

## Avosetta Questionnaire: The SEA Directive

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Report on Austria

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### [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.*

In Austria the SEA Directive has been integrated into various existing laws at the federal level and at the level of each of the nine states, e.g. in the areas of Waste Law, Land-Use Planning, Air Quality Law etc. Only two states (Tyrol, Carinthia) have enacted legislation that aims to transpose the SEA for all areas of competences at the state level. Regarding the Strategic Assessment in the Transport Sector a special federal law has been established (SP-V-G). The latter applies to changes in the network of high-speed railways, motorways and waterways. A comprehensive overview of the implementation of the SEA-Directive in Austria is provided online (list in German and English) by the ministry for the environment: [Implementation of Strategic Environmental Assessment \(SEA\)](#)

### [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.*

Yes, infringement proceedings have been brought against Austria regarding the failure to implement the SEA Directive with regard to infrastructure plans in the energy sector. The issue had been brought up by citizens' claiming that the Network Development Plan (NEP), which forms the framework for a 380 kV electricity line, had not been subjected to a SEA.

### [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?*

Implicitly mostly, but also explicitly in those states where special legislation to transpose the SEA Directive has been enacted. (eg § 1 of the Carinthian Environmental Planning Act or § 1 Environmental Assessment Act of Tyrol)

- (ii) *Has the Objective been used by your national courts to assist them in the interpretation of relevant provisions of national law?*

No, as far as I can see.

**[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](#)).*

The definition of plans and programmes has not been transposed specifically; rather the relevant legislation includes a provision stating which plans or programmes are being subject to a SEA according to the respective law.

In the literature the concept “required by legislative, regulatory or administrative provisions” is mainly understood as plans which the authorities are obliged to prepare. The more nuanced understanding by the Court in C-567/10 has - as far as I can see - not be discussed intensely or transposed explicitly.

- (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?*

The obligation has been respected in the implementing legislation

**[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?

The provision has been transposed, there is no significant jurisprudence.

**[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?*

The provision is understood (in the literature) to establish an obligation to take into account the environmental report, the results of public participation and transboundary consultations when taking the decision to adopt the plan. However some laws only establish an obligation to include information in the summarising statement on how the results of the SEA have been taken into consideration.

**[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).*

Monitoring obligations have been transposed in relevant laws. E.g. the Planning Act in Lower Austria states that the decision taken and the monitoring measures have to be made available online. The state government has the obligation to monitor. No specific mechanisms to address the results of monitoring are made available. In general the effectiveness of the monitoring obligations is difficult to assess and the suggestion of the Refit examinations seems plausible also for Austria.

**[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?*

SEA does not play a significant role in national jurisprudence in general and in cases regarding access to justice specifically. The relevant legislation does not specifically provide for Individual rights to challenge plans that have been adopted without a SEA or with a deficient SEA. In the context of land-use plans, individuals that are directly affected by a plan may have the respective regulation reviewed.

**[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?*

No, to my knowledge

**[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).*

Not as far as I can see.

**[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.*

The Ministry for the Environment has commissioned a number of studies on SEA in the initial phase of implementation. Over the past decade an effort was made to continuously monitor best practices and to facilitate an exchange on best practices (See Question 17).

In the literature the implementation of SEA in Austria has been repeatedly criticized as fragmented. Implementation in the energy sector was criticized as being deficient (see also question 2, infringement proceedings).

**[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.*

The Federal Ministry for Climate Protection, Environment, Energy, Mobility, Innovation and Technology (BMK) issues an annual collection of SEAs carried out in Austria. The contributions come from various authorities that voluntarily submit the information and documents to the BMK. The collection is categorized by sectors.

Link: [Sektoren \(strategischeumweltpruefung.at\)](https://www.sektoren.strategischeumweltpruefung.at)

Summary data for the number of SEAs carried out from 2016-2019 is available online. But no overall number is presented.

The majority of SEAs concern changes in local land use plans. E.g. In 2019 over hundred SEAS have been carried out in the context of local land use planning in the State of Lower Austria. At the federal level only few SEAS have been carried out, e.g. with regard to water management and with regard to programmes in the field of cohesion policy.

- (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.*

See above.

**[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?*

Not specifically.

**[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?*

The Ministry for the Environment has commissioned a number of studies on SEA and continuously facilitates the exchange of best practices in the federal system. A SEA Practice Group was established to pool the experience from the Austrian federal and provincial administrations. The results of the meetings of the practitioners are summarized in SEA practice sheets and made available online.

Practice Sheets have been developed eg on Screening, Scoping, the concept of reasonable alternatives, the interdependency of EIA and SEA.

Link: [Praxisbeispiele für SUP in Österreich \(strategischeumweltpruefung.at\)](http://strategischeumweltpruefung.at)

- [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?*