



EIA/SEA Directives and international obligations: good practice and experience as the base for the development of a new law on Environmental Impact in Georgia

Round-table meeting for the development of a new law on EIA and SEA in Georgia

19 May 2015, Tbilisi



Content

- Origins and concept of environmental assessment
- Development of international/EU legal framework
- EIA and co-related legal instruments
- EIA Directive and Espoo Convention
- National legal frameworks for EIA
- Scope of application
- Key procedural steps
- SEA Directive and SEA Protocol
- National legal frameworks for SEA
- Scope of application
- Key procedural steps

Origins and development of environmental assessment

- US National Environmental Policy Act of 1969
 - covers: plans, programs, policies, legislative proposals, concrete projects
 - key role of discussing alternatives
 - concept of tiering
- Currently in all developed environmental national frameworks
- International and supra-national (EU) framework in Europe
 - Harmonization of national procedures
 - Transboundary procedure

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Concept of environmental assessment

- Preventive tool related to planned activities which may have significant impact on the environment
- Scope
 - Environmental impact assessment (EIA):
 - individual projects
 - Strategic environmental assessment (SEA):
 - plans and programs
 - *policies*
 - *Legislation*
 - Habitat/biodiversity assessment
 - EIA and SEA limited to impact on habitat

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Role of environmental assessment

- collection of information
- consideration of alternatives
- integration of environmental concerns with economic, social etc concerns
- avoidance of irreversible effects
- procedural tool
 - advisory vs decisive role
 - specific situation in case of significant adverse effect on integrity of Natura 2000 site

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EIA and SEA

- Procedural similarities
- Scope of assessment
 - Physical impact in EIA vs achievement of environmental objectives in SEA
 - Larger scale and less precise data
- Role in the procedure: developers in EIA vs planning agencies in SEA (see General Guidance..)
- Legal framework
 - One law with separate schemes for EIA and SEA – **YES**
 - One scheme for EIA and SEA – **NO**

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Procedural steps

- Screening and informing about its results
- Stages
 - scoping
 - submitting assessment documentation
 - taking into account information gathered
 - informing about the decision together with reasons
- Obligatory elements (at various stages)
 - consultation with environmental authorities
 - public participation
- Transboundary consultation (if applicable)

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Development of legal framework in Europe

- EIA Directive 1985 – impact of projects
- Espoo Convention 1991 – transboundary impact of projects
- Habitat Directive 1992 – impact of plans, programs and projects on protected habitats (Natura 2000 sites)
- SEA Directive 2001 – impact of plans and programs
- Kiev SEA Protocol 2003 - transboundary impact of plans and programs

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EIA and co-related legal instruments

- EIA and SEA
 - UNECE SEA Protocol
 - EU SEA Directive
- EIA and Habitat Assessment
 - Convention on Biological Diversity of 1992 – art. 14 and Guidelines adopted by COP 6 in the Hague in 2002
 - EU Habitat Directive
- EIA and Industrial Accidents
 - UNECE Convention on the Transboundary Effects of Industrial Accidents
 - EU Seveso III Directive

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UNECE Espoo Convention and EU EIA Directive

- Both regulate the project level
 - 1 list of activities (projects) in Espoo
 - 2 lists of projects in EIA Directive
- Espoo Convention focused on transboundary procedure (EIA national procedure only in Art.2)
- EIA Directive focused on national EIA procedures (transboundary procedure only in Art.7)

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EIA Directive

- EIA Directive 85/337
- Amended by
 - Directive 97/11 of 1997
 - Public participation Directive 2003/35
 - Directive 2009/31/EC
- Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)
 - amended by Directive 2014/52/EU
- Main EU legal instrument to implement
 - Espoo Convention
 - art.6 and 9.2 of the Aarhus Convention

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EIA Directive – definitions (art. 1)

- Definition of environmental impact assessment (added by 2014 amendment)
- Key definitions determining the scope
 - project
 - development consent
 - developer
 - competent authority
- Definitions added in 2003 following the Aarhus Convention
 - Public
 - Public concerned

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Environmental impact assessment – art. 1.2 (g)

- “environmental impact assessment” means a **process** consisting of:
- (i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);
- (ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;
- (iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;
- (iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and
- (v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

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Project - art. 1.2.(a)

- Definition (art. 1.2.(a):
 - the execution of construction works or of other installations or schemes,
 - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources
- Broad definition of „construction”
 - modernisation of existing road (C-142/07 CODA)
 - demolition works (C-50/09, Commission v. Ireland,)
- Other interventions - for example: afforestation or defforestation, storage of scrap iron, intensive fish farming
- Project = „proposed activity” under Aarhus and Espoo Conventions

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Developer and competent authority - art. 1.2 (b) and ((f)

- (b) „developer”
 - the applicant for authorisation for a private project or the public authority which initiates a project
- (f) "competent authority,, - authority or authorities
 - which the Member States designate as responsible for performing the duties arising from this Directive (EIA Directive)
 - entrusted by a Party with decision-making powers regarding a proposed activity (Espoo Convention)
 - Usually: local or regional authorities with general competence for urban development/construction, sometimes: specialised authorities for energy, resource use, occasionally specialised environmental authorities

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Development consent - art. 1.2 (c)

- Definition - development consent' means
 - the decision of the competent authority or authorities which entitles the developer to proceed with the project
- Development consent =
 - „final decision” (Espoo)
 - „decision on whether to permit proposed activities”
- Must be:
 - Binding (Case 96/81 Commission v. Netherlands)
 - No tacit agreement -C-360/87 and C-230/00 (EC vs

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Public and public concerned - art. 1.2 (d) and (e)

- (d) "public" means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;
- (e) "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;
- Both definitions from Aarhus Convention

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Basic requirements art.2

- Projects likely to have significant effects on the environment are subject to
 - development consent
 - EIA procedure **before** development consent is granted
 - EIA can not be after consent! - C-215/06 (EC vs Ireland)
- EIA procedure is followed strictly
 - need for EIA to be interpreted broadly and strictly - C-72/95 (Kraaijeveld)

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EIA and development control procedures (art. 2.2)

- EIA may be integrated into
 - the existing procedures for development consent to projects in the Member States, or
 - other procedures, or
 - procedures to be established to comply with the aims of this Directive

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EIA and development control procedures (art. 2.2)- typical examples

- Integration into existing development consent procedures
 - Zoning/siting decisions and building/construction permits
 - Examples: Britain, Germany, Poland (before 2009)
- Special procedures
 - Environmental (EIA) decisions
 - Examples : Bulgaria, Czech Republic, Hungary, Romania, Slovakia, Lithuania, Poland (since 2009)

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Development control procedures for projects - typical structure in EU

- EIA decision
- Siting decision/planning permission
- Construction/building permit
- Pollution control (IPPC) permit and/or resource use decisions (e.g. water permit, mining license, nuclear permit)
- Cases
 - multiple decision-making (C-416/10, Križan)
 - main and implementing decision - C-201/02 (Delena Wells)
 - need for repeating EIA - Crystal Palace/White City (C-508/03), Barker (C-290/03)

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Assessment–art.3

1. The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in points (a) to (d).

2. The effects referred to in paragraph 1 on the factors set out therein shall include the expected effects deriving from the vulnerability of the project to risks of major accidents and/or disasters that are relevant to the project concerned.

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Projects subject to assessment – art.4

- Environmental assessment is required for projects likely to have significant effects on the environment
- Projects subject to EIA Directive are listed in Annex I and Annex II
 - Projects listed in Annex I – by definition are likely to have significant effects on the environment and therefore always require assessment
 - Projects listed in Annex II – Member States must determine (using screening methods and criteria listed in Annex III) if a project belonging to a category of projects listed in Annex II is likely to have significant effects on the environment and therefore assessment is needed

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EIA Directive - procedural steps

- Screening for projects in Annex II – art.4.2 and Annex III
- Scoping – art.5.2
- Preparation of EIA documentaton – art.5.3 and Annex IV
- Consultation with environmental authorities – art.6.1
- Public participation – art.6,2- 6.6
- Transboundary procedure – art.7
- Decision and informing thereof – art. 8 -9a
- Post-project monitoring – art.8a.4
- Access to justice – art.11

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Screening of Annex II projects

- Screening methods
 - Case-by case
 - Tresholds/criteria
 - mixed
- Screening criteria (Annex III)
 - Characteristics of projects
 - Location of projects
 - Characteristics of impact
- Screening determination („screening decision”)
 - Based on information provided by developer –Annex IIa
 - Determination – up to 90 days

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Scoping

- In EIA Directive –
 - necessary only if the developer so requests (art.5.2)
 - environmental authorities must be consulted
- In many Member States – mandatory element of EIA procedure
- For Annex II projects often combined with screening
- Procedural consequences
 - public participation provided (Aarhus)
 - transboundary procedure (Espoo)
 - TOR for EIA consultants

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EIA documentation – art. 5 and Annex IV

- EIA report (misleading name before 20014– „information to be provided by the developer”)
- Quality control – art. 5.3
- Details in art.5.3 and Annex IV
 - a description of the project (site, design and size of the project);
 - a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;
 - the data required to identify and assess the main effects which the project is likely to have on the environment;
 - a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen,taking into account the effects of the project on the environment
 - a non-technical summary

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Consultations – art.6 and 7

- With environmental authorities
- With the public (concerned)- public participation
- Transboundary procedure
 - Notification
 - Provision of information and possibility to comment (including for the foreign public)
 - Consultations

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Consultation with environmental authorities – art.6.1

- Authorities likely to be concerned by reason of their specific environmental responsibilities or local and regional competences
- „are given an opportunity to express their opinion,, - thus not necessarily do have to express such an opinion
- Opinion on both
 - The project
 - EIA documentation
- Detailed arrangements to be made by Member States, including reasonable time-frames

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Public participation – art.6.2-6.6, art.8 and art.9.1

- Meant to implement art.6 of the Aarhus Convention
- Relation with transboundary procedure in the context of non-discrimination clause in the Aarhus Convention (art.3.9)
- Elements of the procedure
 - Informing (notifying) the public– art. 6.2 and 6.5
 - Making available relevant information – art. 6.3
 - Possibility to submit comments and opinions– art. 6.4 and 6.5
 - Taking into consideration the results of public participation – art. 8
 - Informing the public on the decision and its availability (together with the reasons and considerations on which the decision is based) – art. 9.1

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Informing the public

- Form
 - public notices or by other appropriate means such as electronic media where available,
 - bill posting within a certain radius
 - publication in local newspapers
- Detailed content of the notification
- Relation to art. 6 Aarhus Convention
 - public vs public concerned
 - timely, effective and adequate manner of informing

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General principles – early participation and reasonable timeframes

- Early participation –
 - when all options are open
 - before decision is taken
- Reasonable timeframes -change of approach
 - (original Directive) „appropriate time limits for the various stages of the procedure in order to ensure that **a decision is taken within a reasonable period**”
 - (current version after Aarhus) „Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.
- Different phases

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Transboundary procedure – art.7

- Espoo Convention approach and methodology applies
- Stage I initiation of the procedure
 - Notification
 - Confirmation from affected country

Stage II – full procedure

- Provision of information and documentation
 - Possibility for commenting (authorities and public)
 - Consultation
 - Final decision and Information about the decision
 - Under Espoo also post-project analysis (if applicable)
- Practical arrangements needed to be establish
 - Ad hoc
 - In bilateral agreements

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Decision – art.8 – 9a

- Reasoned conclusion (validity- art.8a.6.)
- Due account taken of the
 - EIA report
 - Consultation with environmental authorities
 - Transboundary consultation
 - Public participation
- Need for statement of reasons
- Need to inform and make decision available to
 - the public and authorities concerned
 - affected Parties

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Access to justice

- Added in 2003 to implement art.9.2 of the Aarhus Convention
- Possibility to challenge substantive or procedural legality of decisions, acts or omissions
- For those
 - Having a sufficient interest, or
 - Maintaining impairment of rights
- Including NGOs
- Problematic issues
 - Screening
 - Standing for NGOs
 - Standing and scope of review in countries with system based on protection of subjective rights

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EIA Directive - practice

- Full EIAs yearly – appr 20 000-25 000
- Screening of Annex II projects
 - Appr 27 000-33 000 yearly (positive 1400-3500)
- Average duration – 11,6 months
- Average costs – 1% of project costs (41 000 Euro per EIA average)

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Transposition of the requirements of the Protocol on SEA and the EU SEA Directive into the national legislation: European experience and good practice examples

UNECE SEA Protocol and EU SEA Directive

- Health issues in SEA Protocol
 - Substantive part of assessment
 - Role of health authorities
- Natura 2000 in SEA Directive
 - Not mentioned in the SEA Protocol
 - Impact on biodiversity required by art. 14 CBD
- Relation to projects subject to EIA

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SEA Directive – scope of application

- Plans and programs (names irrelevant)
- 1) In certain areas
 - if set the framework for future development consent of projects listed in Annexes I and II to EIA Directive
- 2) Any plan/program – if has impact on Natura 2000 site
- 3) Any other plans and programs with significant environmental effect – to be determined by member State

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SEA Directive - procedure

- Screening –art. 3.5-7
- Scoping – art.5.4
- Environmental report – art.5 and Annex III
- Consultation with environmental authorities – art.6
- Public participation – art. 6
- Transboundary procedure (if applicable) – art.7
- Decision-making and informing thereof– art. 8 and 9
- Monitoring – art. 10

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Number of SEA procedures yearly

- Full SEA procedures
 - about 1500 yearly in Finland
 - about 400-500 yearly in UK and France
 - about 270 yearly in Austria
- Screening procedures
 - in Salzburg region (Austria) - about 300 yearly!

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Environmental authorities

- Role in
 - Screening (their opinion often binding)
 - Scoping (their opinion often binding)
 - Consultation (their opinion usually not binding – unless negative impact on Natura 2000 sites)
- Central authorities for plans and programs at central level and regional authorities for all other plans and programs
- In some countries environmental authorities determined by law, in some countries – ad hoc
- Time-frames - between 10 and 45 days

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National legal framework

- Always in the act of Parliament (law) and not in secondary legislation
- Role of definitions!
- Legal techniques
 - Only „main” act - not effective
 - „Main” act and cross-references in sectoral acts (SEA procedure added to sectoral procedure) - sufficient
 - Procedural details also in sectoral acts (SEA procedure build into the sectoral procedure) – most effective

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Legislative technique: possible approaches

- SEA procedure only in one law (special SEA law or general environmental law) - NO
- SEA procedure in one law and references to SEA procedure in all laws envisaging preparation of plans, programs etc – YES
- SEA procedure build in into all laws envisaging preparation of plans, programs etc – YES (but difficult)
- Pros and cons of the above approaches

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Types of SEA law and sectoral laws

- Types of the „main” act
 - General environmental protection law
 - Special EIA/SEA law
 - Special SEA law
- Types of sectoral legislation
 - Land use planning law, energy law, highway law, regional development law, forrest law, waste law

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Field of application – sectors of economy covered

- Agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning, land use
- other sectors – for example: recultivation of former military basis, nature protection

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Field of application: documents covered

- Name in domestic law is irrelevant!
- SEA required for documents which could be called differently (plans, programs, policies, strategies, concepts, conditions etc)
- Could be called collectively „strategic documents” unless in domestic law
 - already some documents are called as such (example of Moldova)
 - there is another collective term to capture all

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Field of application – „set the framework”

- „which set the framework for future development consent for projects”
 - with regard to location, nature, size, operating conditions, or allocating resources (Annex III.2)
- Directly or indirectly (by influencing other plans - Annex III.3)
- Development consent - „final decision” Espoo
- Lists of projects - those which require EIA
 - Annex I (based on Espoo)
 - Annex II (based on EIA Directive)

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Field of application: setting the framework for projects

- Setting the framework
 - directly: for example binding requirements regarding location, seize, nature etc of projects
 - indirectly: binding requirements for lower level strategic documents
- Projects
 - Different approach in SEA Directive and SEA Protocol
 - Relation to screening in EIA scheme

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Field of application: examples

- Yearly investment plan of the Transport Ministry - DK
- Forrest management plans (including private forrests) - FR
- Plans for encouraging investments (Hungary)
- Urban renovation programs (Poland)

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Field of application: exemptions

- National defence and civil emergencies
 - „sole purpose”
 - Examples
- Financial or budget
 - Strict sense
 - exemption can be used only for those subject to special rules regarding budget
 - Exemption can not be used for documents providing financial means for planned therein activities

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Screening

- Caution: definition of SEA does not include screening!
- Categorical vs case-by-case screening: pros and cons
- Procedure – role of environmental and health authorities
- Methods
 - positive
 - negative

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Scoping

- Early at planning proces (at the stage of blueprint or outline/concept for strategic document)
- Role of
 - environmental and health authorities
 - planning authorities
 - SEA consultants
 - the public
- Procedure – scoping meeting
- Scoping „decision”

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Environmental report and quality control

- Key elements of SEA report
- Role of scoping
- Quality control: pros and cons of different approaches and relation to public tendering
 - Accreditation of SEA consultants
 - EIA/SEA Commissions
 - independent review
 - general requirements in legislation

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Consultation with other authorities

- Environmental and health authorities clearly identified at each applicable stage (for example: Environment Ministry, Regional Sanitary Inspectorate etc)
- Decision-making vs co-decision-making vs consultative role
- Role in screening and scoping vs role in adopting the final strategic document
- Role of Foreign Ministry in case of transboundary procedure

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Public participation in SEA

- Mandatory element of SEA
- SEA and article 7 of the Aarhus Convention
- Requirement for "early in the decision-making when all options are possible"
- Public participation in SEA stages – experience in EU:
 - sometimes at screening
 - often in scoping (could be combined with commenting on outline/concept for strategic document)
 - always: commenting on SEA Report and the draft strategic document

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Public participation – key elements

- Relation to article 7 of Aarhus Convention
- Public vs public concerned
- Identification of the public which should participate
- Key role of informing the public effectively (not only webpage!)
- Time-frames for public participation
 - Belgium and Italy - 60 days
 - Spain, the Netherlands and Latvia - 40-45 days
 - Other countries - usually 30 days

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Transboundary procedure

- Art. 7 of SEA Directive and art. 10 of SEA Protocol
- Stage I initiation of the procedure
 - Notification
 - Confirmation from affected country

Stage II – full procedure

- Provision of information and documentation
- Possibility for commenting by foreign local authorities and public
- Inter-governmental consultations
- Final decision (adoption of strategic document) and Information about the decision
- Two aspects: as „Party of origin” and „Affected party”
- Practical arrangements needed to be establish
 - Ad hoc
 - In bilateral agreements

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Time-frames needed

- Using terms familiar for given administrative tradition (months or week or days – calendar days or working days)
- Should be clearly set for involvement of environmental/health authorities and the public, where applicable in:
 - Screening and scoping
 - Comments of SEA Report and the strategic plan

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Time frames not needed

- No time-frame for
 - The entire SEA procedure
 - Transboundary procedure (set individually in notification)

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Decision and monitoring

- Decision – adopting a strategic document according to national legislation
- Statement of reason needed
- Informing
 - Environmental/health authorities
 - The public
 - Transboundary partners
- Monitoring – included
 - In strategic document or
 - In decision adopting the document

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