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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 liosir 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.

Mainly in Chapter 6 of the Environmental Code (1998:808, MB) on environmental assessments and the underlying Ordinance (2017:966, MBF) on the same subject. These provisions apply to activities covered by the Code, such as action programmes for ambient air quality (Ch 5 and 9), river basin management plans (Ch 5 and 11), national marine plans (Ch 4 sec 10), as well as national and municipal waste plans (Ch 15). The Swedish rules on SEA also cover plans according to legislation outside the Code, most importantly Municipal Comprehensive plans and Regional plans under the Planning and Building Act (2010:900, PBL). Also certain plans and programmes under sectorial legislation include compulsory SEA requirements, such as municipal energy plans (Act 1977:439), as well as national and county infrastructural plans (Ordinances 2009:236 and 1997:263 respectively). A SEA may also be required for other plans and programmes if they are deemed likely to have significant effects on the environment; rural area programmes, programmes for detailed development plans, regional development programmes, traffic support plans, etc. It may be noted, however, that the planning instrument is not very well developed in Sweden outside the compulsory field, so to speak.

[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.

We have had a couple of infringement proceedings concerning the EIA Directive which have touched upon near-related issues in the SEA. In some of these cases, the Commission has also raised concerns about the implementation of Articles 3.7 and 6.3 SEA in Swedish law. These concerns were dealt with in a full reform of Chapter 6 of the EC in 2018 (governmental proposition 2016/17:200).

[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?

Yes, in Chapter 6 sec 1, and yes it would seem likely.

[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).

Although it is stated in the travaux préparatoires to the 2018 reform (prop. 2016/17:200) that also instruments which are not formally named plans or programmes may require a SEA, there is no such possibility left open in Chapter 6 of the Code, the Planning and Building Act or in sectorial legislation. No reaction noted on C-567/10 or C24/19, the Inter-Environnement Bruxelles ASBL case in not even mentioned in the governmental proposal mentioned above.

(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.

Some "plans" on a case-by-case basis have been added, most importantly management plans for national parks and nature reserves, as well as decisions about designations of areas as being of national interest for different purposes (both for exploitation and nature protection, as well as for the protection of the land rights of the Sami people).

(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"?

The Swedish EPA has issued guidance on the implementation of the SEA Directive (https://www.naturvardsverket.se/Stod-i-miljoarbetet/Vagledningar/Miljobedomningar/Strategisk-miljobedomning/), including on the understanding of "significant environmental effects". On the site of that authority one can also find quite substantial information (129 hits) in English under the search

word "strategic environmental assessment" (http://www.swedishepa.se/Global-links/Search/?query=strategic+environmental+assessment). There is also a substantial body of case-law from both the Land and Environmental Court of Appeal and the Supreme Court on the autonomous concept "significant environmental effects" under the EIA Directive (2011/92) and the similar expression "significant effect" on a protected site under Article 6.3 of the Habitats Directive (92/43). Noteworthy in this context are NJA 2010 s. 419, NJA 2013 s. 613 (Supreme Court) and MÖD 2007:50, MÖD 2010:53, MÖD 2016:1, MÖD 2018:19, and MÖD 2012:19 (Land and Environmental Court of Appeal).

(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?

The screening decision is made by the deciding authority in consultation with other authorities and the municipalities involved (Ch 6 secs 6-8 MB). The decision is made available to the public, but is not appealable as such. Thus, the screening decision can be appealed only as a part of an appeal of the plan as such.

(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?

No, just referring to the lists of projects covered by Annex I and II to the EIA Directive (2011/92).

(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?

Verbatim according to the text in the SEA Directive. No possibility to check practise as there is no case-law and municipal decision-making is not very transparent. According to the EPA report 6664 – S*trategic environmental assessment for a sustainable development of the cities* – the municipalities think that the strategic assessment are complicated and try to avoid the concept. The state control of the local level in Sweden is quite weak.

(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?

As noted, the legislation builds upon closed lists and there is no case-law on the matter.

[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?

This obligation is expressed in Ch 6 sec 15 MB, but there is no case-law on this.

[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?

There is a substantial case-law on the similar construct in the EIA Directive (2011/92), but not on the SEA Directive. The EPA report mentioned under Q 4(6) is the only official report to my knowledge.

(ii) Who makes the scoping determination?

The deciding authority in consultation with other authorities and the municipalities involved (Ch 6 sec 10 MB).

(iii) Is the scoping determination available to the public?

No, only the environmental report as such, albeit at an early stage of the planning procedure (Ch 6 sec 15 MB).

(iv) How is the concept "reasonable alternatives" considered in practice – either in national legislation, official guidance and / or national jurisprudence?

Expressed in the requirements for the assessment (Ch 6 sec 11 MB), but there is no case-law on this criterion.

[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.

On a general level, the draft plan including an environmental report is announced on the website of the authority and in the daily papers covering the geographic area. The public is

asked to submit their comments within a fixed period of time. I know not about any significant problems in this context, although the Sami communities may provide with some examples.

[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?

Quite a few actually as Sweden is bordering the Baltic Sea. Notifications to Sweden are posted on the website of the EPA (Naturvårdsverket), competent authority for Espoo cases. Examples are a notification from Denmark about the construction of an Island (Lynetteholm) including dumping of solid matters in Öresund, from Finland about the management plan for the boarder river Torne älv, and from Polen about the country's marine plan, see http://www.swedishepa.se/Global-links/Search/?query=espoo

The other way around, Sweden has notified Espoo Parties about our Marine management plan (Norway, Denmark, Finland and other Baltic countries), the Comprehensive Plan for the city of Malmö (Denmark) and the Regional Plan for Skåne (Denmark).

[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?

This is a requirement in the law (Ch 6 sec 11 MB), but there is no such case-law on the matter under the SEA Directive, although the case-law under the EIA Directive mentioned under Q 4(iii) is relevant.

[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).

The environmental report must contain a description of how monitoring will be performed, but, to my knowledge, the control is weak or even non-existing. This is however nothing specific for the planning system, but a general problem of weak supervision and enforcement in the Swedish environmental law system.

[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?

Very little case-law to my knowledge. Most plans/programmes under SEA are municipal comprehensive plans and those can be challenged in court by any citizen of that local community according to the Local Government Act (2017:725). However, the appeal under that Act is strongly focusing upon the procedural aspects of the planning decision. Having said that, the plan would certainly be declared void if the planning procedure according to the law was not abided to. The screening decision as well as the scoping decision can only be appealed in connection to the appeal of the plan as such. Concerning plans decided by national or regional authorities, they are not appealable according to Swedish law. In most regulations, there is no mentioning of appeal, whereas in others – for example in Ordinance 2009:236 on national infrastructural planning – there is express appeals ban (section 12). This is however not to say that the courts would be too impressed with such a silence or ban if some member of the public concerned – preferably an ENGO – took the chance and appealed anyhow. The Swedish courts have namely been quite willing to quash any such provision if they find it in breach of the principle of judicial protection under EU law (Supreme Administrative Court in HFD 2015 ref 8).

[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?

On the EIA Directive for sure – see C-263/08 *Djurgården-Lilla Värtan* (2009) – but nothing specifically on the SEA Directive.

[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).

The legislation is recent (2018) and there has been no such proposal after that reform.

[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.

In addition to the report from the EPA (6664) mentioned under Q 4(iii), there is a report from the research programme SPEAK. It should be noted however that this report covers the period preceding the 2018 reform. Here is the Summary:

The general aim of the research programme SPEAK (Sustainable Planning and Environmental Assessment Knowledge, www.speakproject.se) was to generate knowledge on, and to strengthen the role of strategic environmental assessment (SEA) in planning as a measure to attain the environmental quality objectives and to promote sustainable development. The SPEAK programme had a transdisciplinary point of departure with close interaction between practice and academy. Within the SPEAK program both quantitative and qualitative methods were applied. The theoretical framework built on the international debate on SEA effectiveness. In the first part of the SPEAK programme a database was developed, which provided an extensive mapping of SEA practice for the period 2004-2014. The mapping showed that the share of municipal comprehensive plans with an SEA has increased from 30-45 percent in the beginning of the period to about 90 percent in the end of the period. For municipal waste plans and energy plans, the improvement is less significant. Statistical analyses suggest that the municipal resources and inter-municipal cooperation have a positive impact on the probability of conducting an SEA. However, the mapping also shows that only half of the SEA documents specify the aim of the municipal plan and merely one in four include more than one plan alternative. In the second part, two in-depth analyses were conducted, one focusing on municipal planning and one focusing on county transport planning. The former analysis points out that the development of alternatives is hampered by the lack of a specific aim of the municipal plan. The Swedish Planning and Building Act does not require an aim or aims of each comprehensive municipal plan to be specified. Yet, the absence of an aim is likely to create difficulties in defining alternatives. Consequently, the low application of more than one plan alternative potentially follows from the lack of an aim. Moreover, interviews with municipal planners indicate that the awareness of SEA requirements is low, implying shortcomings of knowledge and learning effectiveness. The second in-depth study shows that SEAs for county transport plans have often limited impact on the development of the transport plans. Since every new plan includes a substantial number of projects that were identified in previous plans, it is difficult to start SEA from neutral ground. Moreover, interviews indicate low awareness of SEA both among transport planners and among officials from the national government responsible for financing. These observations imply additional shortcomings in knowledge and learning effectiveness. In the third part, the application of SEA in planning in a selection of countries was studied. Representatives from various EU countries were interviewed on the strengths and weaknesses in their SEA practice related to timing, quality assurance, alternatives, public participation and monitoring. Public participation was generally considered as a strength, while monitoring and the development of reasonable alternatives were described as weaknesses. Countries apply various measures to overcome weaknesses, for example, annual meetings to exchange knowledge and experiences and establishment of a review body. In the fourth part, a future vision of SEA practice in Swedish planning was developed. On basis of this vision proposals for adjustments of current practice were identified. The proposals include policy recommendations and legal adjustments to enhance SEA effectiveness. Finally, SPEAK provides suggestions for further research and development.

Further, there is an interesting paper from the Royal Institute of Technology (KTH) on National Infrastructural Planning – *Strategisk miljöbedömning för nationell transportplanering med fokus på inriktningsunderlaget*, authors Balfors/Eriksson/ Gunnarsson-Östling/Isaksson/Lundberg/Robinson – but unfortunately only in Swedish; http://kth.diva-portal.org/smash/get/diva2:1348106/FULLTEXT01.pdf

[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.

No such data base or collection of information except for the Espoo communications mentioned under Q 8.

[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?

I cannot say, but there has been quite some controversy surrounding the national marine management plan. From my general experience, I would say that one may find such examples in the field of municipal wind plans – amendments to the comprehensive plans on local level – but I know of no such study.

[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?

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[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?

As always, the system must be designed with more obligatory demands on the Member States and the enforcement of EU law on the matter must improve…