The SEA Directive

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BELGIUM

[1] National legislative context

On the **Federal level** SEA for federal plans and programmes is regulated by the Act of 13 February 2006 concerning the assessment of the effects of certain plans and programs on the environment and the participation of the public in the elaboration of the plans and programs related to the environment[1]. The Act follows closely Directive 2001/42/EC. The procedure is applicable on various plans for large electricity infrastructures, as well as for plans and programmes concerning provision in gas, management of radioactive waste and fissile materials, exploration and exploitation of marine resources or with possible negative impacts on marine protected habitats, as well as other federal plans or programme's that set the framework for future development consent of projects and that are likely to have significant environmental effects. Specific features are the intervention of a Consultative Committee in screening and scoping and quality control, an elaborated procedure for transboundary consultation, a public consultation procedure of 60 days, suspended between 15 July and 15 August, including the consultation of the Federal Council for Sustainable Development.[2]

On the regional level, the legislations of the three regions are different. Those legislations are applicable on regional, but also on local plans and programmes.

In the **Flemish Region** the basic legislation can be found in the Decree of 5 April 1995 concerning general provisions of environmental policy, in particular Title 4, Chapter 2, initially inserted by Decree of 18 December 2002, modified by Decree of 27 April 2007 (further indicated as DABM). Since that modification the basis legislation follows very closely the wording of the Directive. A specific feature is the intervention of the EIA Team of the Department of the Environment of the Flemish Ministry[3] in screening, scoping and quality control, public participation in scoping (30 days) and the necessity to rely on certified EA-experts for drafting the SEA. The Decree provides for alternative approaches in the form of the so called "integration track". Provided that the basic requirements of SEA are respected SEA can be fully integrated in the planning process of the plan or programmes concerned and in that case the procedure provided for in the DABM will not apply. Such an integration track has been developed for land use plans by a Decree of 1 July 2016 and is integrated in the Flemish Town and Planning Code.[4]

In the **Walloon Region** SEA is regulated in Chapter I of Part V of the Walloon Environmental Code. It follows also closely the wording of the Directive. The Walloon Government determines the content (scoping) of a SEA Report, after consultation of the Environmental

[1] Participation in plans and programmes related to the environment | FPS Public Health (belgium.be)
[2] BE_Federal_SEA_summary_report.pdf (europa.eu)
[3] https://omgeving.vlaanderen.be/milieueffectrapportage
[4] https://omgeving.vlaanderen.be/plan-mer#planmer ; BE_Flanders_SEA_summary_report.pdf (europa.eu)

Section of the Economic, Social and Environmental Council of Wallonia, the local authorities concerned and the agencies and persons that it decides to consult. In case a SEA is necessary, the SEA Report will be submitted to public participation, together with de related draft plan or programme, by the local authorities concerned[5].

In the **Brussels Capital Region** the issue is regulated by the Ordinance of 18 March 2004 on the environmental assessment of plans and programmes The SEA procedure starts with a draft outline of the SEA that the initiator has to submit to some advisory bodies. They shall deliver their opinion within 30 days and the authority that is initiating the plan or programme will than decide on the outline of the SEA.

[2] EU infringement proceedings?

The CJEU, by its judgment of 7 December 2006 in case C-54/06, *Commission v Belgium*, declared that, by failing to adopt, within the period prescribed, all the provisions necessary to comply with Directive 2001/42/EC, the Kingdom of Belgium has failed to fulfil its obligations under that directive. The infringement case had been started by the EC because of failure to transpose the Directive in time on the Federal and Flemish level. Because meanwhile the transposition at the federal level had been completed, the infringement procedure before the Court was limited to the Flemish Region. It must be said that the Flemish Region had already in 2002 introduced the necessary basic legislation, on proposal of the Green Environmental Minister at that time, but the next right wing Government had not taken the necessary executive orders and decided to first modify the basic legislation because of their "no gold-plating policy".

[3] Objectives (Art. 1)

In the **Flemish region** the objective of EA and SA are described as follows: "*Environmental impact and safety assessments aims to assign, in the decision-making on actions that may cause significant environmental impacts and / or that may cause a major accident, a place to the environmental interest and the safety and health of humans in the decision-making process that is equivalent to social, economic and other social interests*" (Art. 4.1.4, § 1, DABM).

In the **Walloon Region** the Environmental Code states:

"*The main purpose of implementing the procedures provided for in this part is:*
- protect and improve the quality of the living environment and living conditions of the population, to ensure a healthy, safe and pleasant environment;
- manage the living environment and natural resources, so as to preserve their qualities and to use their potential rationally and judiciously;
- to establish a balance between human needs and the living environment that will allow the entire population to enjoy a sustainable environment and living conditions;
- ensure a high level of environmental protection and contribute to the integration of environmental considerations in the preparation and adoption of plans and programs likely to have significant effects on the environment in view of to promote sustainable development." (Art. D.50).

[5] http://environnement.wallonie.be/cgi/dgrne/aerw/pe/circul/2008_Presentation_EES_legis.pdf

There are no indications that those legally described objectives have played a major role in domestic jurisprudence. A provision that played a more important role is the provision that describes the general characteristics of EA and SA. In the Flemish Region one can refer to Art. 4.1.4, § 2, DABM:
"*In order to achieve the objective referred to in § 1, the environmental impact and safety report has the following essential characteristics:*
1 ° the systematic and scientifically justified analysis and evaluation of the expected, or in the case of major accidents, possible consequences for people and the environment, of a proposed action and of the alternatives to the action or parts of it that can reasonably be taken into consideration, and the description and evaluation of possible measures to avoid, mitigate, remedy or offset the effects of the envisaged action in a coherent manner;
2 ° the quality assessment of the collected information;
3 ° the active public nature of the report and the decision-making about the intended action."

The Council of State has various times insisted, based on this provision, on the need to carefully investigate possible (less harmful) alternatives.

[4] "Plans and Programmes" subject to SEA

(i)

On the Federal level the Act of 13 February 2006 is applicable on plans and programmes adopted by federal authorities which are required by legislative, regulatory or administrative provisions. The Act contains a positive list of federal plans and programmes that are subject to SEA, as well as a provision submitting "any other plan or programme which set the framework for future development consent of projects that may have significant environmental effects." In the Flemish region the words "required by legislative, regulatory or administrative provisions" have not been reproduced in the legislation, but in the other regions those words are present.

The question if it was sufficient for the SEA Directive to be applicable that the plan or programme was provided for by law – plans or programmes witch content and procedure are regulated by law, regulation or administrative provisions - or that, on the contrary, only those plans or programmes that are mandatory, so excluding plans and programmes regulated by law, but not mandatory rose before the Constitutional Court in a case brought by several ENGOs against an Amendment of the Brussels Land Use Planning Code, that allowed for the abolishment of municipal land use plans without an SEA[6]. The Brussels Capital Government was of the opinion that an abolishment of a plan could not be regarded as a "modification" in the sense of Art. 3.3 of the Directive, because when a plan or programme is abolished it does not set anymore the framework for future development consent of projects. So the Constitutional Court decided to refer that question to the CJEU. Furthermore the Government argued that it has not been mandatory to develop such plans for the whole territory, and that thus the Directive was not applicable neither from that perspective. After having screened the

[6] Judgment n° 133/2010 of 25 November 2010.

preparatory documents of the Directive and an explanatory document published by the EC, the Court was of the opinion that the Directive was not clear on the question of the abolishment of a plan or programme, and because the other issue was also contested, decided to refer two questions to the CJEU.[7] The CJEU answered those questions as follows:

"*1. The concept of plans and programmes 'which are required by legislative, regulatory or administrative provisions', appearing in Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, must be interpreted as also concerning specific land development plans, such as the one covered by the national legislation at issue in the main proceedings.*

2. Article 2(a) of Directive 2001/42 must be interpreted as meaning that a procedure for the total or partial repeal of a land use plan, such as the procedure laid down in Articles 58 to 63 of the Brussels Town and Country Planning Code, as amended by the Order of 14 May 2009, falls in principle within the scope of that directive, so that it is subject to the rules relating to the assessment of effects on the environment that are laid down by the directive."

The Constitutional Court[8] has subsequently annulled the contested articles 25 and 26 "insofar as they exclude any abolition of a special zoning plan from an environmental assessment within the meaning of the Directive 2001/42/EC". So if such an abolishment could have significant environmental effects, SEA should be applied. The contested Articles have been abrogated later on by the regional legislator. Now an abolishment of such a plan is subject to the same procedure as a modification (Art. 57/1 and 63 Brussels Land Use Planning Code).

As far I can see, on the other levels of government the legislation has always been interpreted as it was sufficient to have a legal framework for plans of programmes to apply SEA, also in case of discretion to prepare them (which is in fact most of the time the rule…).

The other issue has however been raised again concerning the Walloon Region. The Constitutional Court has to judge if a provision of the Walloon Land Use Code that has as an effect to abolish the legal effects of some older local land use plans, without SEA, is compatible with the Articles 10, 11 and 23 of the Constitution in combination with Directive 2001/42/EC.

More debate was stirred up by the subsequent CJEU rulings. The judgment in Case C-290/15, *D'Oultremont and Others*, resulted in an annulation of the Regulation of the Walloon Government at stake[9]. The Council of State has upheld the effects of the annulled regulation for three years, giving the opportunity to adopt a new one subject to SEA. The judgment in Case C-671/16, *Inter-Environnement Bruxelles and Others*, dealing with regional town planning regulations laying down certain requirements for the completion of building projects,

[7]" 1) Must the definition of 'plans and programmes' in Article 2(a) of Directive 2001/42 … be interpreted as excluding from the scope of that directive a procedure for the total or partial repeal of a plan such as that applicable to a specific land use plan, provided for in Articles 58 to 63 of the [CoBAT]?
(2) Must the word 'required' in Article 2(a) of that directive be understood as excluding from the definition of 'plans and programmes' plans which are provided for by legislative provisions but the adoption of which is not compulsory, such as the specific land use plans referred to in Article 40 of the [CoBAT]?'"

[8] Judgment n° 95/2012 of van 19 July 2012.

[9] 239886.pdf (raadvst-consetat.be)

resulted in an annulment of that regulation[10]. The judgment in Case C-160/17, *Thybaut and Others*, in which the CJEU held that "an order adopting an urban land consolidation area, the sole purpose of which is to determine a geographical area within which an urban development plan may be carried out with the objective of renovating and developing urban functions and requiring the creation, modification, removal or overhang of roads and public spaces in carrying out that plan, in respect of which it will be permissible to derogate from certain planning requirements, comes, because of that possibility of derogation, within the concept of 'plans and programmes' likely to have significant effects on the environment within the meaning of that directive, thereby necessitating an environmental assessment" resulted in some annulments of such orders.[11] The judgments in case C-290/15 and Case C-671/16 came as a surprise, because the regulations at stake would normally not be considered as a plan or a programme. Those decisions have not only be criticised by governmental officials[12], but also the vast majority of legal writings about those judgments in Belgium is rather critical.

The Constitutional Court has in its judgments n° 33/2019[13] and 145/2019[14] reviewed the whole CJEU case law and the legislative history of the SEA Directive and concluded: "Although it must be established with the Court of Justice that the scope of Directive 2001/42 /EC must be interpreted broadly as it entails it strives to ensure a high level of environmental protection and although *certain acts of a regulatory nature in special circumstances* should be considered as "plans" or "programs" falling within the scope of that Directive, the conclusion remains that neither regulations as such, nor legislation as such, has been brought within the scope of the Directive. Judging that the Lad Use Code or certain parts of are falling within the scope of the Directive would mean that any legislation and any regulation that has significant effects on the environment, would be subject to SEA, which was not the intention of EU legislator."

Meanwhile the CJEU has delivered another judgment. In Case 24/19, *A e.a. (Windturbines in Aalter en Nevele)* the CJEU, in grand chamber, held:

"1. Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment must be interpreted as meaning that the concept of 'plans and programmes' covers an order and circular, adopted by the government of a federated entity of a Member State, both of which contain various provisions concerning the installation and operation of wind turbines.

2. Article 3(2)(a) of Directive 2001/42 must be interpreted as meaning that an order and a circular, both of which contain various provisions concerning the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision.

[10] 245528.pdf (raadvst-consetat.be)
[11] 244110.pdf (raadvst-consetat.be); 245021.pdf (raadvst-consetat.be)
[12] SEA Directive 2001/42/EC 19.09.2018, Ad Hoc Working Group – Discussion Paper, Definition and scope of 'Plans and Programmes' in the light of certain CJEU case law
[13] 2019-033n (const-court.be); 2019-033f (const-court.be)
[14] 2019-145n (const-court.be); 2019-145f (const-court.be)

3. Where it appears that an environmental assessment within the meaning of Directive 2001/42 should have been carried out prior to the adoption of the order and circular on the basis of which a consent, which is contested before a national court, was granted for the installation and operation of wind turbines with the result that those instruments and that consent do not comply with EU law, that court may maintain the effects of those instruments and that consent only if the national law permits it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, and only for the period of time strictly necessary to remedy that illegality. It is for the referring court, if necessary, to carry out that assessment in the case in the main proceedings."

As the referring administrative court, the *Raad voor Vergunningsbetwistingen,* has according domestic law no competence to maintain the effects of the regulation and circular at stake, the solution proposed by the CJEU under 3) could not be applied. Therefore an Urgency Act[15] was adopted by the Regional Parliament. According to that Urgency Act (Decree of 17 July 2020), the regulation and de circular at stake, are partially validated, namely in so far that they have been adopted without a prior SEA, and as long no new regulations have been adopted after having conducted an SEA, and that for a maximum of 3 years. That Decree has been challenged before the Constitutional Court. The Court has rejected a demand for suspension of that Act[16], on the following grounds: as a result of the CJEU judgment, the validity of numerous permits for existing and future wind turbines is jeopardized and with it the targets for renewable energy and electricity supply; the contested validation seems to be the only way to prevent these negative consequences for the environment and for the energy supply, because maintaining the effects of the contested acts by a Court is in this case not available under domestic law (with reference to Case C-348/15, *Stadt Wiener Neustadt)*; the broad interpretation of the scope of SEA Directive in the case law of the CJEU emerged only gradually; at the time of the adoption of the contested regulation and circular it could reasonably not be suspected that it would fall within the scope of that Directive and the Flemish Government was able to base itself on the text of the Directive and on the preparatory works and infer from this that no preliminary SEA was required; in the meanwhile EIA for permitting wind farms is mandatory.

(ii)

In Case C-43/18, *CFE* the CJEU held that Article 3(2) and (4) of Directive 2001/42/EC is to be interpreted as meaning that a decree whereby a Member State designates an SAC, and makes provision as to conservation objectives and certain preventive measures, is not among the 'plans and programmes' in respect of which an environmental impact assessment is required. Maybe a similar reasoning can be held in Case C-300/20.

(iii)

The various legislations limit themselves to the criteria provided for by the Directive (Annex II) to determine the plans and programmes "likely to have significant environmental effects".

[15] Decreet van 17 juli 2020 tot validering van de sectorale milieuvoorwaarden voor windturbines, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2020071703
[16] 2021-030n (const-court.be)

According to the various legislations it is up to respectively the Federal government, having regard to the opinion of the Consultative Committee, the EIA Team (Flemish region) and the Walloon Government or Brussels Capital Government after having received the different mandatory opinions to decide the matter.

(iv)

The various legislations provide for a screening procedure that is activated by the initiating authority of the concerned plan or programme[17]. In 3 out of the 4 legislations it is finally the government that takes the screening decision, except in the Flemish Region, where the administration (the EIA Team) takes that decision. The decisions are public.[18]

(v)

National legislation, official guidance or jurisprudence has not further elaborated on the meaning of the concept "which set the framework for future development consent of projects."

(vi)

Concerning the exception "plans and programmes" that "determine the use of small areas at local level" the various legislations have copied on this point the Directive. In the Flemish Region an Amendment of the DABM of 26 April 2019 has clarified that one should understand this as "a small area in a municipal *or provincial* planning initiative", after the Council of State had judged that only municipal plans and programmes could benefit from the exception. The jurisprudence has indeed construed the exception in a narrow way

(vii)

As a lot of the SEA cases of the CJEU concern Belgium directly, law and practice is forced to align, but the boundaries of the obligation are becoming more and more uncertain.

[5] General obligations (Art. 4)

The obligation to carry out the assessment "during the preparation of" the plan or programme is guaranteed by the respective legislations. Furthermore in the Flemish region the DABM contain general provisions on coordination and integration of assessments (SEA, EIA, and SA). "*Where appropriate, subsequent reports prepared under this Title shall take into account the reports carried out under this Title at earlier stages of decision-making and the resulting approved reports*." (Art. 4.1.5). "*If several reports have to be carried out, either under this title or under this title and other regional and / or federal regulations, the administration takes a decision on its own initiative or at the request of the initiator(s) about the possibility of*

[17] E.g. Begeleidingsinstrument bij de beoordeling van de milieueffecten van bepaalde plannen en programma's op federaal vlak | FOD Volksgezondheid (belgium.be)

[18] In the Flemish Region those decisions can be consulted in a database: https://omgeving.vlaanderen.be/mer-dossierdatabank.

harmonizing or integrating the various assessments and, as far as possible, of the various reports. In any case, the aim is to ensure that the various assessments are carried out simultaneously as much as possible." (Art. 4.1.6). There is also a specific procedure under the "Complex Projects" legislation that provides for different procedural steps and assessments, starting with an SEA-like and ending with an EIA-like assessment, through an integrated planning and licensing procedure.[19]

[6] Environmental Report (Art. 5, together with Art. 2 (b) and Annex I)

(i)

In the first period the jurisprudence was reluctant to judge the quality of SEA reports, as they are drafted by independent recognised experts and undergo a quality check by the competent administration or advisory body. In more recent times there are more and more cases in which the administrative judiciary is judging that some reports lack quality because of missing data (on the existing situation or the expected evolution, on reasonable alternatives or mitigating measures).

(ii)

Under federal law scoping advice is provided for by the Consultation Committee. In the Flemish Region a scoping decision is taken by the administration (the EIA Team). In the Walloon Region the scoping decision is taken by the government.

(iii)

Scoping decisions or advices are accessible for the public.

(iv)

The scoping decisions or advices will indicate which alternatives should be explored and assessed. It can happen that administrative judges come to the conclusion that some reasonable alternatives have not be considered sufficiently and declare therefore the SEA and the plan based on it (partially) void.[20] According to the jurisprudence, the reasonability of alternatives must be judges in the light of the objectives of the plan and programmes.

[7] Consultations (Art. 6 together with Art. 2 (d)):

Under Federal Law the initiator of the plan or program submits the draft plan or program, accompanied by the environmental impact statement, for consultation to the public. To this end, a public consultation is announced, no later than fifteen days before its commencement, by means of a notice attached to the Belgian Official Gazette, on the Federal Portal and by at least one other means of communication chosen by the drafter of the plan. The public

[19] http://www.complexeprojecten.be/
[20] 229271.pdf (raadvst-consetat.be)

consultation lasts sixty days and will be suspended between July 15 and August 15. The publication in the *Belgian Official Gazette* states the start and end date of the public consultation and the way in which the public can make its opinions and comments known. The comments and opinions are addressed to the initiator of the plan or program by post or electronically. Additional modalities of public consultation, in order to publish the draft plan or program and the environmental impact report as widely as possible, can be decided.

Similar provisions exists in regional law. In the Flemish region e.g. it is up to the concerned local authorities to organise the public consultation. An Executive Order of the Flemish Government lists, apart from the concerned provinces and municipalities, which other authorities must be consulted for screening and scoping and those must also be consulted during the consultation phase on the plan or programme and the SEA.

An example is the *Federal Development Plan for the Transmission Network 2020-2030*.[21] Prior to Approval by the Federal Minister of Energy in the spring of 2019, the draft Federal Development plan 2020-2030 was subject of a consultation round with various governments and regulators, and a SEA was drawn up[22]. The SEA procedure started with a draft scoping proposal (called "register") that has been submitted by the initiator (the Network Manager Elia), for an opinion to the SEA Consultative Committee, which is made up of 10 members who come from the different federal departments. The advisory committee has given its advice within 30 days of submission of the draft register. In the final register submitted to the Advisory Committee, this opinion is taken into account. The SEA Report is drawn up on the basis of the final register. Per planned intervention to the high-voltage grid (clustered), the effects on the environment are described and assessed. The Report was submitted for an opinion to the SEA Consultative Committee and to various institutions (Federal Council for Sustainable Development[23], CREG[24], CWAPE, BRUGEL, SERV[25]….). The network manager has on the basis of SEA adapted the final design of the development plan, taking into account the identified possible consequences for the environment. The public consultation on the draft Development Plan together with the final SEA was organised between 15 October and 15 December 2018. A Report of the results is available.[26] The number of reactions was limited (11) and were coming from various stakeholder organisations, some of them being common to more than one organisation. DG Energy has drawn up a declaration how the results of the SEA Report and the consultations have been taken into account.[27]

[21] https://economie.fgov.be/sites/default/files/Files/Energy/Federaal-ontwikkelingsplan-van-het-transmissienet-2020-2030-Elia.pdf
[22] ESENL (1).pdf; ESE-Kaarten (1).pdf
[23] Advies over het ontwerp van ontwikkelingsplan van het elektriciteitstransmissienet 2020-2030 van Elia System Operator NV | FRDO CFDD (frdo-cfdd.be)
[24] A1802NL.pdf (creg.be)
[25] FOPlan van Elia in 3D en in 360°-perspectief (serv.be)
[26] 20190516_Raport-publieke-consultatie_NL.pdf
[27] 20190516_Verklaring-van-conformiteit_NL.pdf

[8] Transboundary consultations (Art. 7)

The different legislations provide for transboundary consultations. Under federal law a Royal Decree of 4 June 2007 has specified the procedure to follow. It's the initiator of the plan of programme who has to trigger the procedure if it appears that the implementation of the plan or programme being prepared is likely to have significant effects on the environment in another Member State. That state can also request for the application of transboundary consultation.[28] The Royal Decree follows closely Art. 7 of the Directive. Similar provisions apply on the regional level, be it that the procedure is also used in case of transboundary effects between the regions in Belgium[29]. In the Flemish Region it is the EIA Team that triggers the procedure. The consultation will not only happen in the final stage, but also in the screening- and scoping phase. In the other regions it is the Government that triggers the application of the transboundary consultation. The BENELUX published some guidance concerning transboundary consultations between the Netherlands and Flanders on land use plans.[30]

The impression exists that there are few transboundary consultations on plans and programmes, and that this is more common for projects. We can refer in this respect to the above discussed SEA on the Federal Development Plan for the Transmission Network 2020-2030. In that Report we can read that the projects that are carried out purely on Belgian territory do not cause any cross-border effects. For landscape impact this is however possible but there no new sites or overhead lines that will be placed less than 500 m from a land border. "*In the present development plan, interconnections with both the United Kingdom and with Germany are provided. Because such interventions are also subject to a permit requirement in the surrounding neighbouring countries, the environmental effects in those countries must be investigated in the context of the permit process on project level. Consequently, it does not appear necessary to consult the surrounding countries within the framework of this SEA* ".

[9] "Taken into account" (Art. 8)

It is understood in the sense that the decision maker must have due regard to the report prepared, the opinions expressed and the results of any transboundary consultations during the preparation of the plan or programme before its adoption or submission to the legislative procedure. The Art. 9 (1), b) statement is playing a crucial role in judicial review because this is an important tool to check if the obligation to give reasons that can support the decision has been observed.[31]

[28] SEA procedure (belgium.be)
[29] E.g. for the Water Management Plans: https://leefmilieu.brussels/news/grensoverschrijdende-raadpleging-voorafgaand-aan-het-project-van-het-vlaamse-waterbeheerplan
[30] https://www.benelux.int/files/1313/9702/7485/Handreiking.pdf
[31] E.g. 227422.pdf (raadvst-consetat.be)

[10] Monitoring the significant environmental effects of implementation of plans / programmes (Art. 10)

Under Federal Law it is the preparer of a plan or program that is in charge of the monitoring provided for by Art. 10 of the Directive. In the Regions there are similar provisions. There is no information available about the implementation of those provisions in practice.

[11] Access to justice

(i)

Screening, scoping or SEA approval decisions as such cannot be challenged on their own in administrative court, because they are not considered to be "executive administrative acts", but only preparatory acts for such a decision, being the plan or programme for which the SEA is conducted[32]. So one can only challenge those decisions, together with the plan or programme at stake. When there is a flaw in the SEA procedure, in the screening[33], scoping or in the environmental report[34] that can lead to the unlawfulness of the plan or programme and, as a consequence, the plan or programme shall be annulled in whole or partially. As has been indicated above, the Flemish region was late in transposing the Directive and a lot of land use plans have been adopted between 21 July 2004 and the entry into force of the amended Flemish SEA legislation. Dozens of those plan have been annulled by the Council of State for violation of the Directive.[35] That is consistent with the CJEU judgment in case C-41/11[36]. As is known only the Court of Justice may, in exceptional cases, for overriding considerations of legal certainty, allow temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto.

(ii)

There are no particular restrictions or limitations on access to justice as a result of national provisions concerning either legitimacy or jurisdiction of (administrative) courts

(iii) and (iv)

As indicated above, it is not possible to challenge a negative screening or scoping determination as such, it can only be done together with the plan or programme that is supposed to be unlawful as a consequence.

[3232] 232161.pdf (raadvst-consetat.be)
[33] E.g. 222251.pdf (raadvst-consetat.be)
[34] E.g. 236049.pdf (raadvst-consetat.be)
[35] L. Lavrysen, *Handboek milieurecht*, Wolters Kluwer, Mechelen, 2020, 344.
[36] Case C-41/11, *Inter-Environnement Wallonie en Terre wallonne*, para 46.

(v)

A quick search in the database of the Council of State resulted in 223 judgments in which there is reference to Directive 2001/42/EC. In the database of the *Raad voor Vergunningsbetwistingen* 47 such judgments could be found.

[12] Direct effect

As indicated above, in more than a dozen of cases the Council of State has annulled land use plans in the period that the directive was not transposed on time in the Flemish Region.

[13] SEA for proposed policies and legislation

Due to the case law of the CJEU some regulations are considered now to be SEA submitted plans or programmes. There are no initiatives to expand SEA to policies and legislation. However on the federal level the Regulatory Impact Analysis has some attention for environmental and health aspects.

[14] National studies

There are no significant official or unofficial studies of the implementation of the Directive and its impact in Belgium published.

[15] National databases:

There is no national, nor an integrated regional database with statistical data. The only database available is the database of the Flemish Region on SEA and EIA. In that database one can find for all past or present EIAs and SEA's the following documentation: type (EIA or SEA), file code, initiator, consultant, non-technical summary of the EIA or SEA, screening- and scoping guidelines, notification, approval report, location and further remarks.[37]

[16] Impact of SEA in practice

It general one can say that most SEAs have an impact on the plan or programme for which the SEA is conducted. It has been argued that The Flemish SEA has more impact than the Dutch SEA.[38]The impact is however varying from case to case. There are no public available scientific data showing the importance of the impact or the factors that are influencing the process.

[37] MER-dossierdatabank - Departement Omgeving (vlaanderen.be)

[38] Hens Runhaar, Annick Gommers, Katelijne Verhaegen, Katrien Cooman, Peter Corens, *The effectiveness of environmental assessment in Flanders: An analysis of practitioner perspectives, Environmental Impact Assessment Review*, Volume 76, 2019, Pages 113-119,

Update to Belgium SEA Report

24 May 2021

- The judgment of the Constitutional Court announced p. 4 [of Belgium SEA Report] has been made public; Microsoft Word - 2021-075f-info 7366 (const-court.be)

- The Council of Permit Disputes has meanwhile followed the Constitutional Court judgment n° 30/2021 discussed p. 6 https://dbrc.be/persbericht-kontich-verzoek-tot-schorsing-omgevingsvergunning-windturbines-verwerping Arrest RvVb-S-2021-1004 in de zaak 2021-RvVb-0212-SA.pdf (dbrc.be)

Here the link to the CC judgment itself:

2021-075f (const-court.be)

2021-075n (const-court.be)