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## REVIEW

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### Conference report: The Strategic Environmental Assessment Directive: joy or sadness at the 20th birthday?

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### Abstract

This paper is a report on the online webinar “The Strategic Environmental Assessment (SEA) Directive: joy or sadness at the 20th birthday” that took place on 15th of June 2021 as part of an elni webinar series. The main speakers were Prof Martin Führ (Professor at the Darmstadt University of Applied Sciences) and Prof Jerzy Jendroška (Professor at the Opole University). The report contains a brief summary of a study on the practice of the SEA Directive in Germany presented by Prof Führ, followed by Prof Jendroška’s presentation on the Directive in the European context and future policy developments. The overall findings from the discussions are focusing on the importance of the scoping and guidance documents, the role and difficulties of the local authorities in the SEA implementation process and a potential conflict with the European jurisprudence.

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## Conference report: The Strategic Environmental Assessment Directive - joy or sadness at the 20th birthday?

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*Report on the online webinar “The Strategic Environmental Assessment Directive: joy or sadness at the 20th birthday?” on 18th of May 2021, as part of the elni webinar series on the challenges of European environmental law towards 2030.*

### 1 Introduction

In the overall context of the upcoming challenges of European environmental law towards 2030, elni and VVOR launched a series of online webinars 2021, addressing different topics. Having started in 2020, the online conferences lead to fruitful debates on issues such as the implementation of the European Green Deal, product policies in the context of circular economy as well regulatory decision-making process at the European level.<sup>1</sup>

The first webinar this year started with the reflection on the Strategic Environmental Assessment Directive and its 20<sup>th</sup> birthday. This webinar’s special feature was the presentation of the results of an empirical study on the SEA implementation in Germany, presented by Prof Martin Führ, followed by Prof Jendroška<sup>2</sup> analysis about the role of the Directive in light of the obligations under the UNECE SEA Protocol<sup>3</sup>, European Green deal<sup>4</sup> and other EU policies. An interactive discussion among the participants, involving some examples from the SEA implementation practice in other EU countries followed.

### 2 Evaluation of the practice of SEA in Germany

Prof Führ<sup>5</sup> initiated the webinar by presenting the results from an empirical study on the SEA practice in Germany with 125 case studies, conducted from 2017 until the end of 2019.<sup>6</sup> The case studies were divided into spatial planning, urban land use planning and sectoral planning. The initial hypothesis was that the

earlier the scoping process was carried out, the higher the report quality. It was assumed that SEA would only prolong the planning process insignificantly and the SEA quality depended on the type of plan as well as on the planners’ attitude towards SEA. The overall goal of this investigation was in the first place to find out how this legal instrument, existing at the federal level for more than 10 years has been established in practice. The main research standards were the effectiveness (how successful the Directive has been so far in achieving its objectives) and the efficiency of the Directive (what the relationship between resources expended and achieved results was). Additionally, its relevance, coherence and an additional value on the European level were looked at in order to evaluate whether the Directive was still fit for its purpose. The survey approach on the individual level supported the findings. The study revealed that the greatest uncertainties existed in the area of urban land use planning.

Besides, Prof Führ underlined in his presentation that SEA has an effect but there are big differences in its implementation among the member states. It brings a benefit but it could be even better. Besides, there is a big difference between the perceived quality and the actual quality by the authorities, as the survey showed. There is a tendency to produce more reports than needed. In this regard, proper instruction is needed. When evaluating the quality of the reports, it could be seen that some authorities hardly carry out those evaluations despite their obligation according to the Directive. They need therefore useful ‘tools’ and a more ‘user-oriented’ approach.

### 3 SEA Directive in light of obligations under the UNECE SEA Protocol, European Green Deal and other EU policies

The webinar was followed by Prof Jendroška’s presentation on the SEA Directive in the European context and future policy developments. He reminded that the SEA Directive is meant to assure the implementation of the SEA Protocol.<sup>7</sup> At the same time, there are some issues in its implementation which have been criticized already quite some time ago in official meetings.<sup>8</sup> There is also no requirement to include health issues into SEA or even to involve health authorities into SEA. Prof Jendroška

<sup>1</sup> Schwarz, 2020.

<sup>2</sup> Professor at Opole University and former member of the Espoo Convention Implementation Committee.

<sup>3</sup> UNECE SEA Protocol.

<sup>4</sup> COM(2019) 640.

<sup>5</sup> Professor of Public and Administrative Law at the University of Applied Sciences, Darmstadt, Founder of the Research Group sofia.

<sup>6</sup> On behalf of the German Environment Protection Agency: FKZ 3716 13 1010 „Evaluation der Praxis der Strategischen Umweltprüfung in Deutschland und Entwicklung von Vorschlägen zur Optimierung des Vollzugs und des Rechtsrahmens“ (Evaluation of the practice of Strategic Environmental Assessment in Germany and development of proposals for optimising enforcement and the legal framework).

<sup>7</sup> Art. 7, Recital of the Directive 2001/42/EC, L 197/30

<sup>8</sup> Jendroška, 2018.

highlighted also the fact that although SEA shall be integrated into procedures in Member States, there is no equivalent SEA procedure in relation to plans and programs to be adopted at the European level.<sup>9</sup> He questioned therefore in his presentation how the cumulative impact on the EU-wide level could be assessed. He mentioned that in this context certain plans and programs were recently under scrutiny at the Espoo Implementation Committee and the Aarhus Compliance Committee.<sup>10</sup> These include the area of transport infrastructure, the area of energy and the area of fishery. In the context of the European Green Deal, SEA procedure is not directly mentioned. The Green Deal Communication considered the Impact Assessment as a main instrument to implement the ‘do no harm principle’.<sup>11</sup> Following this, the European Commission is envisaging strengthening environmental aspects of the Impact Assessment Procedure, as stated in its Communication on Better Regulation from 2021.<sup>12</sup> Additionally, the SEA Directive does not entail any section on the access to justice, despite the fact that it is considered as one of the essential tools for better enforcement in the Green Deal Communication 2019. The Commission announced that it would include access to justice provisions in the future legislative proposals.<sup>13</sup>

## 4 Discussion

The webinar participants had an opportunity to comment on the presentations. Practical implementation examples from the Netherlands, Belgium and Austria were equally brought to the discussion round. The overall findings from the discussions were focusing on the importance of the scoping and guidance documents, the role and difficulties of the local authorities in the SEA implementation process and a potential conflict with the European jurisprudence.

### *Guidance documents*

The experts from the Netherlands raised the point that a proper assessment is needed about the guidance on the SEA itself. Some of the guidance documents are outdated. Support must be thus related to the general guidance. In Flanders, there is a discussion to “*get rid*” of the guidance documents. A centre of expertise might be established in Flanders to facilitate guidance on the EIA

According to Prof Führ, guidance is needed but it has to be designed from a user-oriented perspective, referring to local authorities.

### 4.1 *Potential conflict with the European jurisprudence*

When discussing the ambiguity of the SEA implementation in Belgium, some conflicts between the national and the European level were observed. Namely, some of the local rules in Flanders are almost identical as the European rules. Thus, it has to be assessed how to deal with those, in which case the authorities have to ask for an SEA and in which case not. This assessment can be done in form of a study. In addition, according to the discussion, the Belgian State Council and the court are rather critical about the European jurisprudence. Until now, Belgian courts appear to have a different view than the European courts. At the same time, at the European level, no SEA is being carried out, even though the European Court of Justice has itself the jurisprudence.

### 4.2 *Role and difficulties of the local authorities*

Another important point was the role of the local authorities in the implementation procedure. Very different interests are involved in local planning. According to one participant, in the case of Austria where the executive power is distributed between the federal and local authorities level. In case of the SEA implementation, the same authorities examining the reports, are equally planning them. They control therefore “*themselves*”, as raised by one of the participants.

### 4.3 *Special rules on the spatial permits in the Netherlands*

As for the Netherlands, another issue was pointed out – the interaction between the environmental and the spatial planning. In a case of windmills, the European court decided that the permit required also concerned the “*spatial*” aspects due to the “*height requirement*”.<sup>14</sup> Consequently, there is an overall impression that it is not necessary to keep the general rules if alternatively one may deal with the environmental aspects in the permit, according to one of the participants. However, the constitutional court does not discuss at all whether it is necessary to fill the gap for the environmental protection, contrary to the obligation to have an SEA for such general rules. Therefore, it is not exactly clear, in which cases exactly an exemption from permits can take place. In this regard, the Dutch Council of State has decided recently that for the operation of onshore wind projects in the Netherlands have been adopted in violation of European law. The decision was based on the fact that environmental norms such as noise and external safety are not based on the strategic environmental assessment and cannot be used as a

<sup>9</sup> Jendroška et al., (2021).

<sup>10</sup> Ibidem.

<sup>11</sup> COM(2019) 640, Section 2.2.5.

<sup>12</sup> COM(2021) 219.

<sup>13</sup> Jendroška, (2020).

<sup>14</sup> C-24/19 A and Others (Wind Turbines at Aalter and Nevele).

basis for spatial planning decisions as well and for environmental permits for onshore wind projects.<sup>15</sup>

#### 4.4 Gaps in the Directive

Prof Jendroška identified equally a number of gaps in the Directive. These include first of all lack of procedural details regarding screening and scoping. In particular, it is not clear who is responsible for making final determinations in this regard: planning authorities or environmental authorities? The respective procedures are not regulated nor is the legal form of making these determinations. He underlined that the fact that Directive does not regulate whether screening should be a ‘positive’ or ‘negative’ and who decides (environmental or planning authorities) seems to result in significant differences in the number of SEA procedures between the Member States. Similarly, the Directive does not regulate whether the opinion of environmental authorities should be binding upon planning authorities or not. The practice in the Member States varies in this regards which may also have a bearing on the effectiveness of the SEA procedures. According to professor Jendroška the above issues would merit a comprehensive research in the future.

According to Prof Gerhard Roller, the difficulty also lies in the fact that some of the local authorities are only carrying out SEA once in their lifetime. Some implementation challenges might therefore arise.

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<sup>15</sup> Dutch Council of State, ECLI: NL: RVS: 2021:1395, 30.06.2021.



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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

### elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review ([info@elni.org](mailto:info@elni.org)) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

### elni Website: elni.org

The elni website [www.elni.org](http://www.elni.org) contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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