



Task Force on Public Participation in Decision-Making Eighth meeting Geneva, 8–9 October 2018

For Agenda Item 2 Ensuring effective public participation

(iv) ensuring that greater account is taken of the comments from the public in the final decisions and ensuring the appropriate provision of feedback on how the public's comments have been taken into account in the decisions.

Dear Ms. Chair, dear Colleagues,

This statement is on behalf of Justice and Environment (J&E) and the BlueLink Foundation, I am representing. We would like to present to your attention the comparative legal study done by J&E: *Assessment of environmental impacts of plans and programs: Implementation of key requirements of the SEA Directive in selected EU MS¹*. The study covered the application of the SEA Directive in 8 Member States (Austria, Bulgaria, Croatia, Estonia, France, Hungary, Slovakia, Slovenia) with emphasis on some key aspects, including public participation, follow-up and monitoring, and access to justice.

The SEA Directive (SEAD) has put a strong emphasis on public participation as a critical element of the SEA procedure and having an **impact on the quality and inclusiveness of the process**. The SEAD provides for broad and active public participation in the assessment procedures. According to it Member States shall identify the public, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to the Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned (Art.5.4). In order to provide timely and effective inputs public participation should be integrated into the earliest possible stage in the SEA procedures. In this respect the Member States have the discretion to decide on the detailed arrangements and as the analysed country examples have shown, the public is involved at different stages of these assessment procedures.

The study has analysed in a special section the statutory obligations to take the results of the SEA into account in the decision-making. Here are some of the findings.

1. According to the Recital 17 of the Preamble to the SEA Directive and Art.8 the environmental report and the opinions expressed by the relevant authorities and the public should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure. If the SEA is to influence the planning processes and decision-making leading to integration of the environmental considerations into PP, its results should be reflected into the final planning documents. The practice of implementation across EU as represented by the current study shows that on paper there is such obligation but it is not always clear or strict enough to be enforced.

In **Austria**, the SEA is usually part of a legally defined process and its outcome has a legal form which has to be followed in upcoming procedures. Thus it is not about the SEA itself but rather about the outcome of the whole process. A good example in this regard is the way the Vienna Waste Management Plan was done - with involvement of a lot of stakeholders and an open process, which outcome was agreed upon by all of them and thus is followed by them.

¹ http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2018/SEA_Directive_Implementation_Study_J_E_26.06.18.pdf

In Bulgaria, the results of the consultations shall be reflected into the SEA report and shall be taken into account in the decision of the Minister of Environment and Waters or the competent Regional Inspectorate for Environment and Waters. In the SEA decision the compliance with the public consultations requirements is considered. The SEA decision is based also on the documentation with the results of the consultations with the public, interested authorities and third parties, incl. a note with the motives for acceptance or non-acceptance of the collected opinions and suggestions and with motives for acceptance or rejection of assignment for supplementing or extension of the consultations. The possibility for challenging of the SEA decision serves as a safeguard for the adherence to these rules.

In Croatia, there is an obligation to take into account the results of the SEA but it is not really clear or strict. The Regulation on SEA determines that the competent authority shall consider the opinions, comments and suggestions made by the public in the SEA procedure. In practice, this is done in a way that in the final decision sometimes there is only a list of members of the public, NGOs, experts, etc. who participated in the process and following statement “all opinions, comments and suggestions made by public were taken into consideration”. NGOs have been trying for years to persuade environmental authorities that the SEA procedure should follow the procedure of spatial planning in which all participants at the end of public participation process can see all the comments and short explanations why some comments were not accepted. Regulation on SEA further regulates that after the public participation process is finished the competent authority shall deliver all opinions, remarks and proposals from the public to the experts. Then the experts within 15 days, are obliged to submit observations on the objections and proposals from the public and participate in the preparation of the public hearing report under a special regulation that regulates spatial planning. The Competent Authority after that is responsible to prepare the final draft strategy, plan and program and submit it to the Competent Body for adoption, except in the process of SEA of the Spatial Plan (it is responsibility of the Ministry of Spatial Planning and Construction, or county/city).

In Estonia, the law states that upon preparation of a strategic planning document, the following must be taken account of:

- the results of strategic environmental assessment;
- the opinions submitted by authorities and persons to the extent possible;
- the results of transboundary consultations. (EIA Law § 43).

However, “taking into account” does not mean that the SEA results would be binding and in practice other (social, economic) interests may override environmental concerns. The authority in charge of adopting the strategic PP could decide which concern are more important. The final decision as such can be challenged, but judicial review of value judgements (such as which interest should prevail) is limited to those cases where the weighing of interests was manifestly irrational or some important aspects were not duly taken into account.

In France, there are statutory obligations to take the results of the SEA into account in the decision-making. According to the Environmental Code, before taking its decision concerning the project, the competent authority must take into account the impact assessment, the opinion of several types of authorities, the results of the public consultations, and the result of the transboundary consultation when applicable. In any case, the project cannot be adopted before the expiry of the consultation period, and the drafting of a synthesis allowing the public to make sure that its observations were taken into consideration. The participation processes seem to be insufficient, because civil society in France still has to organise strong opposition protests to make their voices heard (i.e Notre-Dame des Landes airport project or Sivens dam).

In Hungary, the drafter of the PP shall take the environmental report and the results of the consultations into account in drawing up of the PP, and the entity adopting the plan or the program is responsible to take these information into consideration when adopting that plan or program. This obligation of the drafter and/or the entity is not specified in detail, it is not unusual, that the plan of program only declares that this requirement has been satisfied, the results of the SEA and consultations were taken into consideration. For example, the environmental report to the National Energy Strategy (NES) also refers that the comments were received by the experts participating in the assessment and they took them into

account, but neither the content of the comments nor the way of taking those into account were detailed. Furthermore, the SEA working group of the NES recommended the elaboration of research-analysis studies for certain key issues, and commencement of science-based methodology developments, however, it cannot be stated whether this recommendation was considered before the adoption of the strategy.

In **Slovakia**, although the SEA process is mandatory before the strategic documents are approved (without passing through, the strategic document cannot be approved), the final opinion that is the outcome from SEA process, is not binding for the approval. The law only stipulates that the results of the SEA process must be taken into account when approving the strategic document. Only in the case of SEA, which is also an appropriate assessment within the meaning of Art. 6/3 of the Habitats Directive, it is valid as a binding document - a strategic document cannot be approved in this case if the negative impact of the strategic document on Natura 2000 is demonstrated. In **Slovenia**, the law states that the authority which prepares a plan must take opinions and comments from the public into account as far as possible.

2. In addition, we would like to note an instrument that would ensure taking into account all inputs coming in via public participation is **the legal standing of the public**. By applying broadly the legal standing for the public, it provides for the right to be involved in a court review of the administrative decisions and of the scope and extend of taking into account of its lawful, e.g. do its statements have merit or not. E.g. the Supreme Court of Estonia has been maintaining a line of argumentation in its practice that could also be used for SEA and EIA that when the administrative bodies are making discretionary decisions, the decisions may be struck down if they are manifestly irrational. Therefore, if comments of the public are ignored without a proper reasoning, this may lead to annulment of the decision.

3. Another avenue for ensuring that greater account is taken of the comments from the public in the final decisions and ensuring the appropriate provision of feedback on how the public's comments have been taken into account in the decisions is institutionalization of the **partnership of the NGOs with competent environmental authorities** as in the case of Slovenia where for the first time it was established permanent cooperation with periodical meetings of the NGOs with the leadership and experts of Environmental agency, at which systematic problems and solutions are discussed. Through this mechanism the civil society could bring in mayor problems of SEA/EIA implementation, incl, regarding public participation.