

Monitoring and enforcement

Article 10 of directive 2001/42 requests the monitoring of the significant environmental effects of the implementation of plans and programmes. The reports on the situation in Member States all report - with the possible exception of France- that the requirement of Article 10 was taken up by the national legislation which transposed directive 2001/42.

However, the monitoring of the effects of plans and programmes requires some administrative structures, which determine how the monitoring is organised, which administrative or political body is responsible for the monitoring, the frequency of the monitoring, how the results of the monitoring efforts are collected and used to make the system more effective in practice, etc. The administrative mechanisms to make the monitoring really operational are important, because numerous plans and programmes which are covered by the directive, are adopted at local or provincial level, which might follow quite different approaches on the directive's practical implementation.

No Member State legislation provided for details of the monitoring process. Rather, the national legislation satisfied itself with establishing the monitoring requirement, but did not go any further in organising the practical details. This means that the transposition of Article 10 of the directive is insufficient and would need to be completed by practical details as regards the organisation of effective monitoring. Some reporting on the monitoring of the significant environmental effects of the implementation of plans and programmes appears unavoidable.

The Avosetta Group is aware of the need to avoid, via EU legislation and its transposition into national law, an increase in administrative centralisation. Reporting to the EU commission appears thus unnecessary. However, solutions may also be found in the context of the different self-government structures of Member States. Where common self-government structures exist or where Member States have established environmental agencies, these bodies could be charged to collect the different local, provincial, regional and even national reports on the monitoring results. Where such structures do not exist, Member States might opt for other solutions to have information on the significant effects reported, published and disseminated to the public.

A regular publication of the monitoring results also appears necessary, in order to allow the public to actively challenge gaps, omissions or other defects in the transposing or applying legislation or otherwise insist in the improvement of the existing legislative provisions. This could contribute to approach a high level of environmental protection and sustainable development (article 1 of the directive). Indeed, at present, access to the courts for individual citizens or environmental organisations is often difficult or impossible, when plans or programmes are adopted by way of regional or national legislation. The jurisprudence of the CJEU in this regard, which opened the way of access to the courts in such cases - C-444/15 ItaliaNostra and C-24/19, Vlaem II - is far from having been generally accepted by all national administrations and courts. For example, Sweden and Poland do not allow the challenging of national environmental plans and programmes, which is not compatible with directive 2001/42; Sweden extends this barrier even to regional plans.

The majority of Member States does not allow a separate challenging of the screening or scoping process for plans and programmes; it is doubtful, whether such a general prohibition is compatible with EU law (CJEU, case C-570/13 - Gruber). Also, the national provisions are silent on the question, whether a strategic environmental impact assessment can be tackled in court with the argument that it was badly done. The Avosetta Group is of the opinion that such action must be possible; the

question, whether the bad quality of the SEA was sufficient to annul the whole SEA, is a question not of the admissibility of a court action, but of substance.

There are numerous plans and programmes with significant effects on the environment, which are elaborated by the EU institutions. Directive 2001/42 does not apply to such plans or programmes. However, Regulation 1367/2006, Article 9, requires that such plans or programmes are the subject of public participation, before the Commission submits them to other EU institutions for adoption. The Commission systematically ignores this requirement. The most recent example is the European Green Deal (COM (2019/640)) and the different programmes which are initiated as a follow-up.

Furthermore, the EU legislation on Trans-European Networks for transport and energy determine projects for decades ahead, without appropriate environmental impact assessment of the legislative provisions; a later assessment of the specific projects - if really such an assessment is made, the EU TEN-legislation being remarkably silent on this issue - does not repair the initial omission to completely apply Regulation 1367/2006 and the Espoo-Convention on transboundary environmental impact assessment, which also the EU has ratified.