

Case Study: The European SEA Directives

by Simon Marsden

Dr. Simon Marsden is a solicitor and a lecturer in law at the School of International Business, University of South Australia. He has worked for the Environment Agency of England and Wales, giving legal advice on contaminated land, planning, conservation, EIA and SEA. Before then he was a Lecturer in Environmental Law at the University of Exeter, and a Lecturer in Law at the National University of Ireland, Galway. Dr. Marsden holds a bachelors degree in Politics (York), a masters in Environmental Law (Aberdeen) and a doctorate (Tasmania). He is admitted to practice law in England and Wales and Tasmania. He is co-editor/contributor of Strategic Environmental Assessment in Australasia. He has published widely in a number of international refereed journals. He is also the original author of sections in the Australian legal encyclopaedia The Laws of Australia on forests, planning and conservation.

My lecture concerns the legal provision for SEA in the European Union Directive 2001/42/EC on the assessment of the effects of certain plans and programs on the environment, known as the SEA Directive. The Directive comprises 20 recitals, 15 articles, and two annexes.

Recitals 3 and 7 of the Directive recognize the role of SEA in international law. Recital 3 refers to the Convention on Biological Diversity, CBD, which requires parties to integrate as far as possible and appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans and programs. Recital 7 refers to the Convention on EIA in a transboundary context, the Espoo Convention, to which a legally binding protocol on SEA has recently been adopted.

Recital 1 of the Directive refers to Article 174 of the treaty establishing the European Community, which provides that community policy on the environment is to contribute to the preservation, protection, and improvement of the quality of the environment, the protection of human health, and the prudent and rational utilization of natural resources, and that it is to be based on the precautionary principle.

Recital 1 also refers to Article 6 of the treaty establishing the European Community, which provides that environmental protection requirements are to be integrated into the definition of community policies and activities with a view to promoting sustainable development.

Recital 2 refers to the Fifth Environment Action Program Towards Sustainability, a European Community program of policy and action in relation to the environment and sustainable development, as supplemented by a recent council decision on its review which affirms the importance of SEA.

The SEA Directive is closely related to the EIA Directive, Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC. The structure of both is similar, with similar procedural requirements.

Article 1 of the Directive concerns the objectives. These are to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations in plans and programs, with a view to promoting sustainable development. Environment is broadly defined under the Directive. It is stated to include in Annex 1 issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage, including architectural and archaeological heritage, landscape, and the interrelationship between the above factors.

Article 2 of the Directive deals with important definitions. Plans and programs mean new plans and programs, including those cofinanced by the EC, and modifications to existing plans and programs. Environmental assessment means preparing an environmental report, carrying out consultations, taking in account the report and consultations, and providing information on the decision.

The application of the SEA Directive may be divided into two distinct stages.

The first stage considers generally whether the plan or program is being prepared and/or adopted by an authority at a particular level of decisionmaking, and the weight to be attached to provisions providing for the plan or program.

The second stage considers specifically whether particular plans or programs attract mandatory SEA or whether discretion is given to member states.

In the first stage, it is hard to see how any public plans or programs would not be prepared or adopted by authorities at national, regional, or local level, or prepared for adoption through legislative procedure. However, questions of interpretation arise from the need under Article 2-A for the plan or program to be required by legislative, regulatory, or administrative provisions. The question of what a requirement is in this context suggests any provision must be of a mandatory nature. Any discretion will not suffice.

The question of what an administrative provision is is more difficult to determine. Any formal instruction from a member state to authorities at national, regional, or local level will probably suffice, but how detailed must this be? An instruction from an authority to itself would probably not be enough, but this is unknown unless tested by national courts or the European Court of Justice. Guidance from the Commission may resolve some difficulties, but questions of interpretation remain issues for court determination.

It is unclear whether reasons must be given for decisions taken by authorities, either in concluding that Article 2-A does not apply or in concluding that mandatory SEA is not required under Article 3.2. Ordinary principles of administrative or public law would indicate they should, despite the absence of a provision for this in the Directive. By contrast, Article 3.7 of the Directive provides that reasons for not requiring an environmental assessment must be given by member states when applying the discretionary SEA provisions.

Once Stage 1 is past, the provisions of Article 3 are applied. Article 3.2 makes SEA mandatory for central plans or programs listed which are likely to have significant environmental effects and which set the framework for future development consent under the EIA Directive. The interpretation of whether a plan or program sets the framework and what is a future development consent is also likely to be subject to judicial interpretation given the absence of definition in the Directive. Article 3.2 also makes SEA mandatory for plans which are likely to have significant environmental effects and which, in view of the likely effect on sites, have been determined to require an appropriate assessment under the Habitats Directive, Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna.

Recital 10 states that all of these plans or programs are likely to have significant environmental effects and should as a rule be subject to systematic environmental assessment. There is, therefore, no discretion for member states to argue that because environmental effects from these are not significant, that they should not be assessed.

With regard to plans or programs that determine the use of small areas at local level and minor modifications and for non-sectoral plans or programs which set the framework for future development consent of projects under the EIA Directive, under Articles 3.3 and 3.4 member states have discretion to determine whether significant environmental effects are likely. What constitutes "determines the use of" and what "small areas at local level and minor modifications" are is, again, likely to be determined by the courts.

Determinations of significance must, however, be made in accordance with Annex 2 of the Directive. Annex 2 sets out two kinds of criteria: the characteristics of the plans or programs, and the characteristics of the effects and the areas likely to be affected. These criteria may well also be litigated over where there is ambiguity.

It is not made clear what an authority is to do when a plan or program contains both financial and budget provisions and other provisions which must be assessed. Is the entire plan or program exempt? Should only the relevant parts be assessed? Should it all be assessed? There may well be conflict here.

Article 4 recognizes the statement in Recital 8 that the Directive is to lay down a minimum environmental assessment framework which would set out the broad principles of the environmental assessment system and leave the details to the member states, having regard to the principle of subsidiarity. Action by the community should not go beyond what is necessary to achieve the objectives set out in the treaty. Recital 9 repeats the implementation possibilities available to the member states and emphasizes the need to avoid duplication.

Annex 1 includes a wide range of matters to be included in the report. These include the relationship of the plan or program with other relevant plans or programs, relevant environmental protection objectives at international community or member state level, and measures to prevent, reduce, and, as fully as possible, offset any significant adverse environmental effects.

Article 6 and Recital 15 of the Directive deals with consultation. Consultees are defined as authorities designated for their specific environmental responsibilities and the public affected,

likely to be affected, or having an interest in the Directive. Both must be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or program and report before adoption or submission to the legislative procedure. Member states can decide on detailed arrangements for information and consultation.

Article 6 implements the Aarhus Convention on access to information, public participation in decisionmaking, and access to justice in environmental matters. Recital 15 states that the reason it is necessary to provide designated authorities in the public with information and allow consultation and the expression of opinion is to contribute to more transparent decisionmaking.

Article 7 implements the Espoo Convention on EIA in a transboundary context. Articles 8 and 9 concern decisionmaking. Under these articles, the environmental report and opinions must be taken into account in preparing the plan or program. When the plan or program is adopted, the public and designated authorities must be informed of the plan or program as adopted and how the environmental considerations have been integrated in the plan or program and how the opinions have been taken into account in the light of alternatives. They must also be informed of the monitoring measures decided upon. Member states can decide on how all of this information is to be given.

Article 10 of the Directive concerns monitoring. Under this, member states must monitor the significant environmental effects of implementing plans or programs to identify unforeseen effects and to undertake remedial action. Existing monitoring arrangements can be used if appropriate.

For example, the Water Framework Directive requires the preparation of both river basin management plans and programs of measures. Both of these are likely to have to be assessed under both the Water Framework Directive and the SEA Directive itself. Habitats Directive plans are also likely to have to be assessed under both the Habitats Directive and the SEA Directive.

Recommendations for reform may include an expansion of the categories of sectors under Article 3.

It will be noted here that the retrospective application of the Directive prior to the 21st of July 2004 is at the discretion of member states. A number of conclusions can be drawn from the above lecture. The SEA Directive represents an important element of the integration approach under Article 6 of the treaty. The SEA Directive also includes many best practice procedures, including its contribution to decisionmaking, public participation, consideration of alternatives, and monitoring.

The primary weakness of the Directive is that much discretion is left to the member states regarding application. Not many plans or programs will be subject to mandatory SEA. It is also very unlikely to result in gold plating of the Directive's requirements by which member states themselves decide as a matter of policy or law that the SEA Directive will be applied more widely than the Directive itself requires. The Directive does not also apply to policies. Finally,

commission guidance is needed as soon as possible to assist transposition and to provide practical assistance to member states themselves.