

Implementation of the SEA Directive in the Member States

Legal Analysis and Case Studies

SEA

Justice and Environment 2012

Implementation of the SEA Directive in the Member States

Legal Analysis and Case Studies

1. Introduction

In this report we aim to analyze the implementation of SEA Directive in Member States. We identified examples of very good practice even better than what SEA Directive requires, cases where SEA Directive provisions are unclear determining also unclear transposition in MS and also cases of violation of SEA Directive. The main conclusion is that even when the transposition of SEA Directive is complete, there still are problems in realizing a proper strategic evaluation of plans and programs. In this report we will try to summarize the main conclusions of these case studies:

2. The plans and programs that are object of the SEA Directive

Both in Hungarian and Romanian cases arrived at the conclusion that SEA Directive should be clearer regarding the plans and programs subject to the SEA. The Directive is describing the areas where plans and programs should be evaluated but it is not clarifying if *all* plans and programs related to the specific areas indicated in art 3 point 2 a or only certain plans and programs. As it results from the Romanian case, there is no explanation regarding what kind of plans and programs should be subject of SEA. The High Court of Justice and Cassation ruled that the Energy Strategy of Romania is a political act and not a plan so that it shouldn't be subject to SEA, while the Commission, as a result of the infringement complains of the Romanian NGOs, showed that this strategy should be subject of SEA. Romanian Government accepted, as a result of EC intervention, that an SEA is needed and started the evaluation procedure. We think that art. 3 para 2 and para 4 referring to "plans that set the framework for future development consents" should be clearer regarding the scope of the Directive, to avoid such discrepancies.

When referring to "small areas at local level" and "minor modifications to plans and programs", we also feel that the wording of paragraph 3 is not clear. The Directive should also provide definitions of such phrases to ensure a proper implementation by the member states.

3. Interpretation of the "of the importance of the modifications of plans and programs

If the developer is not declaring the changes done to the plans or programs during or after the evaluation procedure, or he is appreciating that the modifications are "minor" the public has no legal mechanism to prove otherwise especially when the developer is the State.

4. Meaning of the significant" effects of plans or programs according to art 3.5 and Annex II

The criteria set in Annex II are general and are depending on the good faith of the developer when analyzing the effects of the plan and program. As results from the Romanian case study, if the developer and its hired experts declares that there are no significant effects and especially when the developer it's the State there is no legal provision forcing the developer

and the competent authorities to reach a different decision. There is no connection between the effects that are produced

5. Regarding the consultation procedure

The case studies from Hungary and Romania and showed that there are major deficiencies of the consultation procedure during SEA. The Austrian and in some regards the German cases are a best practice case studies with good public participation regulations. However, they are not the effect of the transposition of the SEA Directive but more the effect of the Aarhus Conventions and maybe the local traditions regarding the environmental protection. SEA Directive is prescribing the obligation to have public participation but no enforcement of this principle is introduced in the Directive. Therefore each MS realized the transposition differently, according to the importance given to the environmental protection.

The main conclusion of the case studies is that the SEA Directive is obliging the MS to organize public participation procedure and to take into account the opinions expressed during the consultations. However there is no obligation of the MS to base their decision on the opinions expressed by the public concerned and no detailed mechanism about how the proposals of the public should be considered and evaluated when the decision is made.

6. Public participation and conformity with Aarhus Convention:

- Accessibility of the documents and information needed. In **Germany** there is no national data base for the public to find out when the SEA procedures takes place. In **Romania** even if there is a national data base, it is very disorganized and it is nearly impossible to find out about SEA procedures for important plans or programs, and it is also very difficult to follow one case because the documents for all SEA procedures are posted on the same web page all together.
- In **Hungary** there was no dissemination of the comments of the public to the SEA working group. Therefore they were not able to assess and evaluate the comments of the public when the decision was done, meaning that there was actually no effective public participation.
- The public was identified and involved in the public consultation in all case studies, with excellence in Austria where NGOs were a part of the SEA working group and participated directly both to the drafting of the plan and also to SEA procedure. In **Romania** however the authorities failed to invite NGOs to participate into the procedure. Even if they were individually notified when the environmental report was done and posted on the website, the date of the public debate was not even if the developer – Ministry of Economy promised to do so.
- In all cases time frames were large enough to ensure public participation. However if no individual system of notifications for the public concerned in enforced and if the date bases are missing or not well organized, no time frame no matter how long and well structure could be enough for an effective public participation according to art 6 of the Aarhus Convention.
- Regarding the moment when public participation takes place, only in **Austria** the public participation was organized from the very beginning of the plan drafting. In all other cases a draft of the plan was suggested from the very beginning anticipating the final decision.

In Germany some modification of the plan was done during the procedure. **In Hungary and in Romania** the decision was actually made before SEA took place, the entire procedure being only a “simulation”.

7. Regarding the assessment of the significant effects

There is no provision of the SEA Directive to ensure that SEA report is objective and no provision to ensure that all significant effects are described and assessed. Therefore **in Germany** all significant effects were described but there was no final evaluation and no modification of the plan accordingly. **In Romania** the procedure is still not final, but clearly in SEA report not all effects were assessed and no final evaluation was done. We can say that the significant effects were hardly identified, much less evaluated. Both in Germany and in Romania concrete impacts of the plans were said to be left for EIA procedures to be assessed. This raises the question of utility of the SEA Directive. Why is that necessary if the effects and impact are not analyzed anyway?

8. Regarding the alternatives

SEA Directive doesn't require that feasible alternatives are assessed or that the friendliest environmental alternative should be chosen. Therefore description of the alternatives is done so that only one alternative would be possible, of course, the one most wanted by the developer. **In Romania** 0 alternative was considered nonexistence of any energy strategy. Of course alternative 0 should have been entirely different and analyzed for each chapter, like for example, for developing new energy production facilities, feasible alternatives should have been: no new energy facilities, only renewable energy, adding coal energy production facilities, adding nuclear energy production facilities. No such assessment was done. SEA Directive is no defining the alternatives and the way they should be identified and assessed. The developers will never have any interests to analyze anything else then what would ensure the selection of the alternative most profitable for him.

Case studies

Austria

SEA
Waste Management Plan Vienna
2013-2018

Prepared by
Birgit Schmidhuber

Introduction

The current case study intends to investigate some **good practices in the execution of Strategic Environmental Assessments (SEA)** in Austria. Basically planning procedures tend to be very minimalistic regarding public participation in decision making. With transposition of the SEA Directive¹ in Austria public participation regarding certain plans and programs with potential significant impact on the environment was made obligatory – at least for those plans and programs falling under the scope of the SEA Directive. The Austrian legislator implemented this right to public participation by creating a **public consultation procedure** for already developed draft plans and programs. The draft versions are published, and the public usually is invited to hand in written statements. These statements have to be taken in consideration in the final decision making process. The elaboration of the **Viennese Waste Management Plan 2013 – 2018** followed a **much broader approach incorporating different stakeholder groups into the whole decision making process**, thereby creating a **broad consensus** on the proposed plan. As this procedural approach is a real character in Austrian SEA practice we decided to provide a **short study mainly on the procedural aspects** of this SEA which can serve as good practice example and motivation also in other member states.

- I. **Description of the developer - who is the developer, relevant experience in the same type of projects, financial capabilities, known attitude towards environmental protection, etc.**

Basically Waste Management Plans (WMP) are developed by the respective authorities – here: the lead role within the development process was held by the Viennese Waste Management Authority: Municipal Department 48 (= MA 48) in close cooperation with the Environmental Authority: Municipal Department 22 (=MA 22) and the Viennese Ombudsman for the Environment and is adopted by the Viennese regional government.

- II. **Subject of the case: description of the program**

a) The Viennese Waste Management Plan and Waste Avoidance Program (WMP)

The **Viennese Waste Management Act (=Wr. AWG)** regulates beneath other issues the comprehensive collection of residual waste and recyclables. It defines the basic principles of waste disposal fees, conditions for the establishment of waste treatment facilities and

¹ requires that certain plans and programs which may have significant impact on the environment, are subjected to an environmental assessment.

contains guidelines for the development of the Viennese Waste Management Plan (=WMP).

The **responsibility** for the development of the Viennese WMP lies with the regional government (cp. Art 2/1 Wr. AWG). In practice the **Viennese waste management authority (=MA 48)** develops the Viennese Waste Management Plan (is to be elaborated at least every six years – as stipulated in Art 2/3 leg cit).

The strategic plan includes beneath other issues (cp. Art 2/2 Wr. AWG):

- Outline of the current status of waste management, in particular regarding the type and quantity of waste arising in Vienna
- waste management forecasts and actions required
- the demand, inventory and operation of treatment facilities and landfills
- institutions and people providing information concerning waste issues

The formulated goals of the Regional Waste Management Plan **must not contradict the aims of the Federal Waste Management Plan.**

Besides Art 2j Wr. AWG stipulates, that the Viennese government needs to develop latest by 2013 a **Waste Avoidance Program**. So the current WMP includes also the first Viennese Waste Avoidance Program (the abbreviation WMP includes the Waste Avoidance Program likewise).

b) The Strategic Environmental Assessment (SEA)

The Viennese legislator transposed the requirements of the SEA Directive **in March 2006** into the Wr. AWG – the elaboration of a WMP is to be accompanied by a strategic environmental assessment (cp. Art 2a/1 Wr. AWG). **This assessment has to be conducted before the WMP is formally adopted by the regional government.**

According to Art 2a/1 Wr. AWG an environmental assessment consists of

1. the preparation of an environmental report,
2. consultations,
3. the consideration of the environmental report and the results of the consultations in decision-making, and
4. the publication of the decision.

The environmental report is one part of the overall WMP – and needs to be elaborated parallel with the WMP (cp. Art 2a/3f Wr. AWG).

Core element of the SEA is the environmental report. This document must determine, describe and evaluate the likely significant environmental effects of the WMP. **It has to identify, describe and evaluate reasonable alternatives taking into account the objectives and the geographical scope of the WMP (cp. Art 2b Wr. AWG).** The MA 48 has to hear the Viennese Ombudsman for the Environment regarding the type of environmental information incorporated into the report (cp. Art 2b/4 Wr. AWG).

The draft WMP and the environmental report are to be published during a period of at least six weeks. During this period the overall public may comment the environmental report by submitting their **written statements** to the MA48. Every detail on public consultation procedures is to be published in at least two widespread newspapers and on the Internet (Art 2c/1 Wr. AWG). The MA48 has to transmit the plan and the report directly to the Viennese Ombudsman for the Environment and grant him the opportunity to react within a reasonable timeframe (cp. Art 2c/2 leg cit.).

The environmental report, **the opinions expressed** and the eventual results of transboundary consultations **need to be taken into account in the adoption of the WMP** (Art 2e Wr. AWG).

III. Location of the project – geographical area: if it is urban, if it is a natural protected area / what kind (Nature 2000, national park, natural reservation, etc.)

The Viennese Waste Management and Waste Avoidance Plan 2013 – 2018 covers the region of Vienna. Vienna consists of partly shored and partly cultural landscape. Major parts of the “Wienerwald” (Viennese Forest), the “Bisamberg” and the “Donauauen” (Danube Floodplains) is Natura 2000 Area. The Viennese Forest is part of the UNESCO Biosphere reserve “Wienerwald”.

IV. Interested public involved

SEA – Team (find more information about this body in Chapter VI.) was composed of:

- Environmental Organizations (ÖKOBÜRO, Umweltdachverband, die Umweltberatung)
- Viennese Ombudsman for the Environment
- Waste Management Authority (MA 48)
- Environmental Authority (MA 22)
- Representatives of the Viennese Government (Focus group: Environment)
- Coordination Office for Climate Protection
- Environmental Engineering Experts
- Representatives of Energy Suppliers
- External Waste Management Experts from:
 - University of Technology – Institute of Waste Management
 - University of Economics – Institute of Technology and sustainable Product Management
 - University of Agricultural Sciences – Institute of Water Quality and Resource Management

About fifty persons participated within the Feedback – Group beneath others:

- Chamber of Commerce
- Chamber of Agriculture
- Chamber of Labour
- Ministry of Environment
- Austrian Environmental Agency
- Austrian Associations of Towns
- Austrian Ecology Institute
- Waste Management Organizations
- Environmental Protection Agencies
- Universities
- Et al.

Public Consultation

- Citizen’s groups
- Waste Management Organization
- Chamber of commerce

have participated within the public consultation procedure. This procedure was open to anyone (individual, collective, private or public body/person).

V. Estimated environmental impact of the program

Generally the actions planned within the Viennese WMP tend to create positive effects on the environment – e.g. saving resources, emission and greenhouse gas reduction, considerations regarding the townscape and respective improvements.

The enhancement of waste treatment and storage facilities might have a negative impact on the environment. However, the current WMP assumes that sufficient storage and treatment capacities do exist and therefore does not envision new facilities to be built till 2018.

VI. Description of the SEA procedure emphasizing the strengths

Before we go into detail on this particular SEA procedure it is to be mentioned that the Viennese WMP 2013 – 2018 has not been adopted yet by the Viennese government. Public consultation has been conducted in **July/August 2012**. In **September 2012** a workshop was held dealing with public statements and their consideration – currently those parts are to be incorporated into the environmental report. The final drafts of the WMP and the environmental reports will be forwarded for **adoption in November/December 2012**. The specific aim of this study is to highlight the procedural strengths of the current SEA – and as the development process is closed so far a comprehensive analysis of the process can be delivered by now.

a) Developers

The **draft Viennese Waste Management and Waste Avoidance Plan 2013 – 2018 (WMP)** has been elaborated by the so called “**SEA Team**”. The SEA Team is represented by the relevant authorities of the city of Vienna in the area of environmental protection, climate protection, environmental engineering etc., external waste management experts, and the public concerned represented by several environmental organizations and the Viennese Ombudsman for the Environment.

The main task of the **SEA Team** is to **elaborate a professional recommendation based on consensus for the competent political decision makers**. In this respect the team functions as an **advisory body** to the decision makers. The **SEA core group** (= the Viennese waste management authorities and the Ombudsman for the Environment) prepares the SEA, represents the SEA Team and undertakes the communication with the political level.

b) The procedural framework of the SEA

The SEA team conducted **five SEA Workshops (SEA-WS)** between September 2011 and September 2012. Important documents and material (interim reports, technical proposals etc.) have been forwarded to every member of the SEA Team for the preparation of every single SEA-WS. Within the SEA-WS all proposals, reports, opinions and further suggestions have been discussed – **Decisions and adaption were taken on consensual basis**. Furthermore special aspects have been discussed and elaborated in separate subgroups (e.g. Focus Group on Waste Avoidance).

Procedural Timeline:

1st SEA WS – Establishment of procedural rules, current status, goals for the WMP, environmental goals, focus

2nd SEA WS – waste prognosis, investigative framework (alternatives, evaluation methods), list of actions

3rd SEA WS – Assessment of alternatives, prognosis etc.

-> FEEDBACK WORKSHOP

4th SEA WS – final decision making, elaboration of monitoring concept and method

5th SEA WS – Assessment and incorporation of public consultation results

→ Adoption by the Government

After the third SEA-WS a **Feedback Workshop** was held in order to discuss the interim results elaborated by the SEA team **with a wider range of interest groups** and to obtain their opinions. The so called “Feedback Group” consisted of further administrative authorities, the MoE, experts, the chambers and other NGOs.

Within the 4th SEA-WS the action plan for the future WMP was discussed and finalized, and the monitoring agreement was substantiated.

The participation of the wider public, the political parties, and again of the feedback group was secured by their right to comment the WMP² and environmental report³. The documents were published in two widespread newspapers and on the internet – written statements could be handed in to the MA48 within 8 weeks. The rendered statements were considered within the 5th SEA-WS by the SEA Team.

c) Conclusion

As we could see in the above outlined procedural elements, the current SEA was **governed by quite substantial stakeholder participation**. Not only the outcomes of the procedures have been subject to wider consultation but the whole development process was accompanied by several interest groups – The model described above - a “**Round table SEA**” – ensures that the **outcome of a planning process is backed up by a broad consensus, enables to raise different necessities, concerns, problems, solutions within the process which are reflected by the WMP and the environmental report themselves, and allows society to regain political consciousness and responsibility**.

In this respect also the gradual involvement of different stakeholder groups contributed to the **efficiency of the procedure** – where opinions could be taken into account in different stages of the SEA process.

The above described **process reaches way beyond the existing legal requirements for public participation in strategic environmental assessments and planning procedures**. As mentioned above the Wr. AWG solely prescribes public participation in the very last stage of the planning procedure (see Chapter 2a.).

VII. Actions of the public during the procedure

Three environmental organizations with federal significance in Austria (ÖKOBÜRO, Umweltdachverband, die Umweltberatung) were part of the SEA Team accompanying the planning process by attending the SEA-WS. Their opinions and claims were discussed within the SEA-Team and partly incorporated into the drafts. Further Environmental NGOs and public interest groups had the chance to provide their opinions in the Feedback Workshop. Additionally, the compulsive, public consultation procedure was held and four statements of public interest groups were delivered as a result of public consultation procedure.

² Draft WMP 2013 – 2018 for public consultation:

<http://www.wien.gv.at/umwelt/ma48/service/pdf/entwurf-awp-avp-2013-2018.pdf>

³ Draft Environmental Report for public consultation:

<http://www.wien.gv.at/umwelt/ma48/service/pdf/entwurf-umweltbericht-2012.pdf>

VIII. Decision of the environmental authority

As already mentioned above (see Chapter VI) **no final decision on the draft WMP and the environmental report has been rendered by the competent political body so far**. The draft WMP and the environmental report will be forwarded to the Viennese government as a proposal. **Political agents** - as part of the SEA Team - **participated in the whole process**. As a consequence the **draft plan enjoys the relevant political support**. This strategy was to make sure that the draft plan finds also political consensus to be approved in its given form. The same sort of SEA (inclusive and participative) has been conducted for the preceding WMPs and the draft proposal has been adopted without revisions by the Viennese government – an unmodified adoption for this year’s plan is to be anticipated.

IX. Current status of the case

Public consultation has been conducted in **July/August 2012**. In **September 2012** a workshop was held dealing with public statements and their consideration – currently those parts are to be incorporated into the environmental report. The final drafts of the WMP and the environmental reports will be forwarded for **adoption in November/December 2012**.

List of Abbreviations:

Wr. AWG	Viennese Waste Management Act
MA 48	Viennese Waste Management Authority
WMP	Waste Management Plan and Waste Avoidance Program
SEA	Strategic Environmental Assessment
SEA-WS	SEA Workshop

Germany

General Information on the transposition of the SEA Directive into German national legislation

Names of acts:

On federal level:

Amendment to the already existing “Umweltverträglichkeitsprüfungsgesetz (UVPG)” (=Environmental Impact Assessment Act”) via “Gesetz zur Einführung einer Strategischen Umweltprüfung und zur Umsetzung der Richtlinie 2001/42/EG (SUPG)” (= Act on the introduction of the Strategic Environmental Assessment and on the implementation of the Directive 2001/42/EC)

“Europarechtsanpassungsgesetz Bau (EAG Bau)” (Act on the adaptation of the code of building law to European law)

Additional, there are a number of acts on federal state level.

In most of the German federal states SEA is regulated in the federal state planning laws (“Landesplanungsgesetze = LPIG”)

Transposition in time?

The full transposition was too late. The “EAG Bau” came into force in time (24. June 2004), but the “SUPG” came into force on 29. June 2005 with about one year delay. The subordinate acts on federal state level could not be implemented before the SUPG on federal level was finished, so that they came into force even later. To avoid infringement proceedings by the European Commission, in the meantime, when the federal state regulations were already missing, the SEA regulations directly from the SEA Directive were legally binding in the federal states.

Overall framework of SEA in legal system

In Germany, the implementation of the SEA Directive was very complex. The Regulations on SEA proceedings could not have been incorporated into one single legal act, but they had to be integrated into the existing legal framework. Due to a very complex allocation of jurisdictions between the federal level and the federal state level resulting from the German Constitution, there are a variety of different acts on both federal and federal state level which form the legal basis for SEA proceedings. An additional complexity results from the fact that in Germany there is no comprehensive environmental legislation. Environmental legislation is fragmented into separate components of the environment such as water, land use, nature protection etc., each with its own legislation.

The UVPG on federal level is a so called ‘framework act’, that means that it gives only a frame with the basic requirements for the SEA implementation. The procedural details are regulated on federal state level and in separate sectorial acts on both federal and federal state level, depending on the particular responsibility. For example, in some policy areas (e.g. parts of traffic policy with national scope) the federal level is responsible and the UVPG has to be applied directly, while in other policy areas (e.g. water planning and nature protection) the federal state laws are legally binding, so that the SEA proceedings on plans and programmes of these policy areas have to be carried out according to the particular federal state SEA regulations, which can differ from federal state to federal state. Scoping requirements are predominately regulated on federal level, as most of plans and programmes have impacts on more than one federal state.

The dissociation of the environmental competences according to the German Constitution leads to the fact that the integrative EU environmental policy can only be implemented in a very complicated and technically suboptimal way. While the EU environmental directives have a cross-media and integrative character, in German legislation the requirements resulting from EU directives have to be dissembled in its components and cannot be regulated consistently.

In Germany, the information policy regarding SEA and EIA procedures is very passive. SEA and EIA procedures and the dates for public participation events are announced in local media and on the web pages of responsible authorities, but no active distribution of information takes place. There is no national database which includes all active SEA and EIA procedures like for example in Austria, so that it is hard for the general public to find out where SEA and EIA procedures take place.

Case study: SEA on the Federal State Development Plan of Saxony-Anhalt

I. Title

SEA on the Federal State Development Plan (“Landesentwicklungsplan = LEP”) of Saxony-Anhalt

II. Description of the developer - who is the developer, relevant experience in the same type of projects, financial capabilities, known attitude towards environmental protection, etc.

Ministry of Regional Development and Traffic of the Federal State of Saxony-Anhalt
Saxony-Anhalt is one of Germany’s 16 federal states. It is situated in the centre of the Eastern part of Germany. It covers an area of about 20,500 km² and has a population of 2.34 million. In the time, the LEP was carried out, there was a grand coalition government in Saxony-Anhalt, including the two biggest German parties CDU and SPD, which are more or less conservative parties in the field of environmental policy (in contrast to the Green Party).

III. Subject of the case: description of the project, if it is national, local, transborder, etc.

The LEP is an overall spatial concept for the development of the federal state Saxony-Anhalt in a context of changing challenges, such as increasing internationalisation and globalisation, enlargement of the EU and European integration, as well as demographic changes.

The LEP provides a comprehensive approach to spatial planning and development and aims to set out the basics for an economically, environmentally and socially balanced spatial development. The maintenance and further development of the social and technical infrastructure, especially in economically underdeveloped rural areas, is one of its major tasks. The LEP includes both general provisions on the organisation and development of the federal state as well as binding requirements of state planning in the form of concrete stipulations.

It includes general specifications for the development of residential areas, business parks, industrial parks, as well as priority areas for science and research, traffic and logistics, and energy generation. Furthermore, it sets out specifications for the protection and use of open space, including nature protection, flood protection and climate protection, as well as agriculture and resource protection.

The LEP has a regional scope and refers to the whole surface area of Saxony-Anhalt. The LEP has no transboundary impacts, as Saxony-Anhalt has no international borders. But it could have impacts on surrounded German federal states.

IV. Location of the project – geographical area: if it is urban, if it is a natural protected area / what kind (Nature 2000, national park, natural reservation, etc.)

The LEP refers to the whole surface area of Saxony-Anhalt, so it includes both rural and urban areas. The biggest cities are Magdeburg, Halle and Dessau-Rosslau. Within Saxony-Anhalt there are 287 Special Areas of Conservation (SAC) according to the EU-Habitats Directive (92/43/EEC) and 32 Special Protected Areas (SPA) according to the EU Directive on the Conservation of Wild Birds (2009/147/EC). Additionally, there are 388 nature reserves according to German national nature protection regulations which are partially overlapping SACs and SPAs. Parts of the National Park “Harz” and parts of the biosphere reserves “Mittlere Elbe”, “Karstlandschaft Südharz” and “Mittel-elbe” lie within the territory of Saxony-Anhalt.

V. Interested public involved

The first draft of the LEP and the results of the Scoping phase of the SEA were made open to the public and could be commented. A consultation meeting on these documents took place. After a revision of both documents, the second draft of the LEP and the SEA report were made open to the public and a second consultation meeting took place.

The final version of the LEP includes a summarising statement on how the results of the SEA report, the results of the consultation meetings and the proved alternatives were considered in the LEP.

VI. Estimated environmental impact of the plan/programme

As the LEP sets out objectives on a relatively abstract level and does not set concrete targets (like it is often the case in plans and programmes that require an SEA), the evaluation of concrete environmental impacts is not always possible. Therefore, the SEA report describes a lot of possible environmental impacts without making final evaluations on the significance of these impacts. The final evaluation of these impacts has to be carried out within the EIAs on subordinated planning procedures, which are more concrete than the LEP. The possible environmental impacts are as follows:

The construction of big commercial and industrial projects in the new designated business and industrial parks can lead to land consumption, increasing traffic volume, sealing of land, impacts on and loss of biotopes, impacts on the landscape scenery and increasing CO₂ and pollutant emissions. Therefore, the SEA report suggests expanding existing industrial and business parks, rather than designating new ones. The SEA report evaluates the possible environmental impacts of every single site mentioned in the LEP, most of which are close to already existing industrial/commercial areas or other urban areas, so that the environmental impacts are classified as being low. The assessment of alternatives has shown that on all other possible sites similar environmental impacts would be expected, so that no new favourable sites are set out in the SEA report.

The LEP aims to increase rail traffic. This is generally welcome from an environmental point of view, as rail traffic has less negative environmental impacts than road traffic, but it can also have negative effects in individual cases, especially if new railway lines are built. In the case of the planned high speed railway line between Erfurt and Leipzig, possible negative environmental impacts on several SACs and other protected areas were identified. The SEA report suggests to assess these cases individually when the EIA procedure begins and to implement measures for minimising the impacts.

The planned gap closure of the motorway A14 between Magdeburg and the border to the federal state Brandenburg will have significant impacts on the SAC „Colbitz-Letzlinger Heide“ and the SPA „Aland-Elbe-Niederung“. The SEA report indicates that this project can only be realised, if an exceptional assessment according to § 34 (3-5) of the German Federal Nature Protection Act has been carried out. This is possible, if it can be proved that the project is urgent necessary for general public interests, if there are no reasonable alternatives, and if all necessary measures to minimise and compensate the impacts on the protected areas are implemented.

Further impacts on SACs, SPAs and other protected areas result from planned expansions or upgrading of several roads. For all these cases, the SEA report gives similar instructions as in the case of the motorway A14.

The LEP sets out that the inland water way “Schleusenkanal Tornitz” will be expanded. This could have negative effects on the SACs „Saaleaue bei Groß Rosenberg“, „Elbaue Steckby-Lödderitz“, „Elbaue zwischen Saalemündung und Magdeburg“ and on the SPA „Mittlere Elbe einschließlich Steckby-Lödderitzer Forst“. Due to missing details in the LEP, the SEA report suggests to assess these cases individually within subordinated EIA procedures.

VII. Description of the SEA procedure emphasizing the illegalities/shortcomings

The SEA procedure was integrated into the setting up procedure of the LEP itself. The LEP was established according to the federal state planning law of Saxony-Anhalt (“Landesplanungsgesetz = LPIG”), which states in its § 3 that an SEA has to be carried out. The SEA report was drawn up according to § 3 of this LPIG. With the decision of the federal state government to draw up the LEP in June 2008, the Scoping phase of the SEA began. Both (the draft LEP and the results of the Scoping phase) was sent to all counties, municipalities, public planning agencies, and affected associations and organisations for commenting. The comments were discussed during a consultation meeting. The draft LEP was adapted according to the comments and the SEA report was prepared.

After that, the second draft of the LEP and the SEA report were made open to the public in the Ministry for Federal State Development and Traffic, in the county and municipality administrations, and in the offices of regional planning agencies for at least one month and they were published in the internet. After a second consultation meeting, the second draft of the LEP and the SEA report were revised.

The final version of the LEP includes a summarising statement on how the results of the SEA report, the results of the consultation meetings and the proved alternatives were considered in the LEP. It also presents the planned monitoring measures of significant environmental impacts. The monitoring of environmental impacts takes place according to § 19 LPIG.

In the SEA procedure, no illegalities could be identified. All steps were carried out according to existing laws. However, from a technical point of view, there are some shortcomings. The evaluations of environmental impacts stay sketchy and the responsibility to take final decisions is often shifted onto subordinate planning procedures. Even in the cases where significant environmental impacts were identified no clear demands for changing the LEP are formulated.

VIII. Actions of the public during the procedure

No special actions of the public are known

IX. Decision of the environmental authority

The environmental authority, the Ministry of Agriculture and Environment of Saxony-Anhalt approved the LEP and the SEA report.

X. Current status of the case

The case is closed. The LEP came into force on 12.03.2011 via the decree on the LEP of Saxony-Anhalt from 16.02.2012

Hungary

I. Title

The SEA procedure of the National Energy Strategy of Hungary

II. Description of the developer

In this given case the developer is the Hungarian Government. The National Energy Strategy (NES) of Hungary was adopted by the Parliament of Hungary on 14 October 2011 by its resolution No. 77 of 2011.

III. Subject of the case

The NES is a strategic planning document, which was prepared by the Ministry of National Development, adopted by the Hungarian Government first, later discussed by the Parliament and adopted by a Resolution of the Parliament.

“The purpose of the National Energy Strategy is to create the policy framework which will result in the co-ordination of energy policy with climate change policy with a view to economic development and the sustainable environment, and to shape the future image of the energy sector with the involvement of the sector participants. The Energy Strategy gives detailed proposals for the participants of the Hungarian energy sector as well as the Government up to 2030, and sets up a roadmap up to 2050, placing the actions recommended to be taken by 2030 in a global setting and a longer perspective.”⁴

Authorization has been given for the elaboration of further action plans fitting into the system created by the NES, which include detailed measures required for the achievement of the formulated objectives. This will be followed by the adjustment of the legislative framework to the strategy and finally grants-in-aid and financial systems can be built on them.

The NES and the connecting other concepts and action plans (climate change, renewable energy, energy efficiency, power and water supply to buildings) and sectoral (transport, rural development and tertiary education) strategies make a complete system of strategic objectives.

With the NES the Government's purpose was to create a strategic framework that will result in the coordination of energy policy with climate change policy with a view to economic development and towards a sustainable environment. In the light of global climate change challenges and the long-term decline of fossil energy reserves all over the world, the fundamental goals of the NES include – in compliance with the EU's principles – a shift towards guaranteeing the security of supply, increasing competitiveness and sustainability.

⁴<http://www.kormany.hu/en/ministry-of-national-development/news/national-energy-strategy-adopted-by-government>

It has to be highlighted, that the strategy was created for the long term and is intended to run until 2030; however, it also defines general guidelines that will apply until 2050.

It is not a binding legal instrument. Rather, it sets out aims, proposals for action, scenarios and expectations in relation to the government's approach to energy policy for the long term, and calls on the Government to implement its principles.

The Parliament has called on the Government to take the necessary measures to implement the strategy, and theoretically all the further implementation measures has to be elaborated based on the principles, key instruments, aims and expectations of the strategy. In this sense it affects, facilitates or restricts the conditions of further activities.

To sum up, the document sets out Hungary's goals for the energy sector for long term, until 2030. It sets out a new direction in Hungary's energy policies and stresses the need to adapt to climate change challenges and the long term decline of fossil fuels worldwide. It creates significant investment opportunities for investments which promote more efficient energy production and distribution and renewable energies.

Besides being a policy document, the NES is also a specific programme for guaranteeing on the one hand environmental sustainability of energy production and the security of energy supply. The NES includes scenarios and even sets the framework for future development consents, therefore it is not only a policy level document but a programme with practically applicable content for the energy sector.

The Parliament of Hungary has adopted a Resolution No. 77 of 2011 (14 October) on the NES which was also published in the Official Journal of Hungary. This is a 2-page long document that formally adopts the NES and summarizes the standpoint of the Parliament on the energy issues faced by Hungary. The actual NES, the 130+ pages long document is Annex 1 to the Parliamentary Resolution.

According to the Act on Legislation No. 130 of 2010, the resolution made by the Parliament is categorized as a so-called normative decision. Topics of normative decisions can be – amongst others – the own action programmes of the bodies that issue them; however, normative decisions are not binding norms. Consequently, the NES is not a binding norm either in a legal sense.

The NES was subject to an SEA process that started on 15 February 2011 and ended in May 2011.

IV. Location of the project

The NES is relevant to the entire territory of Hungary, as it is a national, long-term planning document.

V. Interested public involved

The public consultation was managed by the Ministry of National Development in cooperation with the SEA workgroup. The inclusion of the public and authorities into the

elaboration of the environmental report is regulated in Art. 6 of the SEA Directive and in Art. 8 of the SEA Decree. The Environmental Report introduces the way and the details of public consultations conducted, and emphasizes, that the results of the very wide-spread consultations has been taken into account though the way how the comments received has been taken into account is not clearly defined.

Art. 6 of the SEA Directive contains the provisions regarding consultations and the bodies and public to involve therein. The draft plan or programme and the environmental report prepared shall be made available to the authorities and the public.

Finalizing the strategy - before submitting to the Government for approval -, the Ministry of National Development took into account the outcome of the Environmental Report and the public consultation and thereafter handed in the strategy with the Environmental Report.

These comments were received by the experts participating in the environmental assessment and – as it was reported – took those into account, but neither the content of the comments nor the way of taking into account were detailed.

Involvement of the interested public

As the SEA Directive lays down, Member States shall identify the concept of the public for the purposes of the public consultations, and the detailed arrangements for the information and consultation of the authorities and the public shall also be determined by the Member States.

The SEA Decree defines the concerned public as follows [SEA Decree Art. 2.1]:

“For the purposes of this Decree, ‘Concerned Public’ means natural persons, legal entities or organizations without legal entity that:

- a) are or may be affected by the decision on the Plan or Programme requiring environmental assessment, in particular because of its effects on the environment;*
- b) have an interest with regard to the decision on the Plan or Programme requiring environmental assessment, in particular, that are environmental or other non-governmental organizations whose range of activity are affected by the said decision;*
- c) are otherwise defined as affected by legal instruments, or by the Developer in the preparation process of the Plans or Programmes.”*

As the SEA Directive regulates, the authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

The process of consultations was managed by the Ministry of National Development in cooperation with the SEA working group. The main elements of the process were – as the environmental report listed – the following:

- Homepage: the public documents were available on the homepage of the Ministry of National Development and if it was requested, the key documents were sent on paper or on CD by mail.
- Press: the Ministry of National Development published a press release after the completion of the Environmental Report as well as advertised in a national newspaper (according to Art. 8.5 of the SEA Decree).
- Direct requests: during the environmental assessment the 40-50 most important professional and interest representing environmental NGOs were directly contacted.
- Public debate of the SEA Environmental Report – Partnership Conferences: there were three partnership conferences held by the Ministry of National Development:
 - a forum on the new national energy strategy – in cooperation with the Scientific Association for Energy Economics;
 - a public debate on the draft of the NES – in cooperation with the Clean Air Action Group;
 - an open partnership forum on the energy strategy for the wide public.
- As the Environmental Report mentioned, the opinions and recommendations were taken into account, although, the way and outcomes thereof are not stated in the Environmental Report.

During the consultation, the text of the NES and the Environmental Report were available on the homepage of the Ministry of National Development, and there also was an e-mail account set up for purposes of receiving comments from the public. In addition, everyone had the opportunity to participate in the process through the homepage and the forums.

Besides mentioning that a number of opinions of organizations were sent to the strategy, it also was stated that the SEA working group did not have access neither to these comments, nor detailed information about the way and mechanism how the proposals were taken into account.

The organizations which made comments to the SEA were the followings:

- Association of Biomass Power Plants
- Hungarian Federation of Forestry and Wood Industries
- Waste Prevention Alliance
- Hungarian Association of Foresters
- Association of Private Forest Owners
- HUNGRAIL Hungarian Rail Association
- MVM (Hungarian Electrical Works) Ltd.
- National Association of Forestry
- Szent István University

The results of the public and partnership consultations are not included in the Environmental Report; the NGO proposals and other organizations' comments to the Environmental Report and the way of taking them into account were mentioned but not specified or detailed therein.

Involvement of professional organizations

Both the National Environmental Council and the National Council for Sustainable Development had debated on the Environmental Report and the strategy and formulated their opinions.

The Environmental Report stated that the received comments to the Environmental Report and the aforementioned written opinions were processed and the participants of the assessment took into account these at the finalization of the documents; however, the method of evaluating of opinions is missing.

Involvement of the authorities responsible for environmental protection

According to Art. 6.4 of the SEA Directive, Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes. Art. 5.4 of the SEA Directive lays down that the authorities referred to in Art. 6.3 shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

According to the SEA Decree, the following authorities were to be involved in the assessment process: the National Inspectorate for Environmental Protection, Nature Conservation and Water Management, the Chief Medical Sanitation Office, the Ministry of Rural Development, the Ministry of Interior and the National Office for Mining.

The Ministry of National Development notified the authorities on the launch of the strategy and the environmental assessment as well as officially sent those to the authorities for consultation.

The SEA working group reportedly integrated the opinions of the authorities, although proposals from the authorities to the Environmental Report and the way of taking them into account are not detailed in the final SEA report.

Art. 9.1.b requires that Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Art. 6.3, the public and any Member State consulted under Art. 7 are informed and the following items are made available to those so informed:

- a statement summarizing how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Art. 5,
- the opinions expressed pursuant to Art. 6 and the results of consultations entered into pursuant to Art. 7 have been taken into account in accordance with Art. 8 and - the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with.

The introduction of the NES refers to the prepared Environmental Report and the partnership consultations; the comments – which were received by the 17th of June, 2011 –

were made available on the website of the Ministry of National Development in September 2011.

Having the comments and opinions to the NES and SEA separately collected and handled, the Ministry of the National Development published the proposals far after the finalization of the Environmental Report; the SEA working group had not been able to access all the opinions; furthermore, lack of information about the way of the SEA proposals' evaluation also decreased the transparency of the process.

VI. Estimated environmental impact of the project

The objective of a strategic environmental assessment (SEA) is to make sure that environmental interests and aspects are enforced with appropriate weight in development concepts. SEA is the first step towards the enforcement of the prevention principle by calling the attention to expected or potential environmental risks and the possibilities to avoid them or mitigate their impacts.

Chapter 3.4. of the Report analyzes the probable environmental impacts during the implementation of the NES. Beside the impacts, the following chapters include the current state of the given element of the environment, contain the related existing environmental problems, and – in addition to the concrete actions of the NES - the areas likely to be significantly affected.

- 3.4.1. Impacts on air
- 3.4.2. Impacts on surface waters and groundwaters
- 3.4.3. Impacts on soil and geological medium
- 3.4.4. Impacts connected to the prevention and consequences of climate change
- 3.4.5. Impacts connected to the risk of an environmental catastrophe
- 3.4.6. Impacts on biodiversity
- 3.4.7. Impacts on Natura 2000 areas
- 3.4.8. Impacts on forests
- 3.4.9. Impacts on human health and quality of life
- 3.4.10. Identification of likely environmental conflicts
- 3.4.11. The expected development of environmental awareness
- 3.4.12. Identification of the impacts on land use and spatial structure
- 3.4.13. Impacts on landscape management and landscape carrying capacity
- 3.4.14. Impacts on the renewal and spatial utilization of natural resources
- 3.4.15. Impacts on urban environmental quality
- 3.4.16. Transboundary environmental impacts
- 3.5. The overall impact of the measures of the NES
 - 3.5.1. The cumulative impact of implementation
 - 3.5.2. Probable environmental conflicts in the case of the cancellation of the implementation of the Plan

VII. Description of the SEA procedure emphasizing the good transposition and implementation of the SEA Directive

The SEA Directive is in force since 2001 and should have been transposed by July 2004 by the Member States.

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

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

The provisions of the environmental assessment according to the SEA Directive have been adopted into the Environmental Protection Act under the title “Integration of environmental protection into legislation and different state decisions”.

Provisions of the environmental assessment according to SEA Directive have been adopted into the EPA under the title “*Integration of environmental protection into legislation and different state decisions*”. The ‘analysis’ of acts and decisions concerning the environment is part of the EPA from its entry into force (19 December 1995), i.e. long before the SEA became part of the European Union legal system. However, in practice it has never become a significant legal institution with a real and meaningful practice.

When transposing the rules laid down in the SEA Directive, the SEA Decree includes the regulation on environmental assessment and environmental report of plans and programmes. The SEA Decree combines both approaches mentioned in the SEA Directive’s Art. 3.5 in order to determine whether plans or programmes are likely to have significant environmental impacts. Namely there are mandatory cases with a list of special types of plans and programmes and there is the case-by-case examination.

The SEA Decree lists in its Annex 1 when SEA is mandatory for a plan or programme. Annex 1 of the SEA Decree lists nine plans or programmes:

1. Regional plans [§23 (1) of Act 21 of 1996]
2. Settlement structural plans, local building codes and zoning map applicable for the whole territory of the settlement [§7 (3) b) and c) of Act 78 of 1997]
3. National Development Plan [in accordance with Article 9 b) of Council Regulation 1260/99/EC]
4. Operative Programmes of the National Development Plan [in accordance with Article 9 f) of Council Regulation 1260/99/EC]
5. National, regional, county or local waste management plans, and the joint waste management plans of micro regions (§33 to §38 of Act 43 of 2000)
6. Mid-term plan of agricultural policy (§2 of Act 114 of 1997)
7. National Water Management Concept and National Programmes (§2 of Act 57 of 1995)
8. River basin management plan [§18 (7) of Act 53 of 1995]
9. National or local road network development plan [§5 of Government Decree No. 30 of 1988 (21 April)]

In addition, according to Article 1.2.ba of the SEA Decree, those plans and programmes shall also undergo an environmental assessment which “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” or under Art. 1.2.bb – which “may have a significant harmful effect on a Natura 2000 site”.

Regarding the SEA proceedings in the energy sector, there are no special rules. Under the SEA Decree, the environmental assessment is part of the elaboration, conciliation and adoption procedure of plans and programmes. The environmental report is part of the plan or programme documentation. **The SEA Decree does not clearly lay down requirements for presenting feasible alternatives.**

In the scoping phase, the drafter shall collect non-formal administrative opinions by competent authorities under the SEA Decree Art. 7.1, and in order to support the professional opinions of competent authorities, the preparer must provide information about the plan or programme.

The information to be shared - listed in Art. 7.2 and Art. 4.3 of the SEA Decree - is narrower than Annex 1 of the SEA Directive requires. The SEA Directive in Annex 1 requires presenting the relevant aspects of the current state of the environment; the environmental characteristics of areas likely to be significantly affected; and any existing environmental problems. The SEA Decree under Art. 7.2.b prescribes “a description of the situation, in particular information of environmental relevance”.

Before scoping, the preparer shall take into account the general mandatory requirements of environmental assessment under Annex 4 and the opinions of competent authorities (Art. 7.4 of the SEA Decree). The detailed list in Annex 4 on general mandatory requirements of environmental assessment meets the requirements listed in Annex 1 of the SEA Directive. The preparer 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.

According to Art. 10 of the SEA Decree, the draft plan or programme has to be submitted to the decision-maker by the drafter together with the environmental report, and at least with a summary of opinions and comments received during the environmental assessment. When adopting the plan or programme, the environmental report as well as the opinions and comments received during the environmental assessment have to be taken into consideration.

In our view, the SEA legal regime is satisfactory in Hungary and meets the requirements of the SEA Directive. Causes of weightlessness of SEA procedures rather originates from the very concept of the SEA. While the obligation of taking the environmental report and the opinions/comments received into account is a legal obligation, its enforcement is not clarified or ensured via any measure of remedy or sanction for non-compliance. This, however, is not a characteristic of the Hungarian regulation but of the SEA as such.

In case of the NES it can be concluded that the SEA had no or only little practical impact on the strategy. The decisions on preparing the strategy had been taken far prior to the beginning of the SEA procedure. This however highlights a common feature of the SEA processes in practice, i.e. they are done not fully parallel but to some extent subsequently to the planning process. This is also highlighted in the introduction of the Environmental Report on page 9 (1.1.2 Connection to the preparation process of the NES): *“the decision on the SEA was made much later than the start of elaboration of the NES.”*

In practice, in most of the cases the SEA is only concluded, because it is a legal requirement, but this legal tool is not used in the since, that originally it should be a planning tool before formulating exact plans and programs. The most serious problem with SEA is, that it is usually only a legal must, and not a real planning document in the merit.

Another interesting problem is to determine on a case-by case basis, if there is an obligation to carry out the SEA or not.

In the case of the NES the situation can be summarized in the followings:

According to Art. 1.2.a of the SEA Decree, the preparation of an environmental assessment is obligatory for all plans and programs listed in Annex 1. The NES does not fit into any of the categories listed in Annex 1.

According to Art. 1.2.b of the SEA Decree, preparation of an environmental assessment is obligatory for all plans and programs which are prepared for (...) energy (...) and set the framework for the future development consent of activities or facilities listed in the appendix of specific other legislation on environmental impact assessments but – from the point of view of the application of the Decree – are independent from the threshold values and territorial restrictions laid down in specific other legislation.

Under the SEA Decree, the conditions of when an SEA is mandatory for a plan or program (or their modification) are the following:

- either the plan or program has to be listed in Annex 1, or
- according to Art. 1.2 point b), those plans and programs 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) that “may have a significant harmful effect on a Natura 2000 site”.

There are special rules applying to modification of plans and programs. If a plan or program, otherwise falling under Art. 3.2 of the SEA Directive. is modified the modification requires an SEA if it meets the respective criteria of Art. 3.2 of the SEA Directive. These we can call “normal” modifications. An exception to the obligation to perform an SEA is when the plan or program in question is a minor modification, in which case it should be subject to SEA only where the preparer of the plan or program determines that it is likely to have significant

effects on the environment. Therefore these so called minor modification cases constitute the subjects of case-by-case examination.

Another exception to the obligation to perform an SEA is when the plan or programme in question determines the use of small areas at local level in which cases again it should be subject to SEA only where the preparer of the plan or programme determines that it is likely to have significant effects on the environment.

Finally, if a plan or programme does not fall under Art. 3.2 of the SEA Directive but under Art. 3.4 of the SEA Directive, i.e. it sets the framework for future development consents but does not belong to the sectors listed in Art. 3.2. Then again a case-by-case analysis is supposed to decide if there is a foreseeable significant environmental effect that necessitates an SEA. This case-by-case examination has to be applied *mutatis mutandis* to the modification of such plans or programs also.

According to the SEA Decree Art. 1.2.a, the preparation of an environmental assessment is obligatory for all plans and programs listed in Annex 1. These plans and programs are the following:

1. Regional plans
2. Settlement structure plans, local construction codes and management plans applicable for the whole settlement
3. National Development Plan
4. Operative Programs of the National Development Plan
5. National, regional, county or local waste management plans, and the joint waste management plans of microregions
6. Mid-term plan of agricultural policy
7. National Water Management Concept and National Programs
8. River basin management plan
9. National or local road network development plan

As we can see, the NES is not included in this Annex therefore the preparation of an SEA for the NES is not an absolute obligation. Therefore, it has to be examined on a case-by-case basis if the NES is subject to an SEA according to the further provisions of the SEA Decree.

Based on Art. 1.2.b of the SEA Decree, plans and programs not listed above, but are prepared for agriculture, forestry, fisheries, energy, industry, transport, traffic, waste management, water management, electronic telecommunication, tourism, regional development and which set the framework for future development consent of activities or facilities listed in the annex of specific other legislation on environmental impact assessment but – from the point of view of the application of the SEA Decree – are independent from the threshold values and territorial restrictions laid down in that specific other legislation; or may have significant adverse effects on Natura 2000 areas as defined in a separate act are also subject to an environmental assessment.

The meaning of „set the framework for future development consent” is crucial to the implementation of the SEA Decree. Based on the definition of the SEA Decree [Art. 1.4] plans

and programs that set a framework for the future development consent of activities or facilities are defined as plans and programs that:

- a) include provisions or conditions to be compulsorily applied, or criteria to be compulsorily considered during the authorization procedure, in particular as regards the location, nature, size and operational conditions of such activities, or the direct use of, load to or other uses of, natural resources by such activities;
- b) require the implementation of any such activities; or
- c) affects the location, nature, size and operational conditions of such activities, or the direct use of, load to or other uses of natural resources by such activities in other ways (by facilitating, encouraging or restricting them).

In our point of view the NES fits into the category described in point c) as a plan or programme which affects the location, nature, size and operational conditions or uses of natural resources of the mentioned activities in other ways (by facilitating, encouraging or restricting them). In this sense the NES influences the mentioned activities.

We have to mention that such an interpretation is in line with the EU or international interpretation of the notion “set the framework for...”. The European Commission has published a guidance document on the implementation of the SEA Directive.⁵ We can find the following references therein:

„3.23. The meaning of 'set the framework for future development consent' is crucial to the interpretation of the Directive, although there is no definition in the text. The words would normally mean that the plan or program contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area).

3.24. The words 'sets a framework for projects and other activities' are used in Annex II with illustrations of how such a framework may be set (location, nature, size or operating conditions of projects and the allocation of resources). These illustrations are indicative and not exhaustive.

3.25. As Annex II states, one way of 'setting the framework' may be through the way resources are allocated but the exemptions in Article 3(8) should be borne in mind. The Directive does not define the meaning of 'resources' and in principle they may be financial or natural (or possibly even human). A generalized allocation of financial resources would not appear to be sufficient to 'set the framework', for example a broad allocation across an entire activity (such as the whole resource allocation for a country's housing program). It would be necessary for the resource allocation to condition in a specific, identifiable way how consent was to be granted (e.g. by setting out a future course of action (as above) or by limiting the types of solution which might be available).”

⁵http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf

The Resource Manual of the UNECE on the application of the SEA in fact refers to the text of the EC guidance document, citing it literally.

Based on all these, we firmly believe that the NES sets the framework for future development consents. Those activities and facilities of the energy sector whose respective future development consent may be affected, by setting their framework, are listed in Annex 1 of the Government Decree No. 314 of 2005 (25 December) on Environmental Impact Assessment and Integrated Pollution Prevention and Control (EIA Decree). These are, for example, the following:

5. Coal mining
8. Uranium ore mining
28. Thermal power plant
30. Wind energy plant, wind farm
31. Nuclear power plant

Interestingly we may trace this characteristic (setting the framework for future development consent) almost exclusively regarding the use of atomic energy and the enlargement of the Paks NPP in the NES.

VIII. Actions of the public during the procedure

As described above at Point No. V.

IX. Decision of the environmental authority

In the SEA Decree it is stated, that: *„§10 The Developer shall submit the draft Plan or Program together with the environmental evaluation and at least a summary of the opinions and comments received during the environmental assessment to the approving administrative body, or, in case the approving body is the Parliament, to the Government. During the approval or submission of the Plan or Program, or proposal to be submitted to the Parliament, due account shall be taken of the environmental evaluation and the opinions and comments received during the environmental assessment [§43 (6) b) of the Environmental Act].”*

In the process the „environmental authority” does only have a kind of consultative role. According to Art. 6.4 of the SEA Directive, Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programs. Art. 5.4 of the SEA Directive lays down that the authorities referred to in Art. 6.3 shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

According to the SEA Decree, the following authorities were to be involved in the assessment process: the National Inspectorate for Environmental Protection, Nature Conservation and Water Management, the Chief Medical Sanitation Office, the Ministry of Rural Development, the Ministry of Interior and the National Office for Mining.

The Ministry of National Development notified the authorities on the launch of the strategy and the environmental assessment as well as officially sent those to the authorities for consultation.

The SEA working group reportedly integrated the opinions of the authorities, although proposals from the authorities to the Environmental Report and the way of taking them into account are not detailed in the final SEA report.

Art. 9.1.b requires that Member States shall ensure that, when a plan or program is adopted, the authorities referred to in Art. 6.3, the public and any Member State consulted under Art. 7 are informed and the following items are made available to those so informed:

- a statement summarizing how environmental considerations have been integrated into the plan or program and how the environmental report prepared pursuant to Art. 5,
- the opinions expressed pursuant to Art. 6 and the results of consultations entered into pursuant to Art. 7 have been taken into account in accordance with Art. 8 and - the reasons for choosing the plan or program as adopted, in the light of the other reasonable alternatives dealt with.

The introduction of the NES refers to the prepared Environmental Report and the partnership consultations; the comments – which were received by the 17th of June, 2011 - were made available on the website of the Ministry of National Development in September 2011.

Having the comments and opinions to the NES and SEA separately collected and handled, the Ministry of the National Development published the proposals far after the finalization of the Environmental Report; the SEA working group had not been able to access all the opinions; furthermore, lack of information about the way of the SEA proposals' evaluation also decreased the transparency of the process.

X. Current status of the case

The case is already closed; the National Energy Strategy of Hungary was adopted by the Parliament of Hungary on 14 October 2011 by its resolution No. 77 of 2011.

Abbreviations:

NES: National Energy Strategy of Hungary

Environmental Protection Act, EPA: Act No. 53 of 1995 on the General Rules of the Protection of the Environment

SEA Decree: Government Decree No. 2 of 2005 on the Environmental Assessment of Certain Plans and Programmes

Romania

I. Title

The SEA procedure of the National Energy Strategy of Romania

II. Description of the developer

The developer is Ministry of Economy – Romania, known as promoter of projects harmful to the environment and for lack of transparency.

III. Subject of the case

The Energy Strategy of Romania regulates projects very harmful for environment like: building two more nuclear reactors in Cernavoda Nuclear Power Plant, developing production of energy based on coal (development of mines, building coal thermal power plants, etc.), opening uranium mines, building nuclear waste repositories, etc.

The proposal of an Energy Strategy of Romania was done in 2007. Process of adoption followed Law no 52/2003 regarding transparency procedures in public administration. This procedure requested that the proposal is posted on website and the public has 10 days to comment the proposal. No SEA procedure started. Greenpeace sent a letter to the Ministry and asked for the project to be translated in English so that they will be able to read it and make comments (Greenpeace Romania was not established at the time), and also requested an SEA procedure for this program. The Minister refused. The Energy Strategy was adopted through Governmental Decision no. 1069/2007.

After establishment of Greenpeace CEE Romania, several complaints were made regarding adoption of the strategy without SEA. A case in national courts was started. In 2010 a complaint to EC was also done requesting opening an infringement case against Romania for violation of SEA Directive.

In 2009, as a result of our complaints to both Ministry of Environment and Ministry of Economy, a working group was created to elaborate SEA for the already adopted Energy Strategy. Three meetings of the working group took place. After our complaint to EC it was decided that it is not possible to realize SEA procedure after the Strategy was adopted and it was decided that a new project should be elaborated. The new project was posted on website. There was no participation of the public in drafting the project. Now SEA procedure is still ongoing for the revised Energy Strategy 2011- 2020.

Regarding the cases in court, both the first court (file no 10543/2/2010, decision no 3688/2011) and The High Court of Cassation and Justice (file no 10543/2/2010 decision no. 3394/2012) rejected our request of annulment of the Governmental Decision no 1069/2007 considering that the strategy is a political act and it does not fall under the scope of SEA procedure and also that SEA will be done for each plan/project separately. Although the Government accepted that SEA procedure is mandatory for The energy Strategy and started a new process for a revised Strategy, in court the government claimed that SEA was not needed because SEA directive or the national legislation that transposed the Directive, are not mentioning that for this strategy an SEA procedure must be carried on.

Against The Energy Strategy approved through Governmental Decision 1069/2007 we filed a communication to Aarhus Convention Compliance Committee. The case is still pending. During the case the government claimed that the public participated into the drafting procedure and gave an example of a Romanian NGO. To our enquiry they replied to the Aarhus Committee that they were never part of the drafting working group as the Romanian Government claimed.

IV. Location of the project

Impact of The Energy Strategy on environment was high and very dangerous for entire country and also for neighboring country or more due to the nuclear plans that in the revised strategy, beside previous projects like two new nuclear reactors at Cernavoda, nuclear waste repositories, uranium mine, a project of building a new nuclear power plant are envisaged, etc. Several projects described in the Strategy are affecting several Natura 2000 areas or protected areas at local level, but the Strategy nor the environmental report are not mentioning each of them nor assessing the effects.

V. Interested public involved

Interested public involved today is Greenpeace CEE Romania and Bankwatch Association Romania.

VI. Estimated environmental impact of the project

Impacts of the Energy Strategy are significant on all environmental factors due to the developments suggested by the strategy: increase of nuclear capacities, developing mining activities like lignite and uranium, developing energy production capacities like nuclear reactors, thermal coal power plants, etc.

However, the environmental report has surprising conclusions for e.g. for the nuclear sector – no significant effects over the environment. The report states that for third and fourth nuclear reactors EIA procedure is ongoing since 2006 and the main reports found that the project will have no significant effects over the environment, therefore in SEA the experts concluded that there are no significant effect off entire nuclear chapter that mentions also new nuclear capacities to be build, even if with no concrete project description. The report has no analysis over accidents that might occur to nuclear facilities (nuclear reactors, waste storages, production of nuclear fuel factory that will increase the capacity, opening new uranium mines). The report mentions that some impact will be on protected areas but the adequate evaluation chapter is extremely small and general. The only species likely to be affected mentioned are the bats. Air quality and climate change is mentioned but there is hardly any concrete evaluation of the impact. The report it is blaming the Strategy for not having concrete objectives and being too general and also the lack of public data regarding the state of the environment or even contradictory data. As a result the experts are showing that they could elaborate a better environmental report.

VII. Description of the SEA procedure emphasizing the good/bad transposition and implementation of the SEA Directive

First failure of implementation of SEA Directive is that the transposition measures were actually a translation of the article of the Directive when it comes to the scope of the directive. Provisions of the Governmental Decision 1076/2004 that is transposing the SEA Directive are not mentioning the actual plans and programs that are object of SEA procedure. In 2006 Order 995 was passed. This order is enumerating several plans and programs with mandatory SEA, but The National Energy Strategy is not mentioned, as are not several others.

There are no real alternatives evaluated. The alternatives considered are the different versions of the strategy: the one from 2007 illegally approved without SEA and the revised version. The main difference is that in 2007 the strategy assumed an increase of GDP and the revised version is considering the economic crisis effects.

Regarding the transboundary procedure, the report mentions that it is not necessary because most of the projects described are done in partnership with other states; therefore it is not needed to carry on SEA transboundary procedure.

For the first version of the Strategy there was no SEA procedure due to the vague provisions of the Directive itself regarding the scoping.

The revised version started with a project, drafted exclusively by the Ministry of Economy with no public participation. Opportunities of the public to participate in the procedure were not mentioned in a public announcement. Some individual notifications were released but they only regarding the upload on webpage of the environmental report and revised version of the strategy. One letter mentions that the date of the public debate will also be notified, but in fact it was not notified individually, nor the announcement posted on website of the Ministry of Economy or Environment (the environmental competent authority to release the SEA permit). Ministry of Environment actually does not have this project on the latest format of webpage; therefore the revised Strategy and environmental report from August 2012 are not posted on their webpage. As a result we were not able to participate to the public debate. We are not sure about the date or about the outcome of the meeting.

The SEA national law, Governmental Decision no 1076/2004 is providing timing for public participation:

In screening/scoping phase the responsibility for public participation procedure is of the developer as well as the competent environmental authority.

The developer is publishing twice an announcement in mass media every 3 days and uploads on his webpage: first version of plan or program, the nature of the plan or program, the beginning of the screening/scoping phase, the place and the schedule when the plan/program can be consulted and the possibility to send in writing comments to the environmental authority in 15 days since the last announcement.

The screening/scoping decision is uploaded on the webpage of the competent environmental authority and the possibility of the public to comment this decision in 10 days since the announcement was made. After the comments the authority can maintain or reconsider the decision. The developer must publish both the initial decision and the final decision in mass media.

In The Energy Strategy case there was no screening /scoping phase announced or decision published.

The next phase is *finalizing the plan or program and of realizing the environmental report*. The responsibility for public participation in this phase belongs to the developer. He must publish in mass media twice every 3 days and also upload on his webpage, an announcement regarding: release of the plan or program, the release of the environmental report, the place and schedule where they can be consulted, and the possibility of the public to comment them in 45 days since the last announcement was made.

This announcement was sent by Ministry of Economy individually to NGOs involved in the procedure, but we are not aware of any upload on the internet or about announcements in mass media.

The public debate has to be announced twice every 3 days in mass media and on the developer's webpage with 45 days before the date of the debate or with 60 days in case of transboundary cases. The announcement contains the date and the hour of the debate, the authorities participating to the debate, the fact that the debate is open to the public and to the authorities from the states likely to be affected if the case is likely to have adverse effects over the environment of the neighboring states.

In this case it was decided in the environmental report that the case will not have significant effects on the neighboring countries, therefore not transboundary procedure is needed. There was no public announcement regarding the public debate posted neither on the developer's website nor on the environment authority's.

The procedure was not elaborated further. In the next phases the developer should:

- Publish an announcement in mass media the decision to issue the SEA permit in 5 days since the decision was made
- The environmental authority has to publish the announcement regarding the decision to issue the SEA permit on webpage.

For violation of the obligations provided, the developer may be fined with amounts between approx. 1100 eur and 11100 eur.

The SEA permit is administrative act according to the Environmental Protection regulation, Governmental Emergency Ordinance 195/2005 and can be attacked in court.

VIII. Actions of the public during the procedure

For the first National Energy Strategy the actions were described above.

For SEA procedure still going on we will start inquiring about the failures of the procedure mentioned above and take legal action in court.

IX. Decision of the environmental authority

No decision was yet taken

X. Current status of the case

The case is still on going

Contact information:

name: Catalina Radulescu
organization: J&E
address: Dvořákova 13, 60200 Brno
tel/fax: 420 575 229/420 542 213373
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

The Work Plan of J&E has received funding from the European Union through its LIFE+ funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.

