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A viewpoint on the approval context of strategic environmental assessments

Branko Kontić, Davor Kontić *

Jozef Stefan Institute, Jamova 39, 1000 Ljubljana, Slovenia

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ABSTRACT

A reflection on the last report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the Directive on Strategic Environmental Assessment (SEA) is provided. It covers the inadequacies of the approval/permitting context of SEA, which appears to be increasingly applied by a significant number of Member States in recent years. A viewpoint is provided on the main deficiencies of such praxis. As a practical defence of the planning context of SEA, the authors propose that the EC should consider a clear recommendation to Member States to cease performing SEA in the approval/permitting context until proper amendments to the SEA Directive are made and implemented.

1. Introduction

1.1. Issue

This viewpoint is aimed at drawing attention to the gradually prevailing approval of the purpose of strategic environmental assessments (SEA) in Slovenia and some other countries of the EU. The key issue is that the administrative, permitting context of SEA has ousted the primary environmental impact assessment goal, namely, optimisation of development proposals – plans and programmes (P&P) – for causing minimal environmental impact. The approval context of SEA on the other hand, despite and contrary to its "good intention" and declared aim of protecting the environment and contributing to sustainable development through praxis of assessing acceptability of the P&P, proves less effective in terms of the desired optimisation. In addition, the approval context moves the basic philosophy of environmental evaluation from the area of environmental protection interests, integrated with coherent social and economic development, to the area of political power for deciding about land-use, spatial management, and acceptability of a particular economic development proposal.

2. Justification

After more than 25 years of formal practise on environmental evaluations in the EU it is evident that there is a gradual decrease in motivation for improving a project, plan or programme, and an increase in the use of environmental assessments as a tool for acquiring a permit for a specific development proposal. The most recent report on the application and effectiveness of the Directive on Strategic Environmental Assessment – Directive 2001/42/EC (COM (2009) 469) – reveals in the conclusion that the application of SEA in Member States (MS) is still in its infancy, and that further experience is needed before deciding on whether the Directive should be amended and, if so, how this should be done to allow SEA systems and processes to provide the opportunity to establish robust ways of using SEAs to improve the planning process. Section 6 of this report deals with the Effectiveness of the Directive (Impact of the SEA on the planning process, Impact of SEA on the content of P&P, Perception of the benefits of SEA) and indicates in rather more detail that benefits of SEA have been recorded only as a direct consequence of the early inclusion of environmental considerations in the P&P, after gradual and iterative links between SEA and P&P. Related to administrative and more prescribed elements of the SEA process, MS report the need for capacity building in order to ensure effective implementation of the Directive, as well as for a need for further guidance on screening criteria, identification of alternatives, coordination mechanisms and/or joint procedures for fulfilling the requirements for assessment under other Directives, and specific guidance on the link between SEA and EIA (EIA — Environmental Impact Assessment; project related). Another report on the application and effectiveness of the SEA (EC, 2009) states in sub-section 7.4 that a quite substantial number of MS report that they apply SEA mainly as an assessment tool. The use of SEA as solely an assessment tool may be a reflection of the fact that planning authorities still consider environmental assessment as an obligation and that a real integrated planning or programming process appears not to have been reached yet. The reported benefits of applying SEA are more or less related to improvements of the "green" component of P&P, of decision-making processes, and of transparency of environmental issues.

* Corresponding author. Tel.: +386 14779751; fax: +386 14779871.
E-mail address: davor.kontic@ijs.si (D. Kontić).

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The findings of these studies are presented in country specific terms, which provide insight into differences between MS, and are summarised at the EU level, giving guidance for needed improvements. However, what is crucially missing in these reports is a consistent, clear and methodologically sound evaluation on how much SEA has contributed to the fulfilment of its primary goals. To perform such an evaluation for a particular, or for a set of SEA, specific methods and tools are needed, not just reporting or answering the questionnaire, based on the perception of a respondent, but using concrete data that enable a quality check of SEA, and also providing answers to questions of the following kind: what were the specific improvements of P&P triggered by SEA? What is the tangible contribution to sustainability of a particular SEA? What are the benefits and costs of a particular SEA considering improvements of P&P in broader sense, fulfilment of specific environmental protection goals, creation of a new, best optimised alternative, and the financial cost of the SEA taking into account efforts of all involved parties? Contextually similar questions were already posed by a number of SEA practitioners more than 10 years ago, i.e. even before the SEA Directive was adopted (Partidario and Clark, 2000; Therivel, 2004; Therivel et al., 1992; Weston, 1997), as well as by DGXI (EC, 1998). Some MS do apply these questions in their SEA processes, e.g. the Netherlands, Sweden, UK, as well as Canada and the USA. However, the topical, recent SEA Quality Review Methodology, prepared for the Development Assistance Committee Task Team on SEA of the OECD, clearly underlines these and similar questions (Sadler and Dalal-Clayton, 2010). Spatial planning, SEA and sustainability appraisal in the UK may still be a subject of improvements (Smith et al., 2010) whilst, generally for the EU, a number of proposals for improvement of SEA and EIA, in terms of both aims of the processes and utility of the evaluations, can be also found in (COM(2009) 378; IMP3, 2006).

Based on this information, it may be concluded that planners and investors strive more and more to get an approval or a permit for their proposals, whilst optimisation of the plans and programmes using the SEA process is considered to be of minor importance. Analyses and interpretation of environmental impacts are consequently, in many cases, adapted to fulfil these planners'/investors' interests. In philosophical and moral terms a consequence of such misuse of SEA is that environmental assessors lose credibility (a problem of "independence" when directly paid by planners/investors — one can easily get an "off the record" confirmation of this problem from environmental assessment practitioners in Slovenia!), whilst the overall system of environmental evaluation suffers systemic damage. This eventually leads to major erosion of trustworthiness of SEA and EIA processes.

In terms of ineffectiveness of optimisation, the approval/permitting context of SEA can be categorised as follows:

a First, and most important, such a process is an ineffectual contributor to environmental quality (its preservation and improvement integrally with economic/social development), since regulatory approvals are primarily based on checking the compliance and not the ALARA[1] principle. Since both SEA and EIA deal with future environmental impacts due to implementation of P&P and projects, respectively, it is important to note that it is physically impossible to check *predicted future impacts* at the present time, so "legal approval of the future" as a concept is a digression!

b Secondly, the approval/permitting context is not feasible in situations where there are no pre-defined legal acceptance criteria of the impacts.

c Thirdly, the bureaucratic SEA process is poor at valuation, optimisation and democracy. As such, it is inefficient at valuing impacts by different stakeholders and does not ensure participatory decision-making. In addition, it fails to adequately exploit the advantages of environmental evaluation, and of SEA in particular, as a planning tool, since planners, investors and other parties involved in such a process strive primarily to go through the procedure as straightforwardly as possible.

To illustrate these categories, together with the deficiency, if SEA is not applied as a planning tool (i.e. if not focusing on the elaboration of alternatives and integrating environmental issues prior or parallel to the plan or programme-making process), in the following section we present the contradictory views of Slovenia and Italy regarding the appropriateness ("acceptability") of constructing two Liquefied Natural Gas (LNG) terminals in the Gulf of Trieste. This case also illustrates the issue of inconsistently linking the higher planning levels with strategic evaluation. Whilst Italy treats the construction of the terminals as a project, i.e. an EIA related procedure, Slovenia makes its arguments in the SEA related context. Such differences in the opinion as to which environmental assessment fits better to a certain development proposal (plan, programme, big/medium project) is not rare amongst MS (COM(2009) 469; Therivel, 2004). In addition, many cases recently dealt with by the EU Court of Justice (ECJ) show that very specific and detailed planning proposals, i.e. projects, have been a subject of ruling and decisions, whilst they were initially filed as a SEA issue. There were, of course, also more general issues and cases considered by the ECJ, for example breaches of environmental law, infringements, scoping of the assessment, implementation of the Habitats Directive, and relation between SEA and EIA, i.e. development of EIA towards the increasing importance of sustained development in planning (ECJ, 2010, 2011; The Environmentalist, 2011). The latter clearly indicates the potential for overlapping between SEA and EIA when dealing with sustainability assessment, which may cause further confusion about which assessment to apply when evaluating a certain plan or project. There is also a recent case filed by Belgium (Constitutional Court of Belgium, 2011) which could be seen as an example of the approval/optimisation context of SEA: the question posed to the ECJ is whether, at least partial, revocation or repeal of a plan or programme could be interpreted as its modification (the terms "revocation" and "repeal" are not used in the SEA Directive, whilst "modification" is). The ECJ has not provided an answer yet, but if it will be positive we understand that it will have negative implications for the "reasonable alternatives" requirement of SEA, and will make an additional shortcut towards the approval context of SEA. Thus, assessment of alternatives is at the heart of the strategic environmental assessment process; omitting it can bring about either approval or rejection of a (single) proposed P&P option, without the reasons for a decision being known in the light of the reasonable alternatives dealt with (Article 9.1 (b) of the SEA Directive).

3. Illustration

The discussion between the Italian and Slovenian authorities regarding construction of two LNG terminals in the Gulf of Trieste has now lasted for 4 years (contrary to the formal timeframe of several months specified by the Italian licencing process, see Figs. 1 and 2). The Italian authorities argue that construction of the terminals is reasonable, well planned, takes into account Italian energy needs, is in line with the European energy policy (Energy and environment in the European Union, 2006), and is without any cross-border environmental impact (Progetto, 2006; Terminale, 2006). Slovenian

[1] ALARA — As Low As Reasonably Achievable; environmental impacts should be as low as possible by using the optimisation approach, comparison of alternatives and selection of the best one, application of BAT — Best Available Techniques, facing development and protection interests, etc. Regulation, per se, does not provide the best, state-of-the art solutions in longer timeframes but rather a compromise adopted at a particular point in time.