

Avosetta Questionnaire: The SEA Directive

Cork, 28-29 May 2021

DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [\[2001\] OJ L 197/30](#)

The aim of our discussions is to identify and examine how the SEA Directive has been transposed into national law, key decisions of the national courts dealing with problem areas and the extent to which the Directive has influenced national practice.

As you may know, there is now a rich CJEU jurisprudence on a broad range of provisions of the Directive. An article in the *ELNI Review* by Thomas Bunge provides an overview of key CJEU decisions on the Directive. You may find this article helpful when completing the questionnaire: [2019] *ELNI Review* 2-9.

The SEA Directive was also subject to a recent REFIT evaluation by the European Commission. On 22 November 2019, the Commission adopted a Staff Working Document on the evaluation of the Directive [SWD\(2019\) 414 final](#). The REFIT evaluation [webpage](#) is a rich source of information, including details of the Commission's SEA Directive REFIT evaluation Roadmap, the public consultation undertaken as part of the REFIT evaluation, the results of this consultation and the conclusions reached.

In summary, the REFIT evaluation concluded:

- The Directive has helped to achieve a high level of environmental protection but that lack of a clear definition of 'plans and programmes' has hindered effectiveness, and that monitoring arrangements are often inadequate;
- The benefits of carrying out SEA outweigh the costs;
- The SEA process complements other environmental assessment requirements (such as EIA and appropriate assessment) and helps achieve sectoral objectives, makes plans and programmes more environmentally robust and sustainable and works well as an instrument to implement the SEA Protocol to the Espoo Convention and the Aarhus Convention;
- The SEA Directive is largely coherent with other relevant environmental legislation and sectoral policies, as well as the EU's international obligations, and plays an important role in implementation of certain EU sectoral policies that require plans and programmes (e.g. water, waste etc.);
- Consultees were divided on the scope of the Directive. Some (mainly NGOs, academics and practitioners) want to see it applied in a broader and more strategic manner, and tackle global and longer-term sustainability challenges such as social issues, climate change and over population. Their view is that SEA often starts too late when many issues are already agreed politically. National authorities, in contrast, see little merit in applying SEA at too high a strategic level, and would prefer to focus SEA on assessing environmental issues at a lower level, and are uncomfortable with the CJEU's broad interpretation of plans and programmes. However, both sets of consultees believed that there was a need to clarify the application of the Directive.

It will be interesting to hear the extent to which Avosetta members concur with the general conclusions of the REFIT evaluation of the Directive. As a result of discussing the national reports, we may be able to reach some general conclusions of our own which can then be submitted to the Commission.

Answering the questions

Although it is never easy, please keep your national SEA reports reasonably succinct (**5 pages max, excluding the questions**) which will hopefully allow everyone to read them before the meeting. You can elaborate on particular points, if you wish, in annexes to your report, and / or the reports can be expanded later on when they are being revised prior to publication on the Avosetta website.

The national reports are **not** intended to provide a comprehensive recital of all national legislation and jurisprudence, but rather to provide a basis for useful discussion between the Avosetta members. So please focus on what you consider to be the most important issues. Please indicate whether there are any **key** decisions of your national courts under the various headings.

Succinctness on complex legal issues is not easy – but please remember the words first attributed to Blaise Pascal in 1657, and subsequently taken up by many other writers: *“Je n’ai fait celle-ci plus longue que parce que je n’ai pas eu le loisir de la faire plus courte”* (basically, “sorry for the length, but I didn’t have time to make it shorter”).

The questions concern both national legislation and jurisprudence on SEA, as well as its actual practice. We appreciate that obtaining information on the practical implementation of SEA is likely to be more challenging. Please do as best as you can within the time available to you – if there is no readily available information in official reports etc. that is also an interesting finding.

[1] National legislative context

Identify and summarise the relevant national legislation transposing Directive 2001/42/EC. In 2017, the Commission concluded that all Member States have transposed the Directive ([COM\(2017\) 234 final](#), 5 May 2017), but some have transposed it by means of specific national legislation while others have integrated its requirements into existing laws.

[2] EU infringement proceedings?

Have EU infringement proceedings been brought against your Member State for alleged failure to comply with the SEA Directive? If yes, please provide brief details.

[3] Objectives (Art. 1)

The CJEU has frequently referred to Art. 1 as a starting point for its rather expansive interpretation of various provisions of the Directive.

- (i) Is the Objective of the Directive reflected in your Member State's national legislation?
- (ii) Has the Objective been used by your national courts to assist them in the interpretation of relevant provisions of national law?

[4] "Plans and Programmes" subject to SEA

- (i) **Art. 2 (a) (Definition of "plans and programmes"):** How has this definition been transposed into national law and, in particular, how is the concept "required by legislative, regulatory or administrative provisions" understood – either in national legislation and / or in national jurisprudence?
Keep in mind here that the CJEU has interpreted this concept to include not only "plans and programmes" which the planning authorities are *legally obliged* to prepare, but also those "plans and programmes" which the authorities *may draw up at their discretion* ([Case C-567/10](#)). **Note that this was quite a controversial ruling. How was it received in your country?**
The CJEU has also recently interpreted the concept of "plans and programmes" as including an "order and circular" adopted by the Flemish Government concerning the installation and operation of wind turbines ([Case C-24/19](#)).
- (ii) **Art. 3 (Scope):** How has this provision been transposed into national legislation, and, in particular, has your country added any additional categories of "plans and programmes", either in legislation or on a case by case basis (see Art. 3(4) and (5))? Note here [Case C-300/20](#), a reference for a preliminary ruling pending before the CJEU concerning the application of Art. 3(2)(a) to a regulation on nature conservation and landscape management.

- (iii) “likely to have significant environmental effects” – is this concept elaborated on in national legislation? Is there official guidance and / or national jurisprudence on the meaning of the phrase “likely to have significant environmental effects”? Who determines whether a particular plan or programme is “likely to have significant environmental effects”?
- (iv) Is there screening? If yes, in what context(s) and how does it operate? Who makes the screening determination? Is the screening determination available to the public?
- (v) “ ... which set the framework for future development consent of projects” specified in the EIA Directive. Has national legislation / official guidance and / or jurisprudence further elaborated on the meaning of this concept?
- (vi) “Plans and programmes” that “determine the use of small areas at local level” – how has this provision been transposed and how it is applied in practice?
- (vii) Does your national legislation and practice reflect the CJEU’s conclusion that it is the “content” rather than the “form” of the planning or programming act that is decisive?

[5] General obligations (Art. 4): How has this provision been transposed? In particular, has the obligation to carry out the assessment “during the preparation of” the plan or programme been respected? Are there any practical examples demonstrating the avoidance of duplication of assessment where there is a hierarchy of plans and programmes?

[6] Environmental Report (Art. 5, together with Art. 2 (b) and Annex I)

- (i) Is there national jurisprudence and / or practical examples demonstrating significant problems with the range of data included in the Environmental Report and the evaluation presented?
- (ii) Who makes the scoping determination?
- (iii) Is the scoping determination available to the public?
- (iv) How is the concept “reasonable alternatives” considered in practice – either in national legislation, official guidance and / or national jurisprudence?

[7] Consultations (Art. 6 together with Art. 2 (d)): How has this provision been transposed and is there national jurisprudence and / or practical examples demonstrating significant problems here?

If available, please provide one example of an SEA with regional or national implications (not just local) to illustrate how consultation is carried out.

[8] Transboundary consultations (Art. 7): Has this provision come into play in your country? Who decides about initiating transboundary consultations? At what stage are transboundary consultations usually initiated? Is there any significant national jurisprudence and / or practical examples? Does the UN ECE SEA Protocol play a role here?

[9] “Taken into account” (Art. 8): How is this provision understood? Is there any significant national jurisprudence? Are there any specific mechanisms in place to monitor compliance with this particular obligation?

[10] Monitoring the significant environmental effects of implementation of plans / programmes (Art. 10)

Is monitoring a legal requirement in your country? If so, how it is organised and who is responsible for monitoring? Is it effective in practice? Are there any specific mechanisms to address the results of monitoring?

(Note: The REFIT examination suggests that monitoring is poorly executed in many countries).

[11] Access to justice:

(i) How are alleged deficiencies in the SEA process dealt with by your national courts? In particular, is a plan or programme declared void if a court determines that the SEA process was deficient / unlawful? (Note here [Case C-24/19](#) paras 80-95 concerning the legal consequences, and the role of the national court, where there has been a breach of EU law).

(ii) Are there any restrictions / limitations on access to justice as a result of national provisions concerning either legitimacy or jurisdiction of (administrative) courts (i.e. are plans / programmes excluded from judicial control on the basis of any rule on jurisdiction of courts or legitimacy)?

(iii) Is it possible to challenge a negative screening determination?

(iv) Is it possible to challenge the scoping determination?

(v) Is there any significant national jurisprudence on access to justice in the SEA context?

- [12] **Direct effect:** Are there any decisions of the national courts in your country where, because of alleged non-transposition, the direct effect of the Directive has been invoked?
- [13] **SEA for proposed policies and legislation:** Have there been any developments in your country as regards SEA requirements for proposed policies and legislation that are likely to have significant effects on the environment, including health? (UN ECE SEA Protocol, Art. 13).
- [14] **National studies:** Have any significant official (or unofficial) studies of the implementation of the Directive and its impact in your country been published? If yes, please provide brief details and the key findings.
- [15] **National databases:**
- (i) Is there any national database on the number and categories of SEAs carried out each year in your country? If there is, please provide summary data for the most recent year available.
 - (ii) Is there any national database of SEA reports, Environmental Assessments and the relevant decisions made by the competent authority etc.? If yes, please summarise the position briefly and indicate if the database is available online.
- [16] **Impact of SEA in practice:** Are you aware of draft plans or programmes in your country which have been amended significantly – prior to their adoption or submission to the legislative procedure – as the result of SEA procedures?
- [17] **Any other significant issues?** Are there any other significant issues concerning the implementation of provisions of the Directive in your country which you consider are worth mentioning here?
- [18] **General assessment and / or any recommendations:** Do you have any overall view of the effectiveness of SEA in Europe and / or any recommendations for improvement?