

J&E Workplan 2007: SEA in transport sector
Legal analysis on SEA implementation with regard to infrastructure projects
Slovenia - PIC

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1. General Information on Transposition of SEA Directive in Transport Sector

a. Names of acts

There is no specific regulation about integrated environmental impact assessment¹ (hereinafter: SEA) in transport sector. SEA for transport is regulated in Slovenian *Environmental protection act* (hereinafter: ZVO)², adopted 31. 3. 2004, in force since 7.05.2004.

In Article 40 Slovenian ZVO regulates that SEA shall be carried out for a plan adopted by the state or municipality for the area of spatial planning, water management, forest management, hunting, fisheries, mining, agriculture, energy, industry, *transport*, waste and waste water management, drinking water supply, telecommunications and tourism. That means that SEA is carried out when the plan lays down or foresees an activity affecting the environment for which EIA also has to be carried out in accordance with Article 51 of this Act, which regulates EIA. The same procedure has to be done when the plan covers a special protection area under the regulations of nature conservation.

b. Transposition in time

SEA was transposed into the Slovenian ZVO before Slovenia became member of the European Union, so transposition has been carried out in time.

c. Overall framework of SEA in legal system

In Slovenia there is no transposition of SEA Directive for transport sector, especially there is no specific act that would provide information regarding transport sector. However, transport is mentioned in the Slovenian ZVO in Article 40, paragraph 2 that provides regulation for SEA.

SEA was transposed into our legal system with the adoption of SEA Directive and is regulated in the Slovenian ZVO in Articles from 40-49. SEA is the basis for EIA, which is regulated in Articles 50-56 of the same Act.

The government adopted the *Decree on the categories of activities for which an EIA is mandatory*³ (OJ~RS, no~78/06), which prescribes activities affecting the environment for which the EIA is obligatory. EIA is obligatory for the activities affecting the environment only above a certain scale of the impact and activities affecting the

¹ Integrated environmental impact assessment is Slovenian definition of SEA.

² (Official Gazette of the RS, nos. 41/04, 20/06, 39/06)

³ With this Decree, the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment was transposed into Slovenian legal system.

environment for which only the report, containing single analysis and partial study suffice. Article 4 of the abovementioned *Decree* also states that EIA is obligatory for transport sector.

Slovenian *Spatial Planning Act* (OJ~RS, no~33/2007) regulates integrated EIA in Article 16, but transport is not specifically mentioned.

d. Other remarks

No other remarks.

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

ZVO in Article 41, paragraph 1, states that prior to carrying out the SEA, the initiator of a plan shall provide definition, description and evaluation of the impacts of the implementation of the plan on the environment and possible alternatives. The objectives and geographical characteristics of the area to which the plan pertains also have to be regarded.

Article 5/1 and Annex I (f), (h) of the SEA Directive were more precisely transposed into our legal system with the adoption of the *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* (OJ~RS, no~73/05). All the information to be provided under Article 5(1) and Annex I (f) and (h) of the Directive are defined in Article 6, paragraph 1 of this *Decree*, which states that:

- *an environmental report has to include information about:*

- *major impacts of the plan on the environment which can be direct, long-distance, cumulative and synergistic, short-term, medium-term and long-term, permanent and temporary, positive and negative and pertain to biodiversity, animal and plant life, soil, air, climate factors, material goods, cultural heritage (including architectural and archaeological heritage), landscape, inhabitants, their health and relations between these factors (§6(1)7);*
- *description of the reasons for selecting the possible alternatives dealt with (§6(1)10);*
- *description of the drafting of the environmental report including all obstacles, such as technical deficiencies, lack of knowledge and experience in gathering the necessary information (§6(1)11).*

ii. All provisions transposed?

Yes, all provisions were transposed.

b. Analyse framework, quality and application of

i. “reasonable alternatives”

Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment states in Article 3, paragraph 1 what the environmental report is:

- The **environmental report** is a document, where the significant effects on the environment, nature conservation, health and cultural heritage preservation are identified, described and evaluated. The environmental report contains also reasonable alternatives, which take into account environmental objectives and characteristics of the area to which the plan pertains.

Paragraph 2 of the same Article states that:

- If in accordance with the nature conservation regulations the plan refers to the protected area, special closed area and potential special areas of conservation, special provisions are used for the preparation of the environmental report.

According to Article 41, paragraph 1 of Slovenian ZVO the initiator of the plan provides environmental report, where the impacts of the implementation of the plan are described. The objectives and geographical characteristics of the area to which the plan pertains also have to be regarded as possible alternatives.

ii. *description of respective “significant effects”*

- Article 8 of the *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* (OJ~RS, no~73/05) states, what kind of impact on the environment the implementation of the plan can have – direct, long-distance, cumulative and synergetic, and how this impacts are determined.

In Article 9, paragraph 2 provides regulation for how the results of the implementation of the plan are evaluated. The evaluation is done according to the state of the environment or its parts, protection of natural resources, protection of valuable natural features, the conservation of biodiversity, including the endangered species of wild fauna and flora, protection of cultural heritage, characteristics of the population, human health. The synergy influence is evaluated on the basis of the consequences of direct, long-distance and cumulative effects of the plan.

PIC managed to get some information from Slovenian NGOs – Mountain Wilderness, Cipra, Dondes and Umanotera. According to their opinion, the precaution principle regarding significant effects is not consequently used in Slovenian practise. With the acceptance of new Slovenian spatial legislation, no SEA will be needed for small scale activities affecting the environment. That means there will be no mechanism, which could prevent big interventions into the environment being done part by part as small activities affecting the environment – for example wind mills, where no SEA procedure will be needed for building up to five turbines each year as independent projects and at the end of five year period Slovenia will have

wind mill field with hundred turbines. This kind of “practice” could be considered as double-crossing Article 10 of the Directive.

- *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* covers cumulative and synergetic effects, which are regulated in Article 8, paragraph 4, 5. The same decree also describes, when cumulative or synergetic effects should be determined. No secondary effects are covered in the environmental report. But in the same Article, paragraph 6 it is established, that if the impacts on the environment are not known when the plan is being prepared, the impacts are then determined according to expected use, use of natural resources or the pursuit of activities.

- The Decree covers short-term, long-term, permanent and temporary effects as well, but no special provisions deal with those terms in detail, except of Article 6 of the mentioned *Decree*, where those terms are listed.

- The Decree covers positive and negative effects related to the environment as well, but no special provisions deal with those terms in detail, except Article 6 of the mentioned environmental report, where those terms are listed.

Comment: Beside the cumulative and synergetic effects Article 8, paragraph 2, 3 of our *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* (OJ~RS, no~73/05) also covers direct and long-distance effects. Direct effects are determined, if the plan affects the environment on direct basis. Long-distance effects are determined, if the plan affects the environment with effects that are consequences of the preformed plan and are supposed to happen after the activity affecting the environment is carried out.

- The significance of alternatives is not covered.

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?*

Article 43 of Slovenian ZVO regulates **public participation**. After the *Ministry of the Environment* determines the adequacy of the report, the initiator of the plan has to ensure access to the draft programme, environmental report and its revision (Official Gazette of the RS, nos. 41/04, 20/06, 39/06 still regulates the revision of the environmental report, but after the new draft changes of the law will be approved, the Article regulating revision will be deleted) to the public within the public display, which shall last a minimum of 30 days. Public hearing regarding draft programme, environmental report and its revision also has to be organized. Within the framework of public display, public has right to give opinions and remarks on the plan and environmental report. The right to give opinions and remarks applies to natural or legal person with permanent residence or registered

office in the area to which the plan pertains, or who own a property in that area, and non-governmental organisations (Article 43, paragraph 5 of ZVO). The originator of the plan has to make public announcement in one of daily newspapers covering the entire territory of the state, on the locally common way and the global network. Public announcement has to include the indication of the place and time of the public display and public hearing and the way of gathering opinions and remarks.

In practice there is, as it is stated in Slovenian Act, an opportunity to express opinions and remarks on draft plan, but the problem is how these opinions and remarks are then considered in the accepted plan. The public involved (in many cases mostly NGOs) is in most cases not actively informed about finalised documents.

However, the plan is available to the public on the web page of *Ministry of the Environment*, so anybody has a chance to compare comments and remarks made during the public display with finalised documents, if they want to get information, to what extent comments were really considered. But it is not very well indicated, where exactly on this webpage this information is published.

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

Slovenian ZVO only regulates public participation in Article 43 as described in previous paragraph. That means that public participation is possible only after the determination of the adequacy of environmental report.

Consequently, the problem is not the effectiveness of the public participation, but the lack of time. The public and NGOs do not have enough time to express their opinions and give remarks to environmental report in the expert manner with clear grounds.

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

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

Transboundary SEA is prescribed in Article 44 of the Slovenian ZVO. It states that when the implementation of the plan could have a substantial impact on the environment in a Member State, the ministry shall send the plan, environmental report and its revision to the competent body of that, potentially affected country. After that the Ministry invites the country to decide in a set time limit whether it intends to participate in the SEA procedure.

If the Member State informs the ministry that it intends to participate in the SEA of the implementation of the plan, the ministry informs the plan initiator about their intention. New time limit is set by the ministry and the competent body of the Member State. The ministry adopts a special decision and publishes it in one of daily newspapers covering the entire territory of the state, on the locally common way and the global network, with the indication

of the place and time of the public display and public hearing and the way of gathering opinions and remarks.

In practice there were some cases with transboundary effects (Slovenian nuclear power plant at Krško where Austrian government and public should be involved and artificial island in Bay of Trieste where Italian government and public should be involved)⁴ when SEA procedure in NGOs opinion should be done, but it was not.

Another recent and still present case with transboundary effects is wind mill case on Volovja reber, which is actually EIA procedure, but EIA procedure is done after SEA. An expert opinion has been made, which “alerts” that the actual construction of wind mills could or would have consequences on the water resources of that area. The threatening consequences, which would be very severe, could occur in case of spillage of motor oils during the construction or actual operation of the wind mills. This area is catchment area of Notranjska river, which is a water source for Trieste water distribution system. But the people living on that area were never informed about this project and about the possible consequences.

ii. *Are all important documents translated?*

Environmental Plan, Environmental Report and its revision are translated into English and also other languages if necessary, but only in case of transboundary effects (in practise nobody really examines whether all important documents regarding transboundary effects are translated and how are they translated). Otherwise all indicated documents are available only in Slovene.

4. Decision Making (Article 8 and Article 9)

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

i. *Transposition in general, practise in general?*

The whole Directive 2001/42/EC was transposed into Slovenian legal system with the adoption of the Slovenian ZVO and the *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment*.

Article 5 of the 2001/42/EC Directive is transposed in Article 41 of the Slovenian ZVO, but more specified provisions dealing with environmental report are set in Slovenian *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* in Articles 3-13. Article 3 partly summarizes Article 5 of the 2001/42/EC Directive, but the content of the environmental report is prescribed in Article 6 of mentioned Decree, where all the information requirements in Annex 1 (f) and (h) were transposed.

⁴ More informaion will be in Slovenian SEA infrastructure case study.

According to first paragraph of Article 46 of the Slovenian ZVO, the ministry examines the acceptability of environmental impacts of the plan implementation on the basis of the plan, environmental report and its revision. The ministry also forms a written opinion and sends it to the plan initiator.

- ii. *Does the decision have to take into account the environmental report in particular with regard to alternative assessment and significance of effects?*

Yes, the decision has to take into account the environmental report, the alternative assessment and significance of effects.

Article 20 of the *Decree laying down the content of environmental report and on detailed procedure for the assessment of the effects on certain plans and programmes on the environment* regulates the decision making process specifically. The ministry sends the written opinion to the plan initiator together with written opinions of the ministers and other organisations (which are according to the content of the plan competent for regulations, programmes and plans that deal with environment protection, nature conservation, protection of natural resources and cultural heritage and environmental starting points) and eventual position or remarks of a Member State because of the transboundary impact of the plan on the environment. In final decision making, after public display, the plan initiator has to consider opinions and positions of the mentioned ministers and organisations and also opinions and observations made by the public or he has to justify their refusal.

Article 21 regulates application for the approval of the plan, where the plan initiator submits the plan to the ministry for confirmation. If the submitted plan is significantly different from the draft plan, to which the environmental report has been done, the report has to be supplemented according to the Article 6, which regulates the content of the environmental report, and added to mentioned plan. The plan is significantly different if it contains new activity affecting the environment, and new areas, for which impacts of the plan have not yet been determined and evaluated in the environmental report. Supplemented revision of the plan has to be added to the plan.

Article 22 regulates the approval of the plan. Decision, that the plan will not have harmful effects on the realisation of the environmental goals, is approved on the basis of the statement from Article 11, paragraphs 2 and 3. The paragraphs define conditions, on which the plan has an impact on meeting the environmental goals - when the impact is positive, when it is essential or unessential, destructive or when the impact cannot be assessed. Ministry checks the level of conformity of the plan with the opinions gathered. For that purpose, the ministry forwards the plan, eventual environmental report and its revision to the ministers and the organisations, who check the level of consideration of their opinions and positions in the plan and give a written opinion about it.

Article 23 regulates monitoring of the implementation of the plan. The environmental monitoring for the implementation of the plan is included in the decision that confirms the plan.

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

i. Transposition in general, practise in general?

In Article 46 of Slovenian ZVO it is provided that on the basis of the plan, environmental report and its revision, the ministry examines the acceptability of environmental impacts of the plan implementation and forms a written opinion. The ministries and organizations that are with regard to the content of the plan responsible for particular environmental protection matters or for the protection or use of natural assets or protection of cultural heritage, also form written opinions and send them to the ministry concerned within 21 days after receiving the plan, the environmental report and its revision. The same is done in the case of the supplemented environmental report and its revision - within 21 days after receiving the supplemented environmental report.

The ministry forwards the mentioned written opinions or the opinions and comments of a Member State affected by transboundary effects to the plan originator within 15 days of their obtaining. The plan initiator has to, to the fullest possible extent, take into consideration the written opinions and comments made by ministers, organizations, the public, and accordingly modifies or amends the plan and forwards it to the ministry for approval. In 30 days upon receipt of the plan, the ministry, taking into consideration the opinions of the ministries and organizations, approves the plan with a decision, with which it approves or refuses to issue a certificate.

According to the opinion of some Slovenian NGOs (Mountain Wilderness, Cipra, Dondes and Umanotera) formal consultations with the public are possible, but the possibility to actually have some influence on the accepted decisions is almost void.

ii. Does the decision refer to the national and transboundary PP process?

Yes, the decision refers to the national and transboundary PP process. According to Article 47 of the Slovenian ZVO, the plan initiator notifies the competent ministries and organizations about the adoption of the plan. It also has to notify the Member State if the implementation of the plan could have a substantial impact on the environment of a Member State and the public. The notification shall include in particular:

1. description of the integration of environmental protection requirements into the plan;
2. integration of opinions and comments obtained in the procedure of SEA in the plan implementation,
3. reasons for the decisions made in respect to potential alternatives, and
4. description of monitoring the environmental impacts during the implementation of the plan.

iii. How is public informed on decision?

The plan initiator has to notify the public about the adoption of the plan in one of the daily newspapers covering the entire territory of the State, by locally common

methods and on the global network. This notification is the same as in case of public participation paragraph 3/a/i.

There is no distinction between the actors that have to be notified about the adoption of the plan regarding the content of the notifications.

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

According to Article 47 of the Slovenian ZVO, the plan initiator also has to notify the public about the adoption of the plan with public announcement in one of daily newspapers covering the entire territory of the state, on the locally common way and the global network. Public announcement has to include the indication of the place and time of the public display and public hearing and the way of gathering the opinions and remarks.

The notification shall include in particular:

1. description of the integration of environmental protection requirements into the plan;
2. integration of opinions and comments obtained in the procedure of SEA in the plan implementation,
3. reasons for the decisions made in respect to potential alternatives, and
4. description of monitoring the environmental impacts during the implementation of the plan.

It can be concluded, that the information to the public does include some information that are stated in Article 9/I, but not all. It means that the public that participated in the SEA procedure almost never gets any direct information about the final decision of the accepted plan or program. They are also not informed and do not get the accepted plan or program right after the acceptance. And even though the information to the public does include the measures decided concerning monitoring in accordance with Article 10, it does not mean this is really considered in practise.

However, information as stated in Article 9/1 is accessible on the Web page of the *Ministry of the Environment* and some other organisations, which participated in SEA procedure.

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

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

According to the information given by one of the Slovenian NGOs, there have been some cases when the political decision was made during the formal adoption of the plan or even before. It means that the political decision was sometimes made before the plan was formally adopted and the plan was then adopted according to that decision.

In case, where the political decision was made during the formal adoption of the plan, the plan was then changed in accordance to that decision.

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

We have no experience that political plans have substantially been changed after an SEA. First of all, MoE or the municipality decides for which plans SEA has to be done, which is a political decision. Furthermore, in NGOs opinion the initiator of the plan, for which SEA has to be done, chooses and directly pays the auditor of the plan, which is a private company. These auditors work on a service market so their only intent is to make profitable decisions – that means they make SEA optional for the convenience of the operator.

The situation in Slovenia shows that credible experts mainly write negative opinion about the investment for which the SEA has to be done. However, the conclusion for this procedure always is that despite negative influence the intervention in the environment is possible.

It can be concluded, that political plans affect SEA procedure throughout the whole procedure. We have no information that political plans have been changed after SEA.

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

Theoretically Slovenia, and in that context public and NGOs, does have a possibility for legal appeal regarding SEA decisions and also for the cases where SEA has not been carried out.

In 2006, Administrative Dispute Act was changed. New Article 3 states among other things that administrative acts are not decisions, made by executive bodies and based on discretion, delegated by constitution or law. In practice this means that there is no legal remedy against political or strategic documents approved by the Government, even though it breaches public participation provisions.

Consequently, in the only Slovenian “SEA procedure case” a request for the review of the constitutionality was set before the Constitutional Court in order to contest the already set regulation, but the court declared its lack of jurisdiction⁵. Thus, Slovenian NGOs currently do not know which legal remedy to use.

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

One of the problems is that in some cases there is no SEA procedure, even though it is needed. Another problem is that there is no direct information to the public involved what happens with public’s opinions and remarks given to the draft plan.

To what extent the opinions and remarks made by the public are considered in practice, is maybe the most relevant problem, because the decision is completely political – if the remarks made are financially or commercially favourable for the plan, then they are considered, otherwise they are put aside. Furthermore, there is no supervision for the auditors of SEA procedure regarding their credibility and quality, so one can become an auditor with almost no expertise.

⁵ More in case study of SEA infrastructure.

In some cases the government accepts more strategic documents, whereas the hierarchy among them is not defined. So there is difference of opinions, when SEA procedure has to be done – the government wants to postpone the procedure, but the public wants the SEA procedure to be done as soon as possible. For that reason it can be concluded that SEA procedure in Slovenia still is a kind of burden for the sector policy, which everyone wants to avoid.

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

SEA procedure presents a good mechanism for opening the decision-making process. Despite all the problems, the public has the opportunity to participate. If in some cases they are ignored, they can still turn to media, who then create public pressure towards government. The media is “the last resort”, because right now access to justice is not available to the NGOs. The reason for that is that in one case the public – NGOs did use access to justice in SEA procedure, but the Constitutional Court declared that it did not have jurisdiction to judge in this case (see more above in 4.d).⁶

7. Conclusions

SEA procedure has been regulated in the Slovenian ZVO, so we had a good legal basis even before Slovenia became an EU Member State. However, the problem is our practice, because even the biggest NGO’s are in most cases not involved in SEA procedure, not actively informed about it or their opinions and remarks are not considered. One of our recent cases of SEA shows that the Government approved the document during the public display. (In 2006 Administrative Dispute Act was changed and new Article 3 among other things states that administrative acts are not decisions, made by executive bodies and based on discretion, delegated by constitution or law. In practice this means that there is no legal remedy against political or strategic document approved by the Government, even though it breaches public participation provisions (see case study for SEA).) The public had no legal way for appeal.

⁶ More in case study of SEA infrastructure.