

Referat ved deltakelse på møter under EU-kommisjonen

Møte/gruppe:	EIA/SEA expert group
Tidspunkt:	7-8 oktober 2021
Fagfelt:	Konsekvensutredninger
Deltaker fra norsk side:	Mari Lise Sjong, Miljødirektoratet

Ekspertgruppemøte om EIA/SEA-direktivene

Møte i ekspertgruppen avholdes to ganger i året. Pga pandemien ble dette møtet gjennomført digitalt via Webex.

Viktigste temaer på møtet av relevans for Norge:

Kort oppsummering av sakene på møtet:

Presentasjon av utkast til *Guidance on the definition of "plans and programmes" according to the Strategic Environmental Directive*. Fremdeles gjenstår en del før denne veilederen er ferdig. Den kan ev. bli nyttig knyttet til tolkning av vårt eget regelverk.

Forslag til revidert rapporteringsskjema ble presentert. Rapportering til Kommisjonen skjer hvert 6. år, og neste frist er mai 2023.

Presentasjon fra Kommisjonen om *a posteriori* konsekvensutredning (konsekvensutredning etter at tiltaket er vedtatt), basert på sammenstilling av saker fra EU-domstolen. En *a posteriori* KU kan ikke erstatte en KU som er gjort før plan eller tiltak blir vedtatt, og kan bare brukes i unntakstilfeller for å finne avbøtende tiltak.

Diskusjon om hvordan *Do No Significant Harm*-prinsippet kan samkjøres med SEA/EIA. Det er uklart om/hvordan Norge er omfattet av dette prinsippet.

Neste møte vil avholdes 7.-8. april 2022 i Paris.

Offisielt referat fra møtet legges ved.

Ble norske innspill fremmet? (u.off)

Nei.

Oppfølging (u.off):

Nei

Godkjenning av nærmeste leder:

Steinulf Hoel, arealplanseksjonen, 10.12.2021

VEDLEGG

Meeting of the European Commission's expert group of EIA/SEA national experts

7-8 October 2021, Webex meeting

Minutes

1. Approval of the agenda

The Commission welcomed the experts in the Webex meeting of the EIA/SEA expert group. It expressed its gratitude to the cooperative spirit of the experts for attending this online meeting. The Slovenian presidency of the Council of the EU expressed its regrets that it was not possible to hold the meeting in Ljubljana due to the COVID-19 crisis. The Commission recalled that the minutes from the previous EIA/SEA national experts' meeting (14-15 April 2021) were agreed by written procedure and are accessible on CIRCABC¹.

2. Purpose of the meeting

The meeting was one of the regular biannual meetings to exchange information on EIA, SEA, organized and chaired by the Commission services. The EIA/SEA Group meetings are not public. There is a dedicated webpage² where all documents are made available to the public after the meeting. The competent Member States' EIA/SEA national authorities, and concerned EU Institutions, such as the EIB, are attending the meetings of the group.

3. List of points discussed

3.1. Implementation of the SEA Directive – updates

The Commission presented the draft outline of the *Commission Notice: Guidance on the definition of "plans and programmes" according to the Strategic Environmental Directive*. The Commission thanked the Member States for their comments. The Member States expressed their support in principle to the proposed draft outline notice and pointed out the parts that would merit revision or clarification. Some Member States asked for practical guidance for applying the case-law of the Court of Justice of the European Union (CJEU).

The Commission highlighted that any practical guidance cannot deviate from the case-law principles and asked the experts to come up with proposals based on their practical experience

¹ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/1b72733e-6504-4dcf-bee9-99d26628f7ee/details>

² https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/c04306be-13d8-4c03-8e3e-d5bb5a13c291?p=1&n=10&sort=modified_DESC

in applying the SEA procedure. As regards the document, the Commission will strive for ensuring the right balance between case law and providing practical advice.

On the occasion of the 20th anniversary of the SEA Directive, the Commission is planning to organize a webinar gathering the EU SEA national experts, to exchange their experience in applying the Directive. The Commission thanked the experts for their support for organizing the event. The date of the webinar is to be confirmed.

Cyprus presented its experience in applying the SEA Directive with particular focus to the Operational Programmes developed under the Cohesion Fund policy.³

3.2. Presentations of the Slovenian Presidency

Firstly, the Slovenian presidency shared its experience in applying the SEA Directive to the Maritime Spatial Plans (MSP).⁴ It has taken more than 2 years of to prepare and adopt the MSP. The MSP provides spatial development guidelines for activities and use in the Slovenian sea and the coastal land area. The objective of the plan is to coordinate the existing and planned activities at sea and in the coastal strip on land without compromising the good environmental status. The SEA procedure ensures that the environmental effects and long-term sustainability are in focus, as well as it integrates the environmental aspects in the planning and decision-making process. Slovenia subjected its MSP to a transboundary SEA procedure and carried cross-border consultations with Italy and Croatia.

Secondly, the Slovenian presidency presented the possible ways for streamlining Article 6(3) and Article 6(4) Habitats Directive assessment with the EIA and SEA procedures.⁵ Slovenia illustrated the application of the three directives to several hydropower plant projects, which have been also subject to spatial planning. The process has taken a couple of years before the actual authorisation of the projects. This is due to the fact that the appropriate assessments (AA) should be as much detailed as possible and all the three procedures (SEA, EIA and AA) had to be organized and performed so to describe adequate mitigation measures and the best scientific knowledge. Slovenia explained that while the AA applies at planning level, it is necessary the AA at project level to be more precise when there is sufficient information about the project design. The conclusions of the AA are compulsory for any decision.

³ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/dde7114d-7885-4c0d-a54b-47ab2e9cf6b1/details>

⁴ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/f31028cb-153d-42c9-ab4d-15bb6eb0c7a2/details>

⁵ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/9ae3051c-2112-4eef-af6d-1fdd8f7b14b8/details>

3.3. Implementation of the EIA Directive - updates

- *Draft reporting format under Article 12(2) of the EIA Directive.*

As agreed during the EIA/SEA expert group meeting in October 2020, the Commission prepared a draft reporting format which was submitted to the Member States ahead of the meeting. The first reporting is due by mid-May 2023. The obligation is for reporting every six years. With regard to the general obligation to report data, the Commission reminded that the Member States need to report the information they have readily available. Member States are invited to submit any comments or suggestions they may have on the draft by the end of 2021.

- *Non-conformity cases under the EIA Directive - information.*

The Commission briefed the Member States on the open infringement cases concerning non-conformity with the EIA Directive. The Commission reminded that formal notification of any amending national legislative measures should be done via the Themis platform. The Commission will make a detailed presentation on the articles of the EIA Directive found to be breached by a majority of Member States during the next EIA/SEA expert group meeting in spring 2022.

- *Address and assess the cumulative effects of certain projects of the same category (e.g. industries, towers) or different categories – Introduction from Cyprus and discussion*

Cyprus presented its experience and approached followed in assessment of the cumulative effects of certain projects.

3.4. EIA Directive communication activities in EU Member States: good practice examples

The Commission informed on the planned future publication(s) on the importance of the principle of environmental integration with a focus on the EIA Directive being one of its major tools. The aim is also to present practical positive examples from Member States. The latter are invited to present examples of recent EIAs/screenings (including where the EIA was coordinated with other environment assessments) as well recent information on benefits of the EIA Directive demonstrating how these procedures can improve the quality of the projects proposed without compromising environmental objectives. A tour-de-table took place.

3.5. Compilation of the CJEU case law on Member States' obligation to remedy failures to carry out environmental assessments⁶

The Commission prepared this compilation as a response to the agreed set of actions during the Environmental Compliance and Governance Forum in February 2020 convened in the framework of the Action Plan on Environmental Compliance Assurance. The SEA and EIA procedures require the assessments on of the likely significant effects on environment to be prior to the approval or authorisation of the respective plans, programmes and projects. The practice has shown that sometimes the Member States fail to duly assess the likely environmental impact of a plan, programme or a project and thus breach the provisions of the EIA Directive and/or SEA Directive. Therefore, in such circumstances the Member State concerned is required to make good any harm caused by the failure to carry out an environmental impact assessment or take all general or particular measures for remedying the failure to carry out strategic environmental assessment⁷.

In its presentation the Commission stressed that neither the SEA Directive, nor the EIA Directive provide for *a posteriori* environmental assessment procedures. Therefore, the **Member States should not rely on the remedial measures to circumvent the requirements of the two directives.**

The remedial SEA or EIA procedures cannot be equivalent⁸ to SEA or EIA preceding the adoption of a plan/programme or a development consent. The remedial *a posteriori* environmental assessment procedures can aim to address the significant environmental effects of a plan, programme or project, mostly by identifying and prescribing mitigation/compensation measures, with due account take of the plan, programme or project's characteristics, cumulative effects and the absorption capacity of the environment.

The detailed procedural rules applicable in the context of providing a remedy for failure to carry out an EIA or SEA are a matter of the procedural autonomy of the Member State concerned, provided that they are not less favourable than those governing the respective environmental procedure which should it have been applied before project's authorization and that they serve the fundamental objective of the Directive.

Thus, the application of the *a posteriori* environmental assessments should be performed with due account taken of the objective of the two directives, the type of plan, programme, or project at stake, the advancement of works, and the possibility for remedial measures to address *de facto*

⁶ <https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/d932f2c2-a08b-42ec-b8fe-4d42ef0440a0/details>

⁷ See to that effect judgments of 7 January 2004, Wells, C-201/02, EU:C:2004:12, paragraphs 66 and 68, of 17 November 2016, Stadt Wiener Neustadt, C-348/15, EU:C:2016:882, paragraph 45, of 26 July 2017, Comune di Corridonia and Others, C-196/16 and C-197/16, EU:C:2017:589, paragraph 36.

⁸ See *Commission v Ireland*, C-215/06, EU:C:2008:380, point 60.

infringements. It should be used only exceptionally and with due account taken of the project's specifics and the exceptional circumstances that could justify it.

3.6. Legal implementation of the EIA and SEA Directives

The Commission presented the latest CJEU case law and AG Opinions⁹ and information and statistics on EIA and SEA infringement cases¹⁰.

3.7. Application of the “do no significant harm principle” under the cohesion policy

Commission prepared an ‘Explanatory note on the application of the “do no significant harm” (DNSH) principle under cohesion policy’ (it was shared with the experts before the meeting). The Commission committed in the EU Green Deal Communication to the implementation of the “do no harm” principle. In practice, this has been translated into the commitment in the [Inter-institutional Agreement](#) accompanying the 2021-2027 MFF. The DNSH principle has been incorporated in the Recovery and Resilience Facility (RRF) and has to be taken into account in the implementation of all Funds subject to the Common Provisions Regulation (CPR), including, the European Regional Development Fund European Social Fund Plus, the Cohesion Fund and the Just Transition Fund. In terms of the compliance with the DNSH, the national authorities have to confirm it in the programmes and provide necessary evidence and clarifications on request of the Commission services. There is no prescribed format in this respect but one of the possible approaches is to follow the [Commission Notice](#) ‘Technical guidance on the application of “do no significant harm” developed under the RRF or the MS’s own methodology, including, the use of the SEA for this purpose, to the extent possible.

The presentation and the discussion focused on the linkages/complementarity between the SEA and the DNSH. In particular, it looked on how to make the best use of the SEA to provide/support evidence on the compliance with the DNSH. On a practical level, going beyond the SEA Directive requirements, one could imagine that those MS that wish to rely heavily on the SEA (and not on the DNSH methodology developed under the RRF or their own methodology) as part of their justification of the compliance with the DNSH principle, could, for example:

- add an additional section/chapter within the SEA report on the compliance with the DNSH principle (if the report has not been finalised yet and the procedure is still ongoing); or
- prepare a summary paper/table outside the SEA report (esp. if the SEA report or the procedure has been already finalised) explaining to what extent the SEA assessed the

⁹ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/f1ba3fc0-8e80-46c6-82f9-5c5331f5ae35/details>

¹⁰ <https://circabc.europa.eu/ui/group/26370f9e-245c-4c09-8a75-68655a74875b/library/3337da60-f9c1-4ac2-992f-9f0d2b720a16/details>

'types of activities' with regards to their potential to do significant harm to the six environmental objectives under the Taxonomy Regulation.

However, if the SEA does not cover all the six environmental objectives of the DNSH principle to a sufficient degree or the assessment under the SEA was not sufficiently robust or detailed, one would expect that additional assessments are carried out for selected objectives (e.g. circular economy or climate change) or for selected types of actions according to the RRF guidance and/or MS methodology. The DNSH assessment puts a strong obligation on decision-makers to remove such types of actions that do a significant harm to any of the six environmental objectives. Thus, in some cases, some types of proposed actions might have to be removed from the programmes if they do a significant harm to any of the six objectives.

3.8. AOB

The French Presidency announced that the next EIA/SEA expert group meeting will take place on 7 and 8 April 2022 in Paris, if the circumstances allow convening a meeting in person.

3.8. Conclusions and follow-up

The Commission will keep informed the EIA/SEA national experts on the follow-up of any developments under EIA/SEA until the next meeting of the group.