different means of transport (like railways, motorways, water-ways) how detailed is information provided as to “objectives and geographical scope” of the plan.*)

„Formulation of alternatives is central to integrating environmental considerations into plan and programme making within the SEA process. A first step is to identify the range of reasonable alternatives that meet the objectives of the proposal, and summarize their environmental aspects. The alternatives should include a ‘do nothing alternative’. Although it is not mandatory, it might also be helpful to include the best practicable environmental option (BPEO).“¹

In the above cited interpretation of “reasonable alternatives” it is a hidden term of the Hungarian SEA Decree.

The Environmental Protection Act applies word-by-word transposition of Article 5.1 of the Directive under Art. 43.7, but the detailed regulation in the SEA Decree does not follow the wording of the Act regarding ‘reasonable alternatives’.

Under Art. 7.2. Point c), the SEA Decree talks about ‘*introduction of possible development directions*’ in frame of the information to be shared with competent authorities in order to have their opinion, which is much wider and less specific than ‘reasonable alternatives’.

Later the Hungarian law uses the term of ‘alternatives’, in particular in Annex 4 Point 3 as ‘*Introduction of environmental effects and consequences of the plan or programme or their alternatives*’. However, elaboration of the above would require a long and detailed list which can not be effectively enforced in practice in each case of ‘alternatives’.

The term of ‘reasonable alternatives’ of the SEA Directive appears only in Art. 11 Point b) of the SEA Decree prescribing the content of the summarizing statement of the plan or programme accepted.

To sum up, the aforementioned legal solutions formally meet the transposition requirements, but can not ensure the elaboration of reasonable alternatives and an effective option among

¹ Resource Manual to Support Application of the Protocol on SEA
http://www.unece.org/env/eia/sea_manual/chapterA5.html

them. There is no clear and absolute legal requirement towards the preparer to present feasible alternatives to the project proposed.

ii. description of respective “significant effects”

1. How is significance analyzed in practise? (with regard to different issues mentioned in Annex 1 f (biodiversity, climate, air, soil, interrelationships..))

Under the SEA Decree, again a separate Annex 2 is collecting those aspects that have to be taken into account when making a decision whether there is a need for the assessment of plans or programmes. These are the above mentioned minor cases, when the plan or programme in question determines the use of small areas at local level or is a minor modification. The significance of an effect depends on the characteristics of the plan or programme, on the features of expected environmental effects and finally whether the affected location is a vulnerable, sensitive area. The features of expected environmental effects are fully listed in Point 2 under Annex 2, e.g. sub-point *a) duration, frequency, probability and reversibility of the effects*; sub-point *b) cumulative and synergetic effects*; etc. Therefore Annex 2 of the SEA Directive has been correctly transposed.

There were no cases reported so far by the Hungarian environmental NGO community where the assessment of significant effects was not appropriate.

2. Does the environmental report cover with regard to significant effects

- a. cumulative, secondary and synergetic effects?**
- b. short-term, long-term, permanent and temporary effects?**
- c. positive and negative effects related to environment?**
- d. Is the significance of alternatives covered too?**

The above analysed characteristics of expected environmental effects have to be taken into account, when there is a case-by-case decision whether the obligation to perform an SEA exists or not. By the transposition of the SEA Directive into the Hungarian law, as we have already pointed out, these case-by-case decision matters are the so called minor cases. Due to this legal solution, under the main provision of the SEA Decree there is not any individual decision, but a general obligation to perform an SEA.² It was important to emphasize it again, because in the environmental report the characteristics of expected environmental effects to be revealed are not prescribed in details. Annex 4 of the SEA Decree on general mandatory requirements of an environmental assessment makes a distinction between direct and indirect effects, but does not talk about cumulative, secondary and synergetic effects or short-term, long-term, permanent or temporary effects.

Regarding targets of direct and indirect effects, there are sub-points in the Annex 4 of the SEA Decree e.g. *direct effects* on environmental elements, systems, climate, biodiversity, natural resources, etc. Within the targets of *indirect effects*, among other things the appearance of new environmental conflicts, the changes in opportunities of environment-

² The review of the implementation of the SEA Decree is running in the Ministry of Environment and Water Management. Therefore there is no information so far, whether these case-by-case decision matters (so called minor cases) occur more frequently in the practice or the general obligatory cases.

friendly attitude and environmental awareness and e.g. the restriction of renewability of natural resources are to be examined. This list covers positive and negative effects to environment and alternatives of the plan or programme as well, and it can be considered varied and exhaustive.

Taking into account that Annex 4 on general mandatory requirements of the environmental assessment is a guideline in the decision-making procedure, but the final decision on the content of environmental report is a result of an individual procedure, this way of transposition can be correct considered.

3. Public participation (PP, Article 6 and 7)

a. “Early and effective opportunity within appropriate time frames” to express opinion on “draft plan”? (transposition and in practise?)

i. At what stage in planning procedure does PP take place?

ii. Does legislation provide for early and effective PP at a stage when all options are open?

In the Hungarian SEA Decree, the opportunities of public participation are regulated at every stage of the procedure. Firstly, there is an individual decision in a number of cases whether the project is likely to have significant effects on the environment or not. Secondly, there is a general mandatory decision on the concrete content and details of environmental report. Thirdly, there is the adoption of the plan or programme. The preparer is obliged at every stage to make the documentation and at the final stage the environmental report public.

The opportunity to express opinion is open only at the final stage of the procedure, before the adoption of the plan or programme, within 30 days from the date of publication, which is in accordance with the SEA Directive. With regard to the above analysed status of “reasonable alternatives” in the SEA Decree, it can be said that according to the wording of the SEA Decree all options of the plan or programme are open to the public to express opinion on them. Finally, there is the opportunity of the concerned public to express opinion in the review procedure of the plan or programme, but not every plan and programme are open to review.

b. PP in transboundary context (transposition and in practise)

i. How is the public of another country informed about transboundary SEA?

Regarding information of the public in a foreign, concerned state the SEA Decree applies word-by-word transposition. In accordance with Art. 7.2 of the SEA Directive the Decree regulates under Art. 9.2 that in case the concerned states enter into consultations they have to agree on detailed arrangements to ensure that the authorities and the public in a state likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable timeframe.

ii. Are all important documents translated?

There are not any provisions on the translation of project documentation in the SEA Decree, there are only few bilateral agreements on this matter, but in general there are not any sufficient guarantees to remedy the disadvantageous situation of a state being incompletely informed on a plan or programme proposed.

4. Decision Making (Article 8 and Article 9)

a. How are Article 5/1 and Annex 1 (f) and (h) considered in decision?

i. Transposition in general, practise in general

Under Art. 10 of the SEA Decree, the preparer is obliged to provide the decision-maker on a plan or programme with the draft of the plan or programme, the environmental report, and at least the summary of opinions and comments submitted in the environmental assessment procedure. By the adoption of the plan or programme, the decision-maker has to take into account the environmental report and the expressed opinions in the environmental assessment procedure.

ii. Does (and to what extent) the decision have to take into account the environmental report in particular with regard to alternative assessment and significance of effects?

The decision has to take into account the environmental report (Art. 10 of SEA Decree). According to Annex 4 of the Decree on general mandatory requirements of environmental assessment, the environmental report should cover the introduction of alternatives examined in preparation of the plan or programme and the reasons of the selection among alternatives (Point 2 of Annex 4). The significance of effects is also a compulsory part of the environmental report, as we pointed out above.

b. How are Articles 6 and 7 considered in decision?

i. Transposition in general, practise in general

Under Art. 43.6 of the Environmental Protection Act and Art. 10 of the SEA Decree, by the adoption of a plan or programme the decision-maker has to take into account the environmental report and the expressed opinions in the environmental assessment procedure, namely non-formal administrative opinions by competent authorities, comments of concerned public and results of consultations with concerned states. The information on the adoption of the plan or programme has to cover as well the reasoning of decision, particularly of the integration or discarding of opinions.

ii. Does (and to what extent) the decision refer to the national and transboundary PP process

The decision has to refer to the result of national and transboundary PP process and to the reasons of integration or discarding of opinions of the public.

iii. How is public informed on decision?

After the adoption of the plan or programme, the adopting authority is obliged to make public the decision by at least one national or local newspaper and if the authority has a webpage also thereon. In that case if the concerned public is limited to a part of a settlement, the locally customary way of publication is also appropriate.

iv. Does the information to the public include the information provided in Article 9/1?

Art. 11 of the SEA Decree establishes the word-by-word transposition of Art. 9/1 of the SEA Directive, therefore the information to the public includes all elements aligned in the SEA Directive.

c. Is it assured that Articles 5 to 7 are effectively being taken into account before the adoption of the plan?

The results of PP have to be taken into account under Art. 10 of the SEA Decree as mentioned above. The opinions of competent authorities have to be integrated as well. The preparer is obliged to inform the adopting authority before the adoption process. Regarding the effectiveness of the integration, there are not any provisions in the Hungarian law. Based on our practical experiences and with regard that there are not any enforcement opportunities, the effectiveness of integration is not guaranteed.

i. Is there a difference in time between the formal adoption and the actual political decision on a plan?

Theoretically, there is no difference in time between the formal adoption and the actual political decision on a plan in the Hungarian law. In the practice the political decision usually precedes the formal adoption of the plan or programme. It is specially true in cases of infrastructure projects in transport sector.

ii. Have any political plans been substantially changed after an SEA?

We have so far no information on political plans which have been substantially changed after an SEA.

d. Is there a possibility for legal review (appeal) SEA decisions (and respectively the final plan) as well as for the case that an SEA has not been carried out for the public concerned ?

The possibility of SEA decisions' legal review is open only in frame of the final plan's review, but not in case of every plan and programme. These plans and programmes are adopted by different sources of laws.

Much of spatial plans and e.g. local waste management plans are adopted by municipalities in form of municipality decrees. The legality of municipality decrees can be reviewed from two different points of view, according to two different procedures:

- a) The procedural legality of municipality decrees (i.e. whether they were adopted in a properly administered procedure) can be reviewed by the Constitutional Court but the exclusive right to initiate such a review process at the Constitutional Court belongs to the regional Administrative Offices. Although any individual or legal person can request the Administrative Office to initiate such a review process, the Administrative Offices are in no case under any legal obligation to do so. The submission of such a request by an individual or a legal person does not constitute a formal administrative procedure and consequently there is no legal standing therein. There are cases of the Constitutional Court where the Court has abolished a municipality decree on spatial planning solely because of infringement of rules of due procedure, including public participation.
- b) The material legality of municipality decrees (i.e. whether they are constitutional and in line with other laws of the legal system) can also be reviewed by the Constitutional Court but such review can be initiated by anybody. The process before the Constitutional Court is a special process in which the classical rules of standing do not prevail, however, the applicant receives the decision of the Court by mail.

There is another type of municipality decision, the resolution. These are applied for deciding single cases and matters by the municipality. The review of the legality of such municipality resolutions can only be initiated by the regional Administrative Offices before a regular court of law.

In case of many other plans and programmes there are not any legal remedies available. These plans do not become laws, these are usually only approved by the Government, Ministries or Municipality Councils.

5. What other problems occur with regard to SEA proceedings?

- i. (Specific problem in Member State (for example different responsibilities on different planning levels like federal, regional, local; lack of obligatory strategic planning at all; competent authority etc))*

Regarding SEA proceedings in Hungary, we find particularly problematic the state of those plans or programmes that determine the use of small areas at local level or their minor modifications. The local community is in these cases usually significantly concerned, but there are not any guarantees to ensure that they get the opportunity to express their opinion, (let alone that their opinions are taken into account). In these cases the preparer is entitled to decide, whether an SEA is necessary to perform or not. The administrative opinions of competent authorities have to be collected and taken into account, but there are not any consequences if it is omitted. The preparer is the exclusive decision-maker whether SEA is necessary or not, what the content of environmental assessment is and how the opinions and comments of concerned authorities and public are integrated.

6. What is particular positive with regard to SEA proceedings in your country?

It is important to mention, as a remarkable aspect of the Hungarian SEA proceeding that the definition of the public is quite comprehensive, with emphasizing on NGOs as being concerned by the plan or programme.

Besides the definition of public the number of plans or programmes involved into the scope of the SEA Decree is also widespread and has a larger scope than in the Directive.

7. Conclusions

Overall, the SEA legal regime and its public participatory components are satisfactory in Hungary and align with the requirements of the SEA Directive. The above mentioned and analysed textual solutions do not necessarily and certainly constitute an infringement of community law, but may result in such a practice, which degrades this proceeding to a formal and weightless procedure.

The weightlessness of SEA procedure stems not only from the Hungarian transposition solutions, but also from the SEA Directive itself. The applied legal solution, i.e. the opinions have to be taken into account, is a legal obligation, but it is not clear so far what it means. The SEA Directive does not ensure an enforcing toolkit either. Therefore the effectiveness of SEA procedures depends heavily on the environmental awareness of the preparer.

We may conclude that the transposition of the SEA Directive into Hungarian law is correct and there are no significant gaps. Regarding its application, our experiences are not clearly convincing. In many cases the procedure of SEA passes almost unnoticed. Due to the role of the Hungarian environmental NGO sector this can change slowly, but correct implementation primarily it depends on the preparers and the authorities.