

**CRITICAL READING OF THE INTERPRETATION OF S.E.A. CONTAINED  
IN DECREE LAW NO. 152 OF 3 APRIL 2006 "ENVIRONMENTAL  
LEGISLATION "**

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*The present document (the complete Italian version of which may be consulted on the INU Study Group on SEA's site) is the result of the reflections made by the Study Group by constantly<sup>1</sup> following the various preparatory phases of the decree under examination, from the emanation of the "Government Delegated law for the reorganization, coordination and integration of legislation on the environment and measures of direct application" (Law no. 308/2004) to its final version, published in Gazzetta Ufficiale no. 88 of 14 April 2006, including the various interim versions shown on the site of the Delegated Law Committee.*

*Since the drawing up of the present document-May 2006-, the coming into force of Part 2 of Decree Law No. 152/2006, including also the SEA, has been postponed until 31 January 2007 (Art. 1-septies, D.L. no. 173 of 12/05/2006).*

*We trust that, also through this contribution towards reflection, a relation of cultural and scientific collaboration may finally be established with the Institutes for the compulsory integration of environmental assessment in planning procedures.*

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<sup>1</sup> The INU Study Group followed the events connected with the drafting of the Consolidated Act on the Environment, guaranteeing information and divulgation of the interpretation of SEA in the Italian context, with articles in *Urbanistica Informazioni* (see no. 200/2005) and with an entire dossier dedicated to Italian experience in the application of SEA (*Urbanistica Informazioni Dossier* no. 88/2006).

## **SEA according to the European Directive vs. the interpretation of the Consolidated Act**

The Consolidated Act on the Environment (hereafter called CA), as known, had anything but an easy genesis, marked by the absence of any real, constructive involvement by the delegated legislator, of local institutions and cultural associations on the matters which, directly or indirectly, have a considerable impact on the territory.

Decree Law 152/2006 was promulgated by the President of the Republic on 3 April 2006.

The present paper intends to provide a critical viewpoint relating to the expected (but unfortunately disregarded) necessary adoption as Italian law of Directive 2001/42/EC which, we would point out, has in any case been in force in the EU Member States since 21 July 2004.

Many European countries around that date introduced into their national legal systems the necessary amendments bringing them into line with the SEA directive.

On this subject the European Environmental Bureau in 2005 published the results of a survey<sup>2</sup> conducted by a number of NGOs<sup>3</sup> of EU Member States (Italy did not participate) regarding the quality of the transposition of the SEA directive into the various national legislative systems. This report highlights the effective difficulty encountered by many countries in applying SEA, each one, obviously, adopting different legislative solutions (partial or total application through amendments to existing laws or through specific laws on SEA). In general, it is deduced however that many European countries, having adopted the directive, are conducting further reflections on the relation between the definitions contained in the SEA directive and their own national legislative situations. In various cases, studies are being carried out on possible improvements of the assessment methodologies –also with general and sectoral guidelines- and in general of the procedures of integrating the environment in planning/programming.

Updating the experiences conducted in various EU countries is of fundamental importance. The exchange of information on the application of the directive in Member States is inserted in Art. 12, which foresees that by 21 July 2006 the European Commission is to send a first report on the application of the SEA directive to the European Parliament and to the Council, possibly accompanied by amendment proposals of its text<sup>4</sup>.

Italy will attend this important appointment on the one hand with a national (non) adoption of the SEA directive –in any case late with respect to the compulsory term of 21 July 2004 as indicated in the directive- and on the other hand, instead, with numerous instances of regional application which, in view of the inertia of the State legislator, have more or less explicitly followed the European requirement.

The SEA procedure contained in the CA here being commented upon, apart from infringing, as we will attempt to explain below, the 2001/42/EC directive and subsequent European indications for its implementation<sup>5</sup>, fails to follow a “philological” interpretation of the European norm, which envisages achieving a single procedure for integrating the environmental considerations within the various plans and programmes. The CA seems to be going along a different track, preferring to concentrate the binding moment of “assessment” in a subject extraneous to its planning/programming procedures.

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<sup>2</sup> European Environmental Bureau, *Biodiversity in Strategic Environmental Assessment-Quality of national transposition and application of the strategic environmental assessment (SEA) directive*, December 2005.

<sup>3</sup> Non-governmental organizations

<sup>4</sup> In particular, the Commission will consider the possibility of extending the sphere of application of the directive to other types of plans and programmes. Subsequently a fresh assessment report will be drawn up every seven years.

<sup>5</sup> Commission's Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, 2003.

The central and most controversial problem of formalizing the SEA in the CA thus regards the codification of the *environmental assessment procedure*, which in our opinion here takes the form of increased planning and programming procedures.

Contradicting the standpoint of the directive, which basically sanctions the *endoprocedural* nature of the environmental assessment of plans and programmes, the CA introduces (Art. 12, para. 2), in close analogy with the procedure for environmental impact assessment foreseen in Italian law, a “**judgement**” to be issued by an authority “other” than the subject drawing up the plan or programme.

If, however, by “assessment” must be understood what is stated in CA Art. 5, para 1, letter a), i.e. “the drawing up of an environmental impact report following the implementation of a given plan or programme to be adopted or approved, the carrying out of consultations, the assessment<sup>6</sup> of the environmental report and of the results of the consultations in the decisional approval procedure of a plan or programme and making available information on the decision”, then the interference of an outside actor who *a posteriori* (Art. 12, para. 2) intervenes in a proceeding which is the responsibility of another subject, namely the one charged institutionally with drawing up the plan/programme<sup>7</sup>, is hardly reasonable, when read in this key.

Such outside intervention is assigned in the CA to the authority charged with environmental assessment (Art. 12, para.2), which at State level is identified as the “technical-consultative commission for environmental assessments” (Art. 6). This has the task of “expressing itself on environmental relations”, examining and assessing (Art. 12, paras. 1,2) the documentation submitted by the authority drawing up the plan/programme and, within sixty days, issuing a judgement of environmental compatibility, containing an “articulated, well-grounded environmental opinion which forms the basis for the continuation of the approval procedure of the plan or of the programme”.

Again in analogy with the EIA procedure, the technical-consultative commission may impose prescriptions, subordinating the judgement of compatibility to the adoption of “specific amendments and integrations to the proposed plan or programme assessed”.

The Regions are required, as per CA Art. 22, to regulate with their own laws and regulations the procedures for the strategic environmental assessment of plans and programmes, in the mean time immediately applying the procedural scheme set out in Part II of the CA (hence also Art. 12 which regulates the judgement of environmental compatibility).

This highly critical problem should immediately be the subject of serious reflection, and the effects stemming from the operative nature of such a rigid set-up on the administrative activity of the local authorities must necessarily be considered.

The short-sighted interpretation of the CA, in our view, is far from the intentions of the European directive, which intends to introduce closer attention to environmental themes within planning/programming, while prescribing (Dir. Art. 12, para. 2) that the Member State shall guarantee qualitative standards for environmental reports (communicating to the commission any measure adopted regarding the quality of said relations).

The aims of the directive are to be pursued by means of an “environmental assessment” procedure intrinsic to the proceeding, and not instead by affixing a seal of approval from above, almost like an “okay” characterized by a certain (and inevitable) degree of discretion left to the one making the

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<sup>6</sup> This term should be replaced by that of *consideration*, a closer translation of the original English and French terms of *taking into account* and *prise en compte*, respectively.

<sup>7</sup> Cfr. Fianza, Alessandra, *Some questions on the environmental assessment of plans and programmes*, UI no. 200/2005: “The responsibility of the planning procedure, enriched by the points prescribed by the directive, remains that of the subjects institutionally vested therewith, who, also through adequate forms of participation and cooperation, must consult the authorities “which, through their specific environmental competence, may be concerned with the effects on the environment due to the application of plans and programmes” (Art. 6, 3)”.

assessment, on proceedings in which the Commission would intervene *a posteriori* without having the responsibility of the planning/programming proceeding<sup>8</sup>.

At State level, the technical-consultative commission for environmental assessments (Art. 6) could instead assume the role of environmental authority, whenever necessary called in by the Administrations that have to draw up plans or programmes, or else acting as guarantor of the quality of environmental relations as per Dir. Art. 12<sup>9</sup>.

CA Art. 16 (*SEA at State level-start-up of the proceeding*) would seem to indicate this direction, instructing as it does that the plan and the environmental report shall be sent not only to the Ministries of the Environment and of Cultural Property (and to the Regions whose territories are concerned) but also to the aforesaid commission<sup>10</sup>.

To be sure the attribution, suggested in the CA, to the commission of a function analogous to the present “EIA Commission” (an exogenous assessment) is not easy to understand if compared with the spirit – not adopted in the CA – of the European directive. It would mean, with the “judgement of compatibility” remaining outside of the procedure followed by plans or programmes, an infringement of the directive.

The choice of introducing into the CA an assessment *a posteriori* would appear to stem from an incorrect translation of directive 2001/42/EC from English (or French) into Italian.

The original version of the text (in English and French) states that the environmental report must be taken into consideration within the planning/programming procedure and that the environmental assessment is an integral part of a single proceeding. As for that matter stated by CA Art. 8, para. 1, referred to in fact as “integration of the environmental assessment in planning proceedings”.

Perhaps it was by reason of the incorrect translation, in the context concerned, of the term “taking into consideration” as “assessment”, that the Italian delegated legislator felt that he had to introduce an outside subject to *assess the plans assessments*?

This interpretation, we repeat, would lead to bogging down the planning/programming procedures, and would question the full responsibility of the competent administrations for drawing up plans and programmes subject to SEA.

The European directive, instead, as already interpreted in numerous regional adoptive laws, would impose a rethinking of planning/programming procedures, modulating, according to the specific cases, the insertion of compulsory moments of attention to environmental themes and to the necessary participation of the public and of the stakeholders, involving the authorities (Dir. Art. 6, para. 3) in the planning process, as “they, for their specific environmental competence, can be concerned in the effects on the environment caused by the application of plans and programmes”.

### **SEA and planning at municipal level**

Another question that has to be clarified regards the hypothesis of excluding plans at municipal level from being subjected to the SEA procedure. In the CA we read in fact (Art. 4, para. 1, letter a, point 3) that the norm constitutes the implementation of directive 2001/42/EC, with the object of promoting the use of SEA in drawing up State, regional and supra-municipal plans and programmes.

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<sup>8</sup> Cfr. Laniado, Eliot, *The guidelines of the Enplan project*, in: La rivista dell’Urbanistica no. 3: “The EA procedure of plans and programmes (P/P) takes place within the body drawing up the P/P, as its adoption/approval is an act of political responsibility. There is thus the risk of self-referencing. The transparency of the procedures and of the contents of the P/P, and the participation and consultation of the subjects, who express opinions that are obligatory but not binding, are the antidote for limiting said risk”.

<sup>9</sup> The identification of a subject able to guarantee a minimum qualitative standard for environmental relations is necessari and right. But the interference of the outside subject in the proceeding must stop at guaranteeing that said standards – which must first be identified - are respected.

<sup>10</sup> Whereas (Art. 16) the Provinces territorially concerned receive only a non-technical summary.

At the same time, Art. 5, para. 1, letter d), providing the definition of “plans and programmes” for purposes of the second part of the CA, makes reference to the administrative acts adopted or approved by State, regional or local authorities, but without specifying the meaning of the term “local”. However, since the condition of adoption or approval is concerned, it should be recalled that the latter, with regard to municipal master plans, albeit with significant differences from region to region, is in many cases the responsibility of the provinces, hence indicating the possibility that municipal plans should not be excluded from the application of the norm.

The planning levels to which the Community directive refers (national, regional and local), as stated, are justified by the fact that the directive is addressed to all EU Member States, whose administrative management makes reference to territorial units that are based on criteria that differ from state to state. Therefore, it would seem reasonable to presume that the acceptance of the term “local” may be understood in the sense of minimum administrative subdivision of the territory.

It should also be observed that the problems stemming from the use of the term “local” within the context of the Community directive had already been pointed out in the document prepared in 2003 by the European Commission<sup>11</sup> where, at point 3.34 is stated:

*There is a similar difficulty in deciding the meaning of ‘local’. The language of the Directive does not establish a clear link with local authorities but the word ‘level’ does imply a contrast with, for example, national or regional levels. The complete phrase (‘small areas at local level’) makes it clear that the whole of a local authority area could not be excluded (unless it were itself small). In some Member States local authority areas can be very large indeed and an exemption for the whole of such an area would be a major loophole in the scope of application.*

The term “local” has been used and understood as minimum administrative unit in Great Britain, where the use of SEA is foreseen also for local plans<sup>12</sup> which, albeit in a town-planning context differing considerably from ours, may be regarded as close to our municipal level town planning.

This orientation has been analogous in France<sup>13</sup>, where the application is foreseen for “plans, schémas, programmes et autres documents de planification adoptés par l’Etat, les collectivités territoriales ou leurs groupements”.

It could be useful to recall that municipal town plans are clearly included among plans concerning “land use” (Dir., Art. 3, para. 2, letter a) and that this indication has been taken up by the CA in Article 7, para. 2, letter a, point 1. Furthermore, according to the case, they may present all the essential characteristics to be considered in the screening procedure (Annex 2 to the directive) for the possible exclusion of a plan or programme.

Moreover, the requisite *sine qua non* that characterizes plans and programmes to be submitted for environmental assessment according to the Directive, i.e. that of defining “the reference framework for authorizing projects for which the EIA procedure is required” (cfr. Dir., Art. 3, para. 2, letter a) or simply “for approval of projects” (cfr. Dir., Art. 3, para. 4), is a requisite that cannot fail to concern also municipal level plans.

It seems moreover decidedly ambiguous that, in one and the same legal text there should be two different categories of plans and programmes for which application is excluded explicitly, in one case (plans and programmes for defence purposes, etc.), and implicitly in the other case (municipal level plans).

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<sup>11</sup> Cfr. note 5

<sup>12</sup> *A Practical Guide to the Strategic Environmental Assessment Directive. Practical guidance on applying European Directive 2001/42/EC “on the assessment of the effects of certain plans and programmes on the environment”*, 2005

<sup>13</sup> Ordonnance n. 2004-489 du 3 juin 2004 portant transposition de la directive 2001/42/CE du Parlement européen et du Conseil du 27 juin 2001 relative à l’évaluation des incidences de certains plans et programmes sur l’environnement.

Therefore their possible exclusion which, we feel certain, is not in keeping with the spirit of the Community directive and could give rise to an infringement procedure by the European Commission, should at the very least be made explicit, as is the case for the plans and programmes as per Art. 7, para. 3, point 8.

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*In the light of what has been set forth, we can state that the “adoption” of the SEA codified in the CA presents considerable lacunae, both methodological and cultural, which, unless corrected in time, risk producing negative consequences for the whole national territory.*

*We hope and trust that the present Government will see fit to devote further reflection to this crucial problem, and will also finally succeed in defining effective “forms of consultation <...> of the acknowledged national associations for environmental protection <...>”, as, moreover, already foreseen by Art. 1 letter g of Delegated Law no. 308/2004.*