

UNIVERSITY OF BIRMINGHAM

University of Birmingham
Research at Birmingham

REFIT of the SEA Directive

Cavoski, Aleksandra

License:

Other (please specify with Rights Statement)

Document Version

Peer reviewed version

Citation for published version (Harvard):

Cavoski, A 2020, 'REFIT of the SEA Directive', *Environmental Law Review*, no. 2.

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

This is an accepted manuscript version of an article accepted for publication in *Environmental Law Review*
<https://journals.sagepub.com/home/elj>

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

REFIT OF THE SEA DIRECTIVE

Aleksandra Čavoški*

The European Commission recently published results of the evaluation of the Strategic Environmental Assessment (SEA) Directive as a part of its Regulatory Fitness and Performance Programme (REFIT), also known as fitness check.¹ As the Directive has been in force for 15 years in member states, the aim of this first comprehensive evaluation was to assess the impacts of the Directive, from its entry into force in 2004 as well as to identify lessons learned and ways of improving the application of the Directive across the EU.² The Commission concluded that the SEA remains fit for purpose. It brought multiple benefits for both the EU and member states and it contributed to achieving several key environmental objectives.³ This paper aims to present some of the main findings of this assessment as well as to identify issues that need to be mitigated in order to reach the full potential of the Directive. The author will briefly describe the Directive followed by a presentation of the main conclusions of the evaluation. Finally, the author will present lessons learned and the next steps the Commission plans to take.

SEA Directive in Brief

The need to adopt legislation enabling the assessment of probable environmental effects of plans and programmes was already emphasised in the Fifth Environment Action Programme which called for a more operational translation of the principle of integration into Community policies.⁴ The objective of integrating environmental assessment within the macro-planning process was not only better environmental protection and resource management optimisation⁵ but also the reduction of disparities that exist amongst member states, manifested in varying assessment systems (or the lack thereof).⁶

The main goal of the SEA is to provide “for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development”.⁷ Its scope is wide and applies to plans and programmes (including those co-financed by the European Community, as well as any modifications to them) likely to have significant effects on the environment. The scope includes plans and programmes in preparation, as well as

* Birmingham Law School, University of Birmingham, Edgbaston, Birmingham, B15 2TT, United Kingdom, a.cavoski@bham.ac.uk

¹ Commission Staff Working Document: Evaluation of the Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment, SWD(2019) 414 final

² See Ibid at 5. Since the adoption of the Directive, the Commission conducted limited assessments of the Directive which are published in the two implementation reports – See COM (2009) 469 and COM (2017) 234. The evaluation of this Directive was included in the Commission’s Work Programme 2015 – See COM(2014) 910 final

³ Ibid at 67

⁴ Fifth Environment Action Programme: “Towards Sustainability”, OJ C 1993 138/I at 7.3. It was reviewed in 1998 – OJ 1998 L275/I.

⁵ Ibid.

⁶ Ibid and Recital 6 of the SEA Directive

⁷ Art 1 of the SEA Directive

those prepared for adoption by a competent authority at different governance levels and which are required by legislative, regulatory or administrative provisions.⁸

The Directive makes a distinction between plans and programmes subject to mandatory assessment and those subject to screening obligation.⁹ Environmental assessment is mandatory for plans and programmes “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 Annexes I and II of the Directive¹⁰. Mandatory assessment also applies to certain plans and programmes which require assessment as per the Habitats Directive.¹¹ Without limiting the assessment to certain sectors, the Directive additionally prescribes a screening obligation for plans and programmes which do not fall within the mandatory category but are likely to have significant environmental effects.¹² This includes plans and programmes others than those included in the mandatory assessment which “set the framework for future development consent of projects”.¹³ The scoping obligation also covers plans and programmes which “determine the use of small areas at local level and minor modifications to plans and programmes”.¹⁴

With the aim of achieving its environmental objectives, the Directive prescribes a comprehensive procedure that national authorities must follow in assessing the environmental effects of plans and programmes, without setting out any measurable performance indicators.¹⁵ This includes a multistage procedure comprising of scoping, preparation of an environmental report, informing of and consultation with relevant authorities and public (including transboundary consultations), decision-making and monitoring. In preparing an environmental report, the national authorities have to identify the likely significant effects on the environment, as well as reasonable alternatives to the proposed plan or programme.¹⁶ The information that needs to be provided in the environmental report is listed in Annex I of the Directive.

The 2017 implementation report confirmed that all member states have implemented the SEA Directive.¹⁷ As the Directive leaves wide discretion to member states in implementation,

⁸ Art 2 of the SEA Directive

⁹ Directive also prescribes certain exemptions from this obligation – Art. 3(8) SEA

¹⁰ Art. 2(a) of the SEA Directive

¹¹ See Art. 6 and 7 of the Habitats Directive - Council Directive 92/43/EEC (OJ 206 21 22.7.1992) on the conservation of natural habitats and of wild fauna and flora

¹² Annex III of the EAI Directive lists selection criteria for assessing whether the project will have significant environmental effects (Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. See also Case C-87/02, *Commission v Italy*, ECLI:EU:C:2004:13; Case 392/96 *Commission v Ireland*, ECLI:EU:C:1999:431 and Case C-2/07 *Paul Abraham and Others v Région wallonne and Others*, ECLI:EU:C:2008:133. See also Environmental Impact Assessment of Projects: Guidance on Screening (Directive 2011/92/EU as amended by 2014/52/EU) available at https://ec.europa.eu/environment/eia/pdf/EIA_guidance_Screening_final.pdf

¹³ Art. 3(4)

¹⁴ Art. 3(3)

¹⁵ See SWD above n. 1 at 7

¹⁶ Art. 5(1) of the SEA Directive

¹⁷ COM (2017) 234 at 2

this report recognised that the legislative framework for transposing the directive varies across member states and it is dependent on different administrative and cultural practices.¹⁸ This is best manifested by a large discrepancy between the numbers of strategic environmental assessments conducted by national authorities in member states. According to data collected in 2016, some member states undertook five SEAs per year for the implementation period 2007-2014, while others undertook 2700 SEAs per year.¹⁹ A good illustration is Finland where on average 1500 SEAs are conducted per year, while only two are conducted SEAs in Portugal.²⁰ Ireland is somewhere in between with 287 SEAs conducted between July 2004 and November 2011.²¹ This discrepancy can be explained by differences in available expertise and available resources for conducting the SEA, as well as differences in data collected and provided by member states that varies in quality, sometimes considerably.²²

Is the SEA Directive Fit for Purpose?

The objective of every fitness check is to provide the Commission with better understanding of intended and unintended consequences of the law, costs and other associated outlays, as well as the fitness of the law for digital area.²³ This is done by assessing each legislation or policy against the five main benchmarks - effectiveness, efficiency, relevance, coherence and EU-added value. To that end, the Commission deployed several different methods of evaluation and gathering data on the SEA encompassing documentary review, targeted online survey and consultation with stakeholders, interviews in 11 member states, online public consultation and the evaluation workshop.²⁴ Moreover, the final evaluation report was accompanied by several studies and reports that provided additional information to the Commission.²⁵ Despite this elaborate methodology and data gathering, the Commission identified certain caveats in undertaking the fitness check, which need to be taken into account in interpreting collected data and findings. As expected, data received from member states varied in terms of their availability and quality, leading to an overreliance on results gathered during the consultation phase.²⁶ As a result, the evaluation offered limited

¹⁸ Ibid at p. 2.

¹⁹ SWD above n. 1 at 9

²⁰ <https://www.eia.nl/en/countries/european+union/sea-profile>

²¹ Review of effectiveness of SEA in Ireland: Key Findings and Recommendations, Environmental Protection Agency (2012) at 9 available at

<http://www.epa.ie/pubs/advice/ea/SEA%20EFFECTIVENESS%20REVIEW%20MAIN%20REPORT%202012.pdf>

²² This conclusion is supported by the findings of the fitness check. See SWD above n. 1 at 19-20.

²³ See Better Regulation Guidelines SWD (2017) 350 and the Commission's policy objective for next five years "A Europe fit for the digital age" available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en

²⁴ SWD above n. 1 at 17-19.

²⁵ Study to support the REFIT evaluation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) Final report, Milieu, June 2019 (hereinafter: External study) available at <https://ec.europa.eu/environment/eia/pdf/REFIT%20Study.pdf> and Open public consultation report: Study to support the REFIT evaluation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) Proceedings of the stakeholder workshop 6 December 2018, Brussels.

²⁶ SWD above n. 1 at 19

availability of data to assess cost and benefits of the SEA Directive as major indicators for testing efficiency.²⁷

Effectiveness

This criterion was deployed to assess the extent to which the EU action was successful in reaching set objectives which, in the case of the SEA, include three main principles – implementing a high level of environmental protection, the principle of integration and sustainable development. It is worth of noting that that the Commission does not provide specific benchmarks for evaluating effectiveness. There is wide agreement among stakeholders and other interested parties who participated in the evaluation that the Directive has successfully contributed in fulfilling those objectives. Moreover, the SEA Directive to some extent facilitated the integration of environmental standards prescribed by other relevant directives.²⁸ The Directive proved to be particularly effective in ‘addressing environmental issues such as biodiversity, including flora and fauna, water’,²⁹ while it was less effective in protecting cultural heritage,³⁰ material assets, human health and population.³¹ The evidence gathered also pointed out that the SEA is less effective in tackling emerging issues such as climate change and factors that contribute to it, though it has the future potential to address this and other emerging issues such as ecosystem services and natural capital.³²

Besides realising the intended environmental objectives, several other important achievements were identified. As the Directive sets a common procedure for national authorities to follow with the aim of pursuing those objectives, it had a profound and positive impact on decision-making procedures in all member states. The evaluation report endorses the Directive’s “potential for promoting a well-informed, transparent, structured and ultimately auditable decision-making process”.³³ Of particular importance is the Directive’s contribution to fostering a dialogue with the public through the consultation procedure, though stakeholders pointed out that the public is not always sufficiently engaged.³⁴ The Directive also has a positive impact on the planning processes, in particular by improving the process of preparing plans and programmes and their content, as well as having a positive impact on “siting, design and implementation of projects developed from plans and programmes”.³⁵

However, the evaluation exposed some limitations to an effective decision-making process. This is particularly noticeable between different sectors. The Directive is most effective with regard to town, country and spatial planning, while less effective in transport, energy, forestry

²⁷ SWD above n. 1 at 20

²⁸ SWD above n. 1 at 21-22 and at 66.

²⁹ SWD above n. 1 at 22 and the External study above n. 25 at 11.

³⁰ Irish study above n. 21 at 15.

³¹ SWD above n. 1 at 22 and the External study above n. 25 at 11.

³² External study above n. 25 at 11 and SWD n. 1 at 22

³³ SWD above n. 1 at 22

³⁴ SWD above n. 1 at 26 and Open public consultation above n. 25 at 9

³⁵ SWD above n. 1 at 24-25, External study n. 25 at 11.

and agriculture.³⁶ This difference between sectors can be explained by competing economic and/or social interests which most often occur in sectors where the SEA is less effective.³⁷ This may also have a knock-on effect on synergies between the SEA and sectoral policies. The effectiveness of the decision-making process will also vary depending on the governance level. The evaluation demonstrated that the SEA Directive is most effectively used at the local level due to the absence of abstract 'high-level' plans and programmes such as strategies or policies.³⁸ Likewise, it is much easier to engage the public in the decision-making procedure at the local level.

Several important challenges have been identified. One significant issue is the timing of the SEA whereby it is often launched relatively "late in the development process of the plan or programme" or there are procedural delays in consulting the public.³⁹ Likewise, there was a wide agreement throughout different phases of the evaluation that the lack of clear definition of the terms 'plans and programmes' represents a significant challenge to effective implementation of the Directive.⁴⁰ As a result, some 'high' level plans and programmes that may have a significant environmental impact are not subject to an SEA, either because they are not regarded as 'setting the framework' directly or there is no clarity on whether they fall within the definitional scope of 'plans and programmes'.⁴¹ Equally, in preparing the environmental report, national authorities are often faced with challenges in identifying and assessing reasonable alternatives.⁴² As this term is not defined in the Directive, alternatives are not properly considered or developed at the national level.⁴³ This is further exacerbated by the lack of a common approach between member states in defining the types and number of alternatives to be evaluated.⁴⁴ Finally, stakeholders identified poor environmental monitoring as another weak link, in particular the lack of monitoring of environmental effects after the adoption or the implementation of the plans or programmes.⁴⁵

Despite these challenges in implementing the Directive, its effectiveness also depends on certain external factors in each member state. National authorities must have technical expertise and well-trained and sufficient human resources allocated to SEA. This is particularly important in regard to high level plans and policies where identification and assessment of likely environmental impacts and subsequent monitoring is more complex due to difficulties in measuring data indicators.⁴⁶ The decision-making process is also dependant on up-to-date and high-quality environmental information in assessing the likely environmental impacts, as well as the political will to ensure the smooth functioning of the Directive.

Efficiency

³⁶ External study above n. 25 at 11-12. See more about the SEA in Air Quality Planning in Germany in U. Weiland, 'Strategic Environmental Assessment in Air Quality Planning in Germany' (2019) elni Review

³⁷ Ibid. at 11 -12;

³⁸ SWD above n. 1 at 27

³⁹ External study n. 25 at 11

⁴⁰ SWD above n. 1 at 23-24

⁴¹ SWD above n. 1 at 26-27

⁴² SWD above n. 1 at 25-26 and External study above n. 25 at 11

⁴³ SWD above n. 1 at 15.

⁴⁴ Ibid.

⁴⁵ Open public consultation above n. 25 at 8.

⁴⁶ SWD above n. 1 at 27.

The use of this criterion assisted in assessing the cost and benefits in implementing the SEA Directive. The overall conclusion is that the costs of implementing the Directive are proportionate to the benefits Directive provides.⁴⁷ However, the costs of individual plans and programmes will vary and it will depend on how the SEA procedure is carried out at the national level.⁴⁸ Costs involved are not excessive for national authorities, though some stakeholders pointed out that the SEA can be unaffordable for small local authorities.⁴⁹ Despite these positive results, the Commission acknowledged that this evaluation exercise did not allow for understanding of ‘costs of the SEA at the EU level or an average estimate by type of plan or programme or by a member state’.⁵⁰ Yet, it is expected that high quality plans or programmes should by their nature provide larger absolute benefits.⁵¹

In determining the factors that may have an impact on efficiency, the evaluation exposed the interconnectedness of this criterion with the criterion of effectiveness, particularly in regard to practical factors.⁵² The efficiency and effectiveness of the SEA Directive depends on how national authorities decide to adapt the SEA procedure to specific cultural and administrative cultures in each member states without compromising a strictly set procedure. With regard to the actual costs of complying with a prescribed procedure, the evaluation demonstrated that the main costs resulting from the SEA procedure relate to preparation of an environmental report.⁵³ This may be due to excessive fees that some external consultants charge, which was often the case in Central and Eastern European countries.⁵⁴ This is also caused by overly detailed environmental reports which do not always follow from an effective scoping exercise.⁵⁵ Levels of expertise and institutional capability are also important as the lack thereof may, in the long term, lead to potential future costs. Some procedural costs may be incurred due to delays in launching the SEA.

An important part of the cost-benefit analysis of the Directive was consideration of practices that may cause unnecessary burden to regulatory authorities in conducting the SEA. There was a general concern among stakeholders about the impact that recent CJEU case law may have by imposing excessive burdens on national authorities. The CJEU has provided a broad interpretation of plans and programmes whereby they relate “to any measure which establishes, by defining rules and procedures, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment”.⁵⁶ The main concern is that this broad definition may be interpreted as to

⁴⁷ SWD above n. 1 at 29

⁴⁸ External study n. 25 at 12

⁴⁹ SWD above n. 1 at 31

⁵⁰ SWD above n. 1 at 32

⁵¹ *Ibid* at 32-33.

⁵² See the list of practical factors in SWD above n. 1 at 32

⁵³ SWD above n. 1 at 31

⁵⁴ Open consultation above n. 25 at 16.

⁵⁵ SWD above n. 1 at 33

⁵⁶ *D’Oultremont and Others*, C-290/15, EU:C:2016:816 at para 49; An extensive list of case law is provided in SWD above n. 1 at 13 including some of the following C-305/18, ECLI:EU:C:2019:384; *Terre wallonne ASBL v Région wallonne*, C-321/18, ECLI:EU:C:2019:484; Case C-671/16 *Inter-Environnement Bruxelles ASBL and Others v Brussels Capital Region*, ECLI:EU:C:2018:403; and Case C-160/17 *Raoul Thybaut and Others v Région wallonne*, ECLI:EU:C:2018:401

include policies and legislation which are not explicitly prescribed by the Directive.⁵⁷ It can also result in over compliance by national authorities. Some stakeholders emphasised that the inclusion of policies and legislation within the scope of the Directive may prove to be technically challenging and complex in practice and called for clarification of the Directive's remit.⁵⁸

Relevance

The evaluation confirmed that the Directive remains relevant and that its objectives still correspond to stakeholders' needs.⁵⁹ The Directive was of particular importance for furthering environmental protection and sustainable development and more specifically to contributing to the preservation of biodiversity and protection of natural capital; yet it had a limited effect with regard to emerging issues such as climate change adaptation, circular economy, sustainable cities, soil protection and resource efficiency.⁶⁰ The Directive sets out broad objectives to be achieved which remain highly relevant on the EU agenda and are aligned to current international and EU objectives. For example, the SEA Directive will be an important tool in pursuit of specific international targets such as SDGs.⁶¹ The evaluation exposed lower relevance of the Directive for lower scale plans and programmes where there is higher potential for overlap between the SEA and EIA.⁶² The SEA procedure was proved equally relevant for strengthening the impact of other EU legislation and policies such as the Habitats Directive through imposing mandatory assessment of any plan or project that may have a significant negative environmental impact on designated sites.⁶³ However, the Directive has the potential to be even more relevant provided that the notion of plans and programmes is further clarified.

Citizens' engagement was commended as one of the key indicators of the Directive's relevance to EU and global policies and objectives. As the SEA procedure enables their engagement at the strategic level, citizens can contribute to formulating broad directions for plans and programmes.⁶⁴ Of particular importance is the encouragement of their early engagement in the scoping process. This obligation of citizens' involvement confirms the Directive's alignment with the public participation rights as prescribed by the Aarhus Convention and its relevance in furthering those rights through the SEA procedure.

There was a broad agreement among participants that the Directive remained relevant due to its flexible nature by leaving significant discretion to member states in implementing the prescribed procedural framework by developing their own best practices. The Directive demonstrated adaptability to scientific and technological advances which may form an

⁵⁷ Commission Staff Working Paper gives examples where the SEA was applied to legislation and strategies – See SWD above n. 1 at 34-35 and External study above n. 25 at 12. See more about the term 'Plans and Programmes' as interpreted by the CJEU in T. Bunge, 'Strategic Environmental Assessment: the Term "Plans and Programmes"' (2019) elni Review.

⁵⁸ SWD above n. 1 at 35; Open public consultation above n. 25 at 15

⁵⁹ SWD above n. 1 at 36.

⁶⁰ Open public consultation above n. 25 at 18

⁶¹ See SWD above n. 1 at 39

⁶² SWD above n. 1 at 37

⁶³ SWD above n. 1 at 39

⁶⁴ See SWD above n. 1 at 41-42

important part of any considered plan or programme such as energy programmes, flood hazard management plans.⁶⁵ However, the extent to which the Directive will remain relevant is dependent on the quality of the planning process, the availability of new technologies and the expertise and skills of national authorities and other stakeholders in undertaking the SEA.⁶⁶

Coherence

This benchmark was used to assess the relationship of the SEA Directive with other environmental and cross-sectoral legislation and policies, as well as to assess the level of consistency with other international obligations. To that end, the study was particularly focused on the relationship with the EIA and the Habitats Directives. With regard to the EIA Directive, the study confirmed that both SEA and EAI pursue the same environmental objectives and are complementary in nature, whereby the SEA can be regarded as an overarching and systematic tool focusing on more strategic levels of assessment, while the EIA assessments are more specific.⁶⁷ The interaction between the two directives also flows from similar procedures, the requirement of public participation and data sharing. However, stakeholders raised the importance of ensuring better understanding of the distinction between the SEA and EIA, as well as better coordination in implementing the two assessments. Better coordination in data sharing would be particularly useful as certain sets of data are used in both procedures. This is particularly important in spatial planning as in some member states spatial plans include projects that fall within scope of both directives.⁶⁸

The relationship between the SEA and the Habitats Directive is more complex due to the different scope and objectives pursued by these two directives.⁶⁹ Some stakeholders emphasised the lack of clear rules regarding the appropriate assessment under Article 6(3) of Habitats Directive⁷⁰ in relation to plans and programmes referred to in Article 3(3) of the SEA Directive.⁷¹ Several opportunities for improving the synergy between the two directives were identified, including ‘common environmental reporting; data-sharing; more efficient public participation and higher quality assessment’.⁷²

With regard to other sectors, the SEA is mandatory for a wide number of sectoral plans and programmes. Despite the different objectives often pursued by cross sectoral policies, such as waste, energy and transport, the evaluation exposed the positive impact that SEA has on supporting effective implementation of EU law in different sectors, as well as ensuring the

⁶⁵ SWD above n. 1 at 41

⁶⁶ External study n. 25 at 13

⁶⁷ SWD above n. 1 at 44

⁶⁸ SWD above n. 1 at 46

⁶⁹ See External study n. 25 at 13, also SWD above n. 1 at 48-49

⁷⁰ The concept of appropriate assessment is not defined in the Habitats Directive. This term was interpreted in Waddenzee case as an examination of “all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect conservation, in the light of the best scientific knowledge in the field” – See Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:2004:482. The UK Government clarified that the concept should not be understood as a technical concept (See for example guidance on UK government website <https://www.gov.uk/guidance/appropriate-assessment>)

⁷¹ Open public consultation above n. 25 at 25.

⁷² SWD above n. 1 at 49

integration of the principle of sustainable development across all policies. However, the synergy between the SEA and the pursuit of sectoral objectives is dependent on ‘alternatives’, which are regarded as an important component of the SEA procedure as they allow for the fulfilment of sectoral objectives without causing environmental damage.⁷³ Some stakeholders pointed out that the SEA process further prolongs decision-making which may affect the timely delivery of sectoral policies.⁷⁴

Finally, coherence also included synergy between the SEA and relevant international legislation, in particular the SEA Protocol and the Aarhus Convention.⁷⁵ The SEA is largely consistent with other EU legislation and policies, as well as relevant international obligations. With regard to possible differences between the Protocol and the Directive, the main issue comes from a different scope of application. While the SEA Directive refers only to plans and programmes,⁷⁶ the Protocol recognises a wider scope beyond plans and programmes to include policies and legislation⁷⁷. In the evaluation, the lack of clarity of the notion of “plans and programmes” was already raised with regard to the effectiveness and efficiency of the directive. With regard to the relationship with the Aarhus Convention a similar conclusion has been reached in the evaluation study. The SEA Directive does not recognise access to justice and there is limited evidence as to the degree to which this access is available across different member states.⁷⁸ As Article 6 of the SEA Directive provides an opportunity for the public to engage in consultation once the environmental report is prepared, this delayed opportunity for engagement undermines the possibility of early public engagement as encouraged by the Aarhus Convention.

EU Added Value

The SEA Directive represents a good example of how an EU measure may be more beneficial than a national measure. In this case, the principle of subsidiarity clearly facilitated the pursuit of objectives that cannot be ‘sufficiently achieved by member states’ acting alone or separately. As only a few member states had a procedure at the national level that partly mirrored the SEA procedure before the adoption of the SEA Directive, there was a clear need for EU action. If the SEA Directive had not been adopted then compliance with similar international obligations such as the Aarhus Convention and the SEA Protocol, as well as the implementation of several EU directives, such as EIA and Habitats Directives, would have only allowed for the partial attainment of objectives set out in the SEA Directive.⁷⁹

The added value of this EU measure can be illustrated by several benefits that the SEA Directive achieved. By introducing a more systematic approach to the assessment of environmental impacts of plans and programmes, the SEA Directive filled the legal gap in

⁷³ External study above n. 25 at 13-14

⁷⁴ SWD above n. 1 at 51

⁷⁵ Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus) 25 June 1998, in force 30 October 2001, 38 ILM 517 (1999) and Protocol on Strategic Environmental Assessment (Kiev) 21 May 2003, in force 11 July 2010, UN Doc. ECE/MP.EIA/2003/2 (2003 SEA Protocol).

⁷⁶ Art 2 of the SEA Directive

⁷⁷ Article 1 of the SEA Protocol

⁷⁸ See SWD above n. 1 at 60-61

⁷⁹ External study above n. 25 at 14

those member states that did not have any procedure in place beforehand.⁸⁰ Likewise, it introduced greater consistency between the member states that already had certain procedures similar to SEA in place and ultimately resulted in a uniform practice across the EU. It proved to be a flexible tool that can work in different regulatory and administrative contexts.

This uniform practice in all member states allows for a comprehensive and timely assessment of environmental impacts at both national, regional and local level, as well as facilitating the assessment of transboundary environmental impact. In line with the principle of taking decision ‘as openly as possible and as closely as possible to the citizen’ guaranteed by the EU Treaty, the SEA procedure allows for greater transparency and effective engagement of the public in the planning process. It also allows for addressing new challenges such as climate change and loss of biodiversity⁸¹ and it also facilitates a balanced approach in assessing the three dimensions of sustainable development, including social, economic and environmental aspects of a strategic action. Finally, through action at the EU level which encourages member states to share data and best practices, the SEA Directive should result in more innovative and effective practices, as well as furthering uniformity across EU.

Lessons Learned and Future Actions

The evaluation concluded that the SEA Directive still remains fit for purpose. It is successfully applied in different social, economic and administrative settings and it acts as a flexible procedural tool in pursuit of important environmental objectives. Showing its resilience after 15 years of application, the SEA Directive also represents an important tool to address emerging issues such as climate change related challenges and nature capital protection, though so far it has had limited impact with regard to those issues. For example, in relation to climate change proofing investments, the SEA can be used to further mitigate measures by ensuring that infrastructure projects are in line with Paris Agreement goals and transition to a zero net emission target.⁸² It can also facilitate adaptation as the SEA can provide an important risk assessment framework which exposes climate vulnerability and identifies possible adaptation measures.⁸³

Although there are inevitable differences between member states in implementing the Directive, the fitness check exposed some of the common challenges facing all member states in implementing different aspects of the Directive in practice. One of the more significant recurring issues was the lack of clarity of the Directive’s scope, an issue that impedes achieving the full potential of the Directive. This in turn may have an impact on consideration and assessment of alternatives as an important aspect of an environmental report.⁸⁴ To that end, the Commission is currently assessing various options which may include amendments to the Directive, as well as provision of various forms of guidance.⁸⁵ Bearing in mind current CJEU practice, it seems more plausible to expect guidelines from the Commission that will

⁸⁰ See External study above n. 25 at 14

⁸¹ Open public consultation above n. 25 at 29

⁸² SWD above n. 1 at 66

⁸³ Ibid.

⁸⁴ SWD above n. 1 at 65

⁸⁵ See External study n. 25 at 15

offer interpretation of the case law coupled with examples where the SEA was conducted for legislation and policy, as well as challenges that member states faced in those instances.

The evaluation exposed difficulties in undertaking different phases of the SEA procedure. There are significant discrepancies between member states in conducting scoping which may affect the quality of environmental reports. This is coupled with additional problems in preparation of those reports, most often manifested in challenges national authorities experience in selecting or developing alternatives or choosing alternatives that often prove to be inefficient. Some of the ways of addressing these concerns would include having more clarity regarding the concept of alternatives or sharing of best national practices at the EU level. At the national level, it would be important to improve the expertise of parties involved, as well as improving the technical capacity of authorities conducting the SEA. Of particular importance is data sharing on already undertaken SEAs at both the national and EU level. Establishment of online data sharing platforms followed by a wider spatial coverage of these platforms⁸⁶ would be particularly significant in ensuring coordination of national authorities in conducting similar procedures such as EIA or appropriate assessment. Better data quality and data accessibility would also assist in implementing transboundary projects and ensure more effective compliance. This approach would be well aligned with the current Commission's priority of making the EU fit for the digital age and would also allow for technology transfer and knowledge sharing.⁸⁷

The timing of the SEA is another practical factor that affects the implementation of the Directive in member states. There is a need for a 'more strategic and inclusive approach to scoping' where the SEA should "start as early as possible in the planning or programming process".⁸⁸ Involving the public before the draft plans and programmes are prepared would give them an opportunity to have a more decisive voice in pushing for changes to plans and programmes and choosing suitable options. Another way to involve the public would be to ensure a wider dissemination of draft plans and programmes.⁸⁹ This does not require any further action at the EU level, as there is general agreement that the Directive offers significant flexibility to member states in organising and conducting the SEA. However, this may require additional institutional resources at the national level, especially to ensure a meaningful interaction with the public.

⁸⁶ SWD above n. 1 at 41

⁸⁷ See Commission's priorities for 2019-2024 at https://ec.europa.eu/info/strategy_en and https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en

⁸⁸ External study above n. 25 at 15.

⁸⁹ See SWD above n. 1 at 73-74