1 An Important Planning Instrument: Strategic Environmental Assessment (EU Directive 2001/42)

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Abstract
Directive 2001/42 requires the elaboration of an environmental impact assessment, before certain national, regional or local plans or programs related to the environment are adopted. The paper presents the content of the Directive and summarizes the case-law of the CJEU on the Directive. Furthermore, it raises a number of legal questions hitherto left undiscussed by the European courts.

1.1 Introduction

Directive 2001/42[1] requests EU Member States to provide for an environmental impact assessment for certain plans or programs, before these plans or programs are adopted by the public authorities or before they are submitted for adoption to the local, regional or national legislator. Although the term 'strategic environmental assessment' (SEA) or a similar term is not used in Directive 2001/42, it is generally applied to the assessment under Directive 2001/42, in order to distinguish this assessment from the environmental impact assessment for specific projects under Directive 2001/92.[2]

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1 Directive 2001/42 on the assessment of certain plans and programmes on the environment.

2 Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment.

1.2 The EU Legislative Framework

When in 1980 the EU Commission made a proposal for a directive on the assessment of the environmental impact of certain projects, it announced this as a first step which would be followed by a proposal on the assessment of plans and programs.[3] It then took until 1996 before such a proposal was submitted[4] and until 2001, before the 'Directive on the assessment of the effects of certain plans and programmes on the environment' (SEA Directive) was adopted. Member States had to apply it by 21 July 2004.

The Directive provides that certain plans or programs shall, before being adopted, undergo an environment impact assessment. This concerns plans and programs for certain sectors[5] which set the framework for granting a planning permission (development consent) for projects that come under the Directive on the environmental impact assessment of certain projects,[6] plans or programs which require an assessment under Directive 92/43,[7] other plans and programs where screening reveals that they may have a significant impact on the environment, and also small plans or programs at local level,[8] where screening shows that they may have a significant impact on the environment. The elaboration of plans or programs must be foreseen under legislative or administrative provisions (Article 2a).

The environment impact assessment consists of the elaboration of an environmental report which identifies, assesses and evaluates the likely significant effects of the plan or program on the environment, including reasonable alternatives (Article 5). Other authorities and the public concerned shall be consulted on the draft plan or program; the results of the consultation shall be taken into consideration in the final version of the plan or program (Article 8). The final plan or program is to be made public (Article 9). The significant effects of the plan or program shall be monitored (Article 10).

In December 2004, the Commission opened formal procedures against 15 Member States for failure to transpose the Directive in time into national law;[9] five cases ended before the CJEU. The Court found that Belgium (Flanders), Luxemburg, Italy, Finland

3 COM(1980) 313, Recital (4).

4 COM(96) 511.

5 The Directive enumerates the sectors of agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunication, tourism, town and country planning and land use.

6 Directive 85/337, now replaced by Directive 2011/92.

7 Directive 92/43 on the conservation of natural habitats and of wild fauna and flora.

8 The term 'small plans' has to be understood in a purely quantitative form; and 'local level' refers to the administrative authority which is charged to adopt local plans, *see* Judgment of 21 December 2016, *Case C-444/15, Associazione Italia Nostra Onlus v. Comune di Venezia and Others (Italia Nostra)*, ECLI:EU:C:2016:978.

9 COM(2009) 469, p. 2.

(Aaland Islands) and Portugal had not transposed the Directive in time;[10] by 2009, all member States had transposed the Directive. No case was decided by the CJEU regarding the incorrect transposition of the Directive into national law. However, by mid-2019, the CJEU gave 20 preliminary judgments on the Directive upon request of national courts;[11] these will be discussed below.

The Commission reported in 2009 and 2017 on the Directive's implementation.[12] It issued, probably in 2003 and then in 2013, two non-binding guidance documents.[13] Member States submitted to the Commission, according to the Commission's website, overall 230 pieces of legislation which transposed the Directive's requirements into national law.[14] The titles of the relevant national legislation are available on the Commission's website, but not the text of the national legislation itself; as the references are vague and translations uncertain, these texts cannot be retraced.

The Directive remained unamended until mid-2019. However, in 2008, the EU concluded the 'Protocol on strategic environmental assessment to the UNECE Espoo Convention for environmental impact assessment in a transboundary context'[15] which became, according to Article 216(2) TFEU, integral part of EU law and prevailed over secondary EU legislation. The Protocol obliges contracting parties to make an environmental impact assessment for plans or programs which are required by legislative, regulatory or administrative provisions and subject to the preparation and adoption by an authority or prepared for adoption, through a formal procedure, by a parliament or a government.[16] As a contracting party, the EU is therefore obliged to submit EU plans or programs to an environmental impact assessment. Although the Espoo Convention itself refers to transboundary projects only, the Protocol to the Convention is not limited to plans or programs which have a transboundary impact.

10 Judgment of 7 December 2006, *Case C-54/06, Commission v. Belgium*, ECLI:EU:C:2006:767; Judgment of 26 October 2006, *Case C-77/06, Commission v. Luxemburg*, ECLI:EU:C:2006:689; Judgment of 8 November 2007, *Case C-40/07, Commission v. Italy*, ECLI:EU:C:2007:665; Judgment of 27 October 2006, *Case C-159/06, Commission v. Finland*, ECLI:EU:C:2006:694; Judgment of 24 May 2007, *Case C-376/06, Commission v. Portugal*, ECLI:EU:C:2007:308.

11 Ten of these 20 cases were submitted by Belgian courts.

12 COM(2009) 469 and COM(2017) 234.

13 Commission, Implementation of Directive 2001/42, undated [2003]; Guidance on integrating climate change and biodiversity into SEA, 2013.

14 The number of the pieces of national legislation is as follows: Belgium 19, Bulgaria 3, Czechia 1, Denmark 10, Germany 34, Estonia 4, Ireland 6, Croatia 1, Spain 2, France 7, Greece 7, Italy 2, Cyprus 1, Latvia 2, Lithuania 27, Luxemburg 1, Hungary 2, Malta 5, Netherlands 3, Austria 47, Poland 6, Portugal 1, Romania 1, Slovenia 6, Slovakia 4, Finland 21, Sweden 2, United Kingdom 6.

15 Decision 2008/871.

16 Protocol, Article 2(5).

Furthermore, in 2005, the EU concluded the Aarhus Convention[17] which contains relevant provisions on public participation in environmental decision-making which prevails over EU secondary legislation. Consequently, EU institutions[18] and EU Member States are obliged to apply the provisions of the Convention, when they make assessments according to the provisions of Directive 2001/42. Finally, the EU concluded the 'Protocol on strategic environmental assessment to the Convention on environmental impact assessment in a transboundary context'[19] which must also be applied.

1.3 The CJEU's Interpretation of Directive 2001/42

Directive 2001/42 concerns plans and programs which are elaborated or adopted by an authority at national, regional or local level [Article 2(a)]. The CJEU clarified that also those plans or programs were covered by this provision which were adopted by the legislature.[20] The terms 'plan' or 'program' are not defined, neither in Directive 2001/42 nor elsewhere in EU law,[21] and are used, in EU law, without differentiation. In case C-225/13, the CJEU referred to plans as 'an organized and coherent system' for achieving the objectives of waste management.[22] This excluded the possibility to consider a single legislative provision which contained conditions under which derogation for landfills could be authorized as a plan. The amendment of a plan is also covered by Directive 2001/42 [Article 2(a)].[23] Such plans or programs are covered by the Directive, when they establish,

> "by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and

17 Decision 2005/370; the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters is reproduced in the Annex to that decision.

18 There are no binding provisions on the making of an environmental impact assessment of plans and programs that the EU institutions elaborate. However, the provisions of the Aarhus Convention regarding public participation also apply to EU plans and programs that are related to the environment, as the EU has ratified the Aarhus Convention which thus forms integral part of EU law [Article 216(2) TFEU], *see* Judgment of 8 March 2011, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo zivotného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125.

19 Decision 2008/871.

20 Judgment of 17 June 2010, *Joined Cases C-105/09 and C-110/09, Terre wallonne ASBL and Inter-Environnement Wallonie ASBL v. Région wallonne (Terre wallonne)*, ECLI:EU:C:2010:355, para. 41; Judgment of 22 September 2011, *Case C-295/10, Genovaité Valciukiene and Others v. Pakruojo rajono savivaldybé and Others (Valciukiene)*, ECLI:EU:C:2011:608. *See* also Article 4(1) of the Directive.

21 *See* Ludwig Krämer, *Casebook on EU Environmental Law*, London, 2002, p. 264.

22 Judgment of 9 April 2014, *Case C-225/13, Ville d'Ottignies-Louvain-la-Neuve and Others v. Région wallonne*, ECLI:EU:C:2014:245, para. 29.

23 *See* also Judgment of 10 September 2015, *Case C-473/14, Dimos Kropias Attikis v. Ypourgos Perivallontos, Energeias kai Klimatikis Allagis*, ECLI:EU:C:2015:582.

> implementation of one or more projects likely to have a significant effect on the environment."[24]

The term 'body of criteria and detailed rules' has to be understood qualitatively, not quantitatively, in particular in order to avoid attempts to circumvent the Directive's application by splitting the planning into several smaller parts.[25] The CJEU consistently held that the Directive's objective, to contribute to the objective of a high level of environmental protection, means that the provisions of the Directive have to be interpreted broadly and, consequently, any exception provided for has to be interpreted narrowly.[26] This approach led the Court to conclude that a plan or program is also 'required', when its adoption is not compulsory, but when the relevant legislative or regulatory provisions regulate details of the plan, such as the determination of the competent authorities or the procedure to be followed for the preparation of the plan. An exclusion of such cases would, in the opinion of the Court, unduly restrict the practical effect of Directive 2001/42 and would undermine the overall objective to ensure a high level of environmental protection.[27] For the same reasons, the Court concluded that the repeal of a plan or program could also have significant effects on the environment and was therefore covered by the Directive's provisions.[28]

When the national authority dealing with environmental matters which is, according to Article 6(3) of the Directive, to be consulted on the plan, is identical to the authority that elaborates the plan, the Member State in question is not obliged to set up, for the purposes of that consultation, a new body. However, responsibilities within the public authority for drawing up the plan and for giving expert advice during the consultation phase, must be functionally separated, in order to comply with Article 6(2).[29]

The CJEU held that the diversion of a course of a river did not constitute a 'plan', since it did not define criteria or detailed rules for the development of land or the implementation of subsequent projects.[30] In contrast, a decree which fixed a specific area, within which it was procedurally easier to realize infrastructure projects, was a 'plan' which was covered

24 *C-290/15, Valciukiene*, para. 69; settled case-law.

25 Judgment of 8 May 2019, *Case C-305/18, Associazione "Verdi Ambiente e Società – Aps Onlus" (VAS) and "Movimento Legge Rifiuti Zero per l'Economia Circolare" Aps v. Presidente del Consiglio dei Ministri and Others (Verdi Ambiente)*, ECLI:EU:C:2019:384, para. 50; settled case-law.

26 *See e.g.* Judgment of 7 June 2018, *Case C-671/16, Inter-Environnement Bruxelles ASBL and Others v. Région de Bruxelles-Capitale (Inter-Environnement Bruxelles)*, ECLI:EU:C:2018:403.

27 Judgment of 22 March 2012, *Case C-567/10, Inter-Environnement Bruxelles ASBL and Others v. Région de Bruxelles-Capitale (Inter-Environnement Bruxelles)*, ECLI:EU:C:2012:159; settled case-law.

28 Id.

29 Judgment of 10 October 2011, *Case C-474/10, Department of the Environment for Northern Ireland v. Seaport (NI) Ltd and Others*, ECLI:EU:C:2011:681.

30 Judgment of 11 September 2012, *Case C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v. Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others (Acheloos)*, ECLI:EU:C:2012:560.

by the Directive.[31] Likewise, a decree which concerned the regional and district planning of wind turbines, was considered to be a plan, as it set technical standards such as operating conditions ('shadow flicker'), measures to prevent accidents and fires, and the restoration of the landscape.[32] Furthermore, the CJEU considered provisions concerning the areas around buildings, the size and layout of buildings, construction-free areas, courtyards and garden areas, fences, hedges, boarding walls, the collection of rainwater, and vehicle access to buildings as indications that the measure under scrutiny in fact is a (town and country) plan. It held that such measures could influence the lighting, the wind inside agglomerations, the urban landscape, air quality, biodiversity, water management, emissions and the sustainability of buildings.[33]

The fact that a plan only covered one specific sector – in the specific case pig-rearing installations – did not exclude it from being covered by Directive 2001/42.[34] As regards a plan which affects a natural habitat or a bird habitat, the CJEU held that such a plan is only excluded from the scope of Directive 2001/42 and does not necessitate an environmental impact assessment, when it can be ascertained, 'on the basis of objective information' that the plan has no significant impact on the habitat.[35] The CJEU also pronounced itself on the consequences of a plan having been adopted without proper environmental impact assessment. It held that

> "courts, before which actions are brought in that regard [a plan or program having been adopted without an environmental impact assessment] must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'program' adopted in breach of the obligation to carry out an environmental assessment."[36]

Consequently, it clarified that a provision of national law providing that a plan which had been adopted without the required environmental assessment, should nevertheless remain in force, was incompatible with Directive 2001/42, since it undermined the Directive's effects.[37]

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31 Judgment of 7 June 2018, *Case C-160/17, Raoul Thybaut and Others v. Région wallonne*, ECLI:EU:C:2018:401.

32 *C-290/15, Valciukiene*.

33 *C-671/16, Inter-Environnement Bruxelles*, para. 57.

34 Id.

35 Judgment of 21 June 2012, *Case C-177/11, Syllogos Ellinon Poleodomon kai Chorotakton v. Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon and Others (Syllogos Ellinon)*, ECLI:EU:C:2012:378.

36 Judgment of 28 February 2012, *Case C-41/11, Inter-Environnement Wallonie ASBL and Terre wallonne ASBL v. Région wallonne (Inter-Environnement Wallonie)*, ECLI:EU:C:2012:103, para. 46; Judgment of 18 April 2013, *Case C-463/11, L. v. M.*, ECLI:EU:C:2013:247, para. 43.

37 *C-463/11, L. v. M.*

In case *C-379/15*, the CJEU held that, exceptionally, a national decree which constituted a plan, but had not complied with the requirements of Directive 2001/42, could nevertheless be maintained in force for a specific period, for overriding environmental reasons. Otherwise, different implementing measures and decisions which had been based on the decree would also have to be annulled, which would run the risk of an increased impairment of the environment. The Court set, however, detailed restrictive conditions for such an exceptional possibility to maintain illegal national provisions in effect.[38] Similarly, the Court upheld a plan that dealt with the reduction of nitrogen in the environment under Directive 91/676[39] and complied with the requirements of that directive, but which had not been the subject of an environmental impact assessment under Directive 2001/42.[40] The Court insisted, however, that such a plan could only be maintained in force for the time necessary to make the impact assessment, and that its remaining in force was owed to the fact that its annulment would result in a legal vacuum, that it had no negative effects on the environment and that Directive 91/676 was complied with.

This Court jurisprudence does not answer all those questions which the monitoring of Directive 2001/42 raises. Some of these questions will be discussed below, without however providing an exhaustive discussion of all problems.

1.4 Definition of a Plan

The general approach of the CJEU that the provisions of the Directive are to be interpreted broadly, in order to ensure a high level of environmental protection, means that in case of doubt and depending on their content, circulars and other measures may well be considered to be 'plans' in the meaning of the Directive.[41] The mentioning by the Court that a plan constitutes an organized and coherent system to achieve a certain result, completed by the requirement that rules and procedures are set for granting or the implementation of one or several projects, are essential elements in the definition of a plan. These aspects differentiate a plan (or program) from general legislation which regulates one or more sectors, but which does not necessarily set the framework for subsequent planning permissions for projects and which has, among others, informative and coordinating functions.[42]

38 Judgment of 28 July 2016, *Case C-379/15, Association France Nature Environnement v. Premier ministre és Ministre de l'Écologie, du Développement durable et de l'Énergie*, ECLI:EU:C:2016:103.

39 Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources.

40 *C-41/11, Inter-Environnement Wallonie.*

41 *See e.g.* the facts of the application for a preliminary ruling of the CJEU in case *C-24/19, A. and Others* (pending).

42 *See* also Advocate General Kokott in *Case C-43/18, Compagnie d'entreprises CFE SA v. Région de Bruxelles-Capitale, and C-321/18, Terre wallonne ASBL v. Région wallonne*, ECLI:EU:C:2019:56, para. 97.

A timetable, within which the objectives of the plan or program are to be attained, does not appear to be necessary. First, there may also be plans which have a permanent objective, for example plans to protect against floods. Second, if a time frame were required in order to have a plan come under the scope of Directive 2001/42, it would be easy to circumvent the application of the Directive, by not providing for such a timetable.

Directive 2001/42 addresses the Member States. It does not apply to plans or programs which are adopted by EU institutions. However, the Protocol to the Espoo Convention, mentioned above, concluded by the EU in 2008 and which forms thus part of EU law, provides for strategic environmental impact assessments for plans and programs that are required by legislative, regulatory or administrative provisions and which set the framework for future planning permissions (development consents) for projects.[43] If one applies also to such plans the above-mentioned jurisdiction by the CJEU setting forth when a plan is 'required',[44] numerous plans and programs adopted by EU institutions must undergo an environmental impact assessment, before they are adopted. Examples would be plans for energy-saving, programs in the agricultural sector or, generally, programs related to EU structural funds, plans for trans-European networks or on industrial standardization *etc.* In particular, Article 2(a) of Directive 2001/42 clarifies that also measures which are adopted by national or EU legislative acts, are covered by the Directive. An example for this is case *C-305/18*, where the CJEU declared a national legislation which laid down the framework for the construction of waste incineration installations, to be a plan under Directive 2001/42 which thus required an environmental impact assessment.[45] The relevance of this provision becomes clear, when the jurisdiction of the CJEU, also mentioned above, is taken into consideration, according to which a plan is illegal and must normally be declared void, if it was adopted without respecting the requirements of Directive 2001/42.[46]

The plan must be adopted by a public authority, an administration, a government or another legislative authority. Plans which are adopted by private bodies are not covered by Directive 2001/42. However, sometimes private bodies have quasi-public functions and may therefore be considered to be 'public authorities' under Directive 2001/42. The CJEU considers in its settled case-law a body to be associated to a public authority, when it fulfills a public service and was given, in order to fulfill its functions, specific powers which the body would normally not possess under private law.[47]

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43 The list of projects which require such an environmental impact assessment, is slightly different from the list of projects under Directive 2011/92. The impact assessment of EU plans or programs will not further be discussed here.

44 *Case C-567/10, Inter-Environnement Bruxelles.*

45 *Case C-305/18, Verdi Ambiente.*

46 *Case C-463/11, L.v. M.*

47 Judgment of 19 December 2013, *Case C-279/12, Fish Legal and Emily Shirley v. Information Commissioner and Others*, ECLI:EU:C:2012:853; settled case-law.

1.5 Assessment of Plans and Assessments of Projects

Article 11 of Directive 2001/42 explicitly provides that an environmental impact assessment under the Directive shall be 'without prejudice' to any requirement under Directive 85/337 – now Directive 2011/92. This is logical, as the latter directive applies to specific projects, whereas Directive 2001/42 applies to plans and programs. Nevertheless, the distinction between a plan and a project is not always easily made. Examples for such a possible overlap are projects – all enumerated in Annex II to Directive 2011/92 – for urban development, the restructuring of rural land holdings, coastal work to combat erosion or holiday villages. The CJEU considered that a river diversion did not establish criteria and detailed rules for the development of land use which normally concerned multiple projects, and was therefore not subject to an assessment under Directive 2001/42.[48] In contrast, plans such as those which limit nitrates in waters,[49] waste management plans, noise reduction plans or plans to reduce the risk of floods may well be covered by Directive 2001/42.[50]

With regard to plans and programs that are mentioned in Article 6 of Directive 92/43, the CJEU clarified that the assessment under Directive 92/43 is limited to the question, whether the plan or program has a significant effect on the habitat in question.[51] If such an effect cannot be excluded on the basis of objective information, an impact assessment has to be made. However, all other potential effects which the plan or program may have outside the habitat – on air, water, land use, noise *etc.* – are not assessed by the assessment under Article 6 of Directive 92/43. Therefore, these effects must be the subject of another impact assessment under Directive 2001/42. An example could be an urban development plan outside a natural habitat, which may, however, have some impact on the protected site.

In contrast, a regulatory act which designates, under Directive 92/43, a special area of protection, setting objectives for the conservation of that area and certain measures of prevention, does not constitute a plan which comes under Directive 2001/42.[52]

48 *Case C-43/10, Acheloos*, referring to *C-567/10, Inter-Environnement Bruxelles*, para. 30.

49 *Joined Cases C-105/09 and C-110/09, Terre wallonne.*

50 COM(2017) 234, part 3. Relationship with other EU legislation and policy areas.

51 *Case C-177/11, Syllogos Ellinon.*

52 Judgment of 12 June 2019, *Case C-43/18, Compagnie d'entreprises CFE SA v. Région de Bruxelles-Capitale*, ECLI:EU:C:2019:483; similarly (when the regulatory act only sets conservation objectives for a habitat): Judgment of 12 June 2019, *Case C-321/18, Terre wallonne ASBL v. Région wallonne*, ECLI:EU:C:2019:484.

1.6 The Environmental Report

The environmental report that must be elaborated according to Article 5 of Directive 2001/42, shall 'identify, describe and evaluate' the likely significant effects that the implementation of the plan may have on the environment, as well as reasonable alternatives to the plan. Annex I to the Directive enumerates the aspects which are to be considered in the report. Of particular relevance is the fact that the 'significant effects' include "secondary, cumulative, synergistic, short, medium and long-term permanent, temporary, positive and negative effects" of the plan.[53]

As far as national plans are concerned, such requirements can hardly ever be complied with, unless a book is published on each plan. For example, the German plan to finish coal mining and the use of coal as fuel by 2038 at the latest, is certainly a plan that comes under Directive 2001/42, as regards the closing of coal and lignite mines. However the economic, social and environmental impact, its interrelationship with the ending of using nuclear energy, the construction of renewable energy installations, the electricity transport networks, the relocation of people, the land use including expropriations *etc.*, furthermore the impact of coal and alternative energies on soil, water, landscape, nature conservation, town and country planning, the mitigation measures envisaged, the zero alternative (not realizing the plan), all this over a period of some twenty years makes full compliance of the impact report with Article 5 and Annex I to the Directive something of a wishful thinking.

Of course, one might argue that the German plan to abandon coal as an energy source is not 'required'. However, Germany ratified the Paris Agreement on fighting climate change, is bound by numerous EU regulations and directives to reduce its greenhouse gas emissions and has itself several times publicly declared that it would renounce on the use of coal as quickly as possible. All this constitutes, in this author's opinion, a 'requirement' to take measures that reduce the use of coal in Germany. The Commission does not examine, whether the requirements of Article 5 are complied with.

1.7 Participation and Consultation

Article 6 of Directive 2001/42 provides for the consultation on the draft plan of authorities concerned and of the public. This consultation shall take place early and shall be effective to allow the authorities and the public to express an opinion on the draft within appropriate time frames. The main problem with this provision is that it does not take into consideration the amendments which the Aarhus Convention brought to EU law. As mentioned, the provisions of that Convention are binding on the EU institutions and the Member States.

53 Directive 2001/42, Annex I.

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The Convention requires the participation of the public in the elaboration of plans or programs, not only their consultation. 'Participation' constitutes, in contrast with 'consultation', a bilateral process: the public concerned shall be informed early, "when all options are open and effective participation can take place."[54] 'Effective participation' means that the information regarding the draft is made available to the public concerned in the language of the public, not only in English.[55] No discrimination as to nationality may take place[56] which means that Article 7 of Directive 2001/42 is not in accordance with other legal obligations arisen from EU law and international law. Indeed, this provisions suggests an intergovernmental consultation on plans which may affect the environment of another EU Member State – not any other neighboring State –, since citizens of the planning Member State are directly consulted; therefore, also the public of any neighboring country Party to the Aarhus Convention has the right to obtain appropriate information, the possibility to read the draft plan and the opportunity to issue an opinion on it, directly and not only via its Government. Finally, 'participation' means that the opinions of the public concerned are taken into consideration and that the final plan mentions why these comments were taken into consideration, or why not.

1.8 Plans for the Trans-European Networks

A particularly problematic area with regard to environmental impact assessments of plans and programs concerning energy and transport are the trans-European Network (TEN) plans and programs. Their legal bases are Articles 170 to 172 TFEU. For the implementation of these provisions, regulations were elaborated to establish a trans-European energy infrastructure[57] and a trans-European transport network.[58] Both Regulations, required under Article 172 TFEU, establish a framework for the realization of projects of common EU interest: energy projects are proposed by one of the twelve regional groups, in which Member States and the EU decide on the proposals to make: the proposals are then inserted into an EU-wide list of projects of common interest. Transport projects of EU common interest are listed directly in Regulation 1315/2013. The Regulations lay down procedures for realizing the projects and provide for financial means that are made available by the EU for such projects.

54 Aarhus Convention, Articles 7 and 6(4).
55 The EU Commission's consultations normally take place via internet and in one language only.
56 Aarhus Convention, Article 3(9).
57 Regulation (EU) No 347/2013 on the establishment of a framework for the identification, planning and implementation of energy projects of common [EU] interest.
58 Regulation (EU) No 1315/2013 on Union guidelines for the development of the trans-European transport network.

Both regulations thus fulfill the criteria of being plans that are related to the environment and should therefore, according to Article 7 of the Aarhus Convention and Directive 2001/42, have been the subject of a strategic environment impact assessment. The same applies to the proposals which are made by the regional groups of Member States for energy projects of EU interest, as these proposals are integrated into the general legislative EU plan. Insofar, a Commission Regulation on energy projects limits itself to state that, among others, environmental organizations were consulted on the proposals[59] – without any indication as to whether the public was consulted, when the consultations had taken place, what the content of the observations had been *etc.* In general, it is fair to state that the trans-European energy and transport projects have never been the subject of a strategic environmental impact assessment. A subsequent possible impact assessment of the specific project at national level cannot remedy this omission, as the lines, corridors and sometimes even the location of the projects have already been determined by the trans-European procedure at EU level. In 2003, the Commission had suggested to make, for trans-European projects, an EU-wide environmental impact assessment,[60] but this proposal had not been accepted by Member States.

An illustration of the problem is Commission Decision 2019/1118 on the linking of the rivers Seine (France) and Scheldt (Belgium).[61] The Decision lays down a considerable number of work on inland waterways in France and in Belgium, in particular the construction of a canal 'Seine-Nord Europe'; the construction of such a canal comes under Annex I or II to Directive 2011/92 on the environmental impact assessment of projects.

Decision 2019/1118 lays down in great detail what kind of work has to be carried out in France and in Belgium, enumerating overall 39 different work activities which have to be executed. For the canal, it determines the precise dates (months and year), in both countries, for the granting of a single environmental authorization, the start of the main work, the completion of the work and the commencement of the operation of the canal. In substance, the Decision constitutes a 'plan' according to Directive 2001/42. However, it does not contain any information on an environmental impact assessment having been made, or any consultation or participation of the public. It is an illusion to believe that the impact assessment will be made following the Commission Decision, as the agenda set for the different activities does not foresee the elaboration of an impact report, the consultation with the public *etc.*

59 *See e.g.* Commission Delegated Regulation (EU) 2018/540 as regards the Union list of energy projects of common interest, Recital (5).

60 COM(2003) 742.

61 Decision 2019/1118 on the Seine-Scheldt cross-border project.

1.9 Monitoring and Reporting

Article 10 of Directive 2001/42 provides that the Member States monitor the implementation of the plans and programs falling under the scope of the Directive, in order to identify in particular any unforeseen negative effects and to be able to take the appropriate remedial measure. However, Member States do not have any obligation to inform the Commission or the public on the results of their monitoring. Article 12(1) only provides that the Member States and the Commission exchange experience on the implementation of the Directive. Nothing is said on the frequency of such an exchange and nothing is known about the results of such an exchange.

The Commission was to report in 2006 and then every seven years on the implementation and effectiveness of the Directive [Article 12(3)]. Such reports were made in 2009 and 2017.[62] Both Commission reports are very vague as to the implementation of Article 10. The 2017 report does not record on any concrete monitoring measures undertaken such as the methodology used or the bodies entrusted with the monitoring, but only indicates that most Member States were unable to indicate the frequency of their monitoring measures and that Member States 'tend to use', where applicable, the monitoring systems set up under other directives.[63] The problem is that no information is available either on the monitoring of these other directives. It can thus be concluded with some certainty that the monitoring of Directive 2001/42 according to Article 10 does not take place in most Member States.

The Commission also reported that many Member States consider that the Directive is more effective when it comes to small scale or regional plans than for national plans.[64] This is plausible, as already the consultation process and the taking into consideration of opinions that were voiced by the public raise almost unsurmountable organizational difficulties with large projects.

Directive 2001/42 also applies to the plans and programs which Member States adopt under the EU Structural Funds.[65] In this regard, Regulation 1303/2013[66] provides that, where appropriate, the Member States shall take into consideration the requirements of Directive 2001/42 when they make an ex-ante evaluation of the programs which are to be co-financed by the EU. The Regulation does not provide for any specific sanction, so that the 'sanctions' of Directive 2001/42 apply: according to the CJEU a plan or program that was adopted without the impact assessment under the Directive having been made, is normally to be declared void. The Commission reported that 'most' of the national plans

62 COM(2009) 469 and COM(2017) 234.
63 The report mentions the water framework Directive, Directive 92/43 and the industrial emissions Directive.
64 COM(2017) 234, part 5. Effectiveness of the SEA Directive.
65 Directive 2001/42, Article 3(9).
66 Regulation 1303/2013 laying down common provisions on the EU Structural Funds, Article 55.

and programs under the Structural Funds complied with the requirements of Directive 2001/42,[67] without giving the slightest details on the number of plans and programs, the number of impact assessments made and the number where such an impact assessment was not made, the public consultation, the publication of the impact report *etc*. Of course, the Commission also failed to report, whether it took any measures, when a Member State had failed to carry out the environmental assessment under Directive 2001/42.

1.10 Concluding Remarks

According to the Commission, there is a general conviction within the EU that the environmental impact assessment procedure, established by Directive 2001/42 "is more effective, if there is the political will to effectively influence the planning process."[68] The general broad formulation of Directive 2001/42 and the general character of several of its provisions certainly lead to the conclusion that this statement is correct. Directive 2001/42 shares, in this regard, the impact of numerous pieces of EU environmental legislation: if there is a political will in the administrative, political and judicial instances of the Member States – at national, but also at regional and local level – to effectively apply the provisions of EU environmental law, this law has the capacity of preserving and significantly improving the protection of the environment, *i.e.* of water, air and soil, fauna and flora, climate, cultural heritage *etc*., including, last but not least, the health and well-being of humans. When this political will is lacking, EU environmental directives and regulations offer ample opportunities to avoid the protection obligations. The enforcement powers of EU institutions are not strong enough to counterbalance any such lack of political will.

Article 12(3) of Directive 2001/42 evokes the eventuality of an amendment of the Directive in light of the experience made with its application. After more than fifteen years of application, the question might be posed, what amendments to the Directive would appear timely and reasonable. Some proposals are submitted hereafter.

i. The first aspect that springs to mind is the accountability of the Member States. Member States should be obliged to report at regular intervals – Article 12 of the directive refers to an interval of seven years – on the application of the Directive and of their national transposing provisions. This report need not necessarily be sent to the European Commission, but should be made public,[69] so that the interested or

67 Commission, COM(2017) 234, Section 4.

68 Id. Section 5.

69 *See* also Article 5(5) of the Aarhus Convention: "Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*: *(a)* […] progress reports on their [legislation and policy documents] implementation." Directive 2003/4 on public access to environmental information,

concerned public is aware, if and to what extent the provisions of Directive 2001/42 are actually applied.

ii. Also, the legislation adopted by the Member States to transpose Directive 2001/42 into the national legal order should be made available to the public. In the electronic age, it is not comprehensible, why the Commission does not make these texts available on its website. As there is a question of EU legislation and its implementation, it is not sufficient that the transposing texts are available in national or regional official publication. Indeed, the question, whether the Directive was properly implemented is of interest to all EU citizens.

iii. The anachronistic provision of Article 7 of the Directive on transboundary consultations which is, as mentioned above, not in compliance with the provisions of the Aarhus Convention, should be replaced by a version which gives citizens in a neighboring country – be it an EU Member State or not – which are likely to be significantly affected by a plan or a program, the direct right to give an opinion or voice objections to a draft plan. It is wrong to pass via the neighboring government for such a consultation. After all, the environment has no frontiers.

iv. It should be clearly stated in an amended text that a plan or program which is covered by the Directive, but which was adopted without an environmental assessment, is as a main rule not valid. This consequence, already clearly pronounced by the CJEU, would act as a powerful deterrent to disregard the requirements of the Directive.

It can be gleaned from the above that none of these suggestions intends to change the planning responsibility of the Member States in favor of the EU. The suggestions rather intend to better clarify, what the different responsibilities are. Already today, a responsible Member State could implement the different suggestions in its national legislation.

Directive 2001/42 is a useful planning instrument which helps integrate environmental requirements into the elaboration and implementation of sectoral policies, such as agriculture, fisheries, energy, transport, town and country planning *etc.* At a time, when the environmental challenges for the Member States, the EU itself and even for the whole planet are greater than ever in the past, the full use of this instrument by all planning authorities would be a sign of determination to effectively try protect our common heritage which constitutes the environment.

Article 7(2): "The information to be made available and [systematically] disseminated shall be updated as appropriate and shall include at least: […] *(c)* progress reports on the implementation of […] Community, national, regional and local legislation on the environment or relating to it."