AVOSETTA QUESTIONNAIRE: THE SEA DIRECTIVE
CORK, 28-29 MAY 2021

FRENCH REPORT
Nathalie HERVE-FOURNEREAU & SIMON JOLIVET

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.

The directive was transposed into French law by Order no. 2004-489 of June 3, 2004, codified in a section of the Environmental Code, entitled "*Assessment of certain plans and programmes with a significant impact on the environment*" (art. L. 122-4 et seq.) and, for urban planning documents, in articles L. 104-1 et seq. of the Urban Planning Code ("Code de l'urbanisme") for the general provisions, with specific provisions for each category of plan in the Urban Planning Code and the general Code for Local Authorities (e.g. art. L. 4424-9 for Corsica and L. 4433-7 for the regional development plan of French overseas regions). The implementing measures provided for in the order were adopted by two decrees, no. 2005-608 and no. 2005-613 of May 27, 2005, codified in articles R. 104-1 et seq. of the Urban Planning Code and in articles R. 122-17 et seq. of the Environmental Code.

In order to take into account the observations of the European Union institutions, these provisions were modified by the Grenelle II Law no. 2010-788 of July 12, 2010 and decrees no. 2010-1178 of October 6, 2010 and no. 2012-995 of August 23, 2012 modifying the Urban Planning Code and no. 2011-492 of May 5, 2011 and no. 2011-2019 modifying the Environmental Code. This reform leads, for the most part, to a broadening of the scope of application of the environmental assessment of plans and programmes. It also completes the content and, eventually, strengthens the control and information procedures.

A new reform was introduced by Order No. 2016-1058 of August 3, 2016 and Decree No. 2016-1110 of August 11, 2016 on the modification of the rules applicable to the environmental assessment of projects, plans and programmes. The reform pursues an objective of "*simplification*" and "*clarification*" of the Law of environmental assessments, but also of better compatibility vis-à-vis European Union Law. In addition, to promote the articulation of the different types of environmental assessment, the 2016 reform creates common and coordinated procedures between SEA on the one hand, and EIA on the other. The order of August 3, 2016 was ratified, with modifications, by Law No. 2018-148 of March 2, 2018.

The adoption of another regulatory text is to be expected especially with regard to the environmental assessment of urban planning documents, insofar as the Council of State (CE, July 19, 2017, France Nature Environnement, n° 400420) has annulled articles R. 104-1 to R. 104-16 of the Urban Planning Code issued from decree no. 2015-1783 of December 28, 2015, insofar as they do not require an environmental assessment to be carried out in all cases where, on the one hand, the changes made to the local urban planning plan by the amendment procedure and, on the other hand, the bringing into compatibility of a local urban planning document with a higher urban planning document, are likely to have significant environmental effects within the meaning of Annex II of Directive 2001/42/CE. In April 2021, a public consultation took place on the draft Decree amending the provisions relating to the environmental assessment of urban planning document and new tourism units; this draft decree therefore is expected to comply with the requirements of directive 2001/42/EC following the two judgement of the Council of state (see above CE, July 19, 2017, France Nature Environnement, n° 400420 and CE, June 2019, France Nature Environnement n°414931 (annulment of the decree 2017/1039 related to the new tourism units (Unités Touristiques Nouvelles).

[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.

Unlike other Member States, France has not yet been the subject of any infringement proceeding related the transposition or the implementation of Directive 2001/42/EC. 31 cases have been brought before the CJUE concerning the directive 2001/42/EC but only 8 concern infringement proceeding (from 2006 to 2011). Among the 23 references for preliminary rulings, only one came from France which is really insignificant compared to the Belgian Courts (11 preliminary reference). The only reference for a

preliminary ruling was submitted by the French Council of State (*Association France Nature Environnement (**C-379/15, 2016).*** The purpose of the reference is to seek the interpretation of the CJUE on the possibility of limiting certain temporal effects of a declaration of illegality of provisions of national law adopted in disregard of the obligations of Directive 2001/42/EC (article 6). In the light of its jurisprudence (see C-41/11), the CJUE emphasized that "*a national Court may, when this is allowed by domestic law, exceptionally and case by case, limit certain effects*" of such declaration of the illegality that is "*dictated by an overriding consideration linked to environmental protection and having regard to the specific circumstances of the case pending before it*". The Court also recalled the necessity to respect the conditions for the exercice of this exceptional power as it stated in the case C-41/11. The French Council also questioned the Court whether the national court are obliged *in all the cases to request a preliminary ruling from the CJEU in order to determine whether provisions held by the national court to be contrary to EU law should be maintained temporarily in force?* While the CJUE recalled that a "*national court against whose decisions there is no longer any judicial remedy under law is in principle. required to refer to the Court for a preliminary ruling"* in such case, it underlined that "*national court is relieved of that obligation only when it is convinced which it must establish in detail that no reasonable doubt exists as to the interpretation and application of the conditions set out* "in the case C-41/11. This question of the French Council of State is quite interesting when we consider its limited willingness to refer to the CJUE in the name of the absence of doubt on the interpretation of EU Law; if we analyse its case law on the implementation of the Directive 2001/4/EC, the administrative Court almost systematically considered that there is no need to refer to the Court for a preliminary ruling, even if the applicants invoked this possibility. The administrative Courts thus refer to the case law of the CJUE (C 474/10, C 43/10, C 290/15, C 321/18) to enlighten their analysis of the conformity of local, regional and national acts with the obligations of directive 2001/42/CE.

[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?

No

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

Not so far as we know. We've only found one general reference to "the objectives of the directive" used by the Council of State to cancel a decree that do not provide for an "environmental assessment procedure in line with the objectives of the June 27, 2001 directive", as far as a certain type of plan and programme ("unités touristiques nouvelles" = new tourist units) is concerned (CE 26 June 2019, *FNE,* n° 414931).

[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).

Article L. 122-4 I 1° of the Environmental Code defines plans and programmes as "*plans, schemes, programmes and other planning documents drawn up or adopted by the State, local authorities or their*

groupings and public establishments dependent on them, as well as their modification, when they are provided for by legislative or regulatory provisions, including those co-financed by the European Union"

(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.

Article L. 122-4 II of the Environmental Code first lists **two categories of plans and programmes that are subject to systematic SEA**. On the one hand, these are plans and programmes drawn up in a series of fields (agriculture, forestry, fisheries, energy, industry, transport, waste, water, telecommunications, tourism, regional planning) and which "define the framework within which the projects mentioned in article L. 122-1" (in other words, those subject to EIA) may be authorized. On the other hand, these are "plans and programmes for which a Natura 2000 impact assessment is required in application of article L. 414-4".
Article L. 122-4 III then lists **three other categories of plans and programs that are subject to systematic environmental assessment** (as before, which is therefore not very enlightening) or "after case-by-case examination by the environmental authority". For them, it is the notion of significant environmental effect that will be critical in determining their submission to environmental assessment. These are, firstly, plans and programmes drawn up in the same areas as those referred to above, but "which relate to small territories"; secondly, plans and programmes drawn up in areas other than those referred to above "which define the framework within which the implementation of projects may be authorized"; thirdly, modifications to plans and programmes". In these three cases, the plans or programmes (or their modifications) will only be subject to environmental assessment (systematic or case-by-case) if they "are likely to have significant effects on the environment".
This general definition does not cover urban planning documents, which are governed by the special provisions of the Urban Planning Code. A distinction must therefore be made between urban planning documents and other plans and programmes that fall within the scope of the SEA.

(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"?

It is the environmental authority, which is independent from the competent authority that will adopt the plan or programme. Article R. 122-18 of the Environmental Code : "*For plans, schemes, programmes or planning documents subject to an environmental assessment after a case-by-case examination (…), the environmental authority determines, in the light of the information provided by the responsible public person and the criteria of Annex II of Directive No. 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 whether an environmental assessment is to be conducted*"

(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 is also made by the environmental authority (articles R122-19 of Environmental Code, R104-10 of Urban and Planning Code). It is seen as an option for the public person responsible for drawing up or revising a plan or programme subject to SEA to consult the environmental authority on the level of detail of the information that the environmental effect report must contain.
Thus the environmental authority "*specifies the elements that make it possible to adjust the content of the environmental assessment report to the sensitivity of the environment and the potential impacts of the plan, scheme, programme or planning document on the environment or human health, as well as, where appropriate, the need to study the significant impacts of the plan, scheme, programme or*

planning document on the environment of another Member State of the European Union" (article R122-19) The various advices of the environmental authority, including for screening, are made available to the public (article L122-7 of the Environmental Code)

(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?

See 4 (ii) above.

(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?

See 4 (ii) above.

(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?

Not really, because the legislation is mainly grounded on a list system, and because French administrative jurisdictions have a very "formal" approach of European environmental obligations in general.

[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?**

Under Article 123-6 of the Environmental Code, a single enquiry may be held when the enquiries of several projects, plans or programmes can be organized simultaneously and the organization of such an enquiry contributes to improving public information and participation
Similarly, the possibility of organizing a joint or coordinated environmental assessment procedure, equivalent to the assessment of both a plan or programme and a project, is provided for, on condition that the report on the environmental impact of the plan or programme contains all the elements mentioned in Article R 122-5 of the Environmental Code and that the consultations provided (article L 122-1-1) are carried out. Regarding the "joint procedure" (procédure commune), the single environmental authority is the one which is competent for the plan or programme; in the case of application of the "coordinated procedure", the environmental authority asked for an opinion on the plan or programme assesses the significant environmental impacts of the plan or programme and those of the project(s) presented (article R 122-25 Environmental Code)
Concerning the question of hierarchy between plans and programmes, the Environmental Code does not include specific provisions in the section related the environmental assessment; in reality everything will depend on the legal compatibility between different plans, programmes and others schemes (e.g. article L 219-4 of Environmental Code : compatibility with the strategic document for the coastline or maritime basin, Art L 222-4 : atmospheric protection plan compatible with the guidelines of the regional air quality plan and the guidelines of the regional climate, air and energy scheme (…).

[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?
We have encountered only a few examples.
- About the degree of accuracy of the environmental report, the Council of State does not seem to be very demanding: while the draft master plan (of the region "Ile de France") must be subject to an environmental assessment intended to identify, describe and evaluate the significant effects that its

implementation may have on the environment and to set out the reasons for the choice of the main directions selected, this assessment does not have to cover each of the major transport infrastructures likely to be included in the master plan. ● CE 23 October 2015, Commune de Maisons-Laffitte, no 375814 B

- About the difference between SEA and EIA (as expected, the Council of State finds that SEA does not have to include elements required in a future EIA): the municipal council of Ollières approved a simplified revision of the land use plan with the aim of modifying the regulations of the land use plan to introduce provisions that are limited to allowing the installation of wind turbines in this sector and to setting a rule of minimum distance concerning their implantation with respect to the departmental road. The environmental assessment of which this urban planning document had to be the subject had to contain the information relating to this regulatory act and not that relating to the specific projects for the implantation of wind turbines, projects which were the subject of applications for building permits then under investigation and were subject to an impact study ● CE 17 July 2013, Commune de Ollières, no 362022

(ii) Who makes the scoping determination?

The scoping determination is made up by the competent authority for elaborating or modifying the plan or programme itself (under the administrative judge control).

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

The environmental report is available to the public, and it encompasses "8° *A presentation of the methods used to prepare the environmental assessment report and, where more than one method is available, an explanation of the reasons for the choice made*;" R122-20 Environmental Code

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

The concept was transposed at the Article R122-20 of the Environmental Code. It provides that the environmental report encompasses: "3° *The reasonable alternatives that would meet the purpose of the plan, scheme, programme or planning document within its territorial scope. Each alternative solution shall mention the advantages and disadvantages it presents*". A similar provision exists in the Urban planning Code as regards to urban planning documents (article R. 104-18).
We are not aware of national jurisprudence on this specific issue

[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 a SEA with regional or national implications (not just local) to illustrate how consultation is carried out.

The Order of 3 June 2004 and then the Law of 12 July 2010 transposed article 6 by providing that the public may be informed either during the public inquiry ("enquête publique") if such a procedure is provided for, or during an existing equivalent consultation procedure, or, if the plan is not preceded by any consultation procedure, by a special procedure for making the public available. The difficulty lies in the fact that the Law of 12 July 2010 rather awkwardly defined the scope of application of these different procedures.
The order of August 3, 2016 has again reformed the system by formalizing a procedure for public participation by electronic means, which becomes the "common law" information and participation procedure for plans and programmes subject to SEA for which a public inquiry is not required (C. environnement., art. L. 123-19). This is the procedure that will be implemented when the plans and programmes are not expressly subject to a public inquiry or another participation procedure defined by

Law. Unlike the public inquiry, however, public participation by electronic means does not include a debate and is not placed under the authority of the investigating-commissioner ("commissaire-enquêteur").

We are not aware of a national jurisprudence on this specific issue.

[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?

When a plan or programme is likely to have significant effects on the environment of another member state of the European Union, articles L. 104-7 of the Urban Planning Code and L. 122-8 of the Environmental Code provide for the organization of a transboundary consultation procedure. It is either the authorities of the other member state of the French authorities that initiate the procedure. Article L. 104-8 of the Urban Planning Code logically provides for the opposite hypothesis, that of a foreign plan or programme likely to produce effects on the national territory. The French public "may" – and not "must" - then be consulted on the project.
According to the Urban Planning Code, the authority competent to approve the urban planning document (which is a local authority) is in charge of transmitting the information to the foreign authorities.
According to the Environmental Code, the procedure is more centralized. It is certainly deconcentrated for domestic plans: if the public person responsible for drawing up the document is not a government department, it is the prefect who will transmit the file to the authorities of the State concerned (article R. 122-22). But in the case of an external plan, the procedure is clearly concentrated: it is directly the Minister of the Environment who, after informing the Minister of Foreign Affairs, indicates to the State at the origin of the plan the wish of the French authorities to initiate consultations or not.
In any case, the consultation takes place after the environmental report has been prepared.
Furthermore, nothing is said about the consequences to be drawn from the possible unfavourable opinion of the neighbouring State consulted.
We are not aware of a national jurisprudence on this specific issue.

[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?

There is no specific mechanism: the way that public opinions are taken into account depend on the applicable participation procedure. If this is a public enquiry, within a maximum of 30 days following its closure, the investigating commissioner shall submit his report and reasoned conclusions. This report must state the "observations and proposals" that were made during the inquiry (article L123-15 of the Environmental Code). If this a procedure for public participation by electronic means, the Environmental Code (article L123-19-1) provides that a minimum period of 4 days between the closing of the consultation and the decision (as opposed to 2 days before) should allow the results to be taken into consideration. This remains excessively short and highlights the opposition between the speed of procedures and administrative democracy as perceived by successive governments. A summary of the observations must be drawn up, which is made public by the decision-making authority at the latest on the date of publication of the decision. The summary indicates the comments and proposals of the public "which have been taken into account" (which is an awkward wording). In principle, it is the competent authority that draws up this summary. A separate document presents the reasons for the decision: this is important because the obligation to give reasons is undoubtedly the best legal instrument for guaranteeing that participation is taken into account. This is a challenge (limited to the environment) to the principle of non-motivation of general regulatory acts in French administrative law.
With regard to transboundary consultations, the authority that adopted the plan or programme informs "the authorities of the other European Union Member States consulted" (Art. L. 122-9 of the

Environmental Code). It shall make available to them a statement summarizing the manner in which the consultations have been taken into account. The exchange of information must continue over time, as the public person responsible for the plan or programme must communicate to the States consulted the results of the monitoring of the environmental impacts of the plan or programme once it has been adopted (Art. R. 122-23 II C. envir.).

We are not aware of a national jurisprudence on this specific issue.

[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 Code does not provide any provision related such monitoring system to control the effective implementation of measures included in the environmental report of the plan, programme or scheme (R 122-20). However, such monitoring system (with indicators) is essential to ensure good knowledge of the impacts, particularly in the perspective of revision of plans, programmes and other schemes, and to identify any negative effects (see Note méthodologique du Commissariat général au développement durable, Préconisations relatives à l'évaluation environnementale stratégique, 2015, https://www.cerema.fr/system/files/documents/2017/08/Ref_-_Preconisation_EES_cle0b9958.pdf

[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)?
As mentioned in the environmental implementation review 2019 concerning France, "*the French system of legal standing is based on whether the litigant has interests that are affected and is liberal* (interest & standing before the Court & access to justice for environmental associations: see L142-1 of Environmental Code). *However, the european Commission considered that an obstacle to access to justice in France is the high cost of hiring expert lawyers specialised in environmental matters, especially as their involvement is mandatory in certain courts. However, legal aid is available under certain conditions*"; Among the priority action, the Commission mentioned the importance to better inform the public about their right to access justice.
Is it possible to challenge the scoping determination?
Access to justice to challenge a decision which subject a plan or programme to an environmental assessment
According to the article R 122-18 of the Environmental Code, any appeal against the decision requiring an environmental assessment must be preceded by a prior administrative appeal (brought within 2 months following the receipt of the decision) to the environmental authority which adopted the decision. The absence of response is equivalent to an implicit decision to reject the request. From the date of this refusal decision, the applicant has 2 months to file an appeal to the competent administrative court.
Is it possible to challenge a negative screening determination?
In the case of the decision of the authority exempts the plan or the programme from environmental assessment following the case-by-case examination
Such decision constitutes only a preparatory act and it cannot be appealed against directly either through prior administrative appeal (recours gracieux) or through litigation. The appeal must be made against the decision approving or adopting the plan or programme concerned.
See the Council of State opinion n°395916 of 6th April 2016.

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

Many cases have been brought by environmental associations before the administrative courts; these associations support their request for annulment requiring compliance with the obligations of the Directive 2001/42/EC in the light of the case law of the CJUE. They use the same litigation strategy to contribute to ensure compliance with the Directive 2011/92-2014/52/EU by the French authorities (see the recent judgement of the Council of State 15/4/2021 (FNE, n°425424) which annulled provisions of the decree 4/6/2018 modifying the categories of projects, plans and programmes subject to environmental assessment. These litigation actions have focused on the three major issues : functional separation and the real autonomy of the environmental authority at the local scale, the case-by-case examination of plans, programmes or schemes subject to environmental assessment, the delimitation of the concept of plans & programmes). These contentious actions have led to the annulment of various acts (Prefect 'order, ministerial decree, provisions of the Urban Planning Code, Order.); this obliged the judge to consider the complex consequences of the effect of such annulments (regulatory process, time modulation of court judgments.) which could render many others decisions unlawful. As a result, the legislator had adopted new acts to comply with the obligations of the Directive 2001/42 (and also Directive 2011/92-2014/52/UE: see the recent judgement of the Council of state April 2021 see above). Few examples

-Council of State, 19/7/2017 (n°400420, France Nature Environnement): annulment of the articles R. 104 to R. 104-16 of the Urban Planning Code insofar they do not require an environmental assessment of urban planning documents where this is likely to have significant effects on the environment – See above the current project of decree submitted to public consultation to take into consideration this annulment.

-Council of State, 26/6/2015 (France Nature Environnement, n°360212) – preliminary ruling to CJEU - annulment of provisions (designation of the environmental authority) of the decree 2012/616 concerning the assessment of certain plans and documents having an impact on the environment - Judgment of the Council of State 3/11/2016 following the response of the CJEU (C-379/15) – A new decree is adopted: decree 2016/519 reforming the environmental authority.

-Council of State, 6/12/2017 (France Nature Environnement, n°400559) annulment of article 1.1 of the decree 2016/519 (which maintains the designation of the regional prefect as the competent environmental authority)- New decree 2020/844 concerning the environmental authority and the authority in charge of the case-by-case examination (modification of R.122-3.& R 122.6 of the Environmental Code)

-Council of State, 26/6/2019, (France Nature Environnement, n°414931) : annulment of the decree 2017/1039 on new tourist units insofar as it does not subject to an environmental assessment under plans and programmes the creation or extension of new tourist subject to prefectoral authorisation in the absence of territorial coherence schemes (SCOT) or local urban planning (PLU) which are likely to have a significant impact on the environment.

-Council of State, 28/4/2021 (Société civile immobilière, n°437581). The Court recalled the identical role of environmental authorities in accordance with Directives 2001/42/EC & 2011/92/UE. The Court concluded that the irregularity resulting from the violation of the principle of functional separation always constitutes a substantial procedural defect which cannot be neutralized and leads to the illegality of the administrative decision taken as a result of the procedure thus vitiated. It therefore excludes any possibility of regularization process which it had outlined in its previous judgements (see the Law 2019/1147 on energy and climate introduces a new article L 191-1 related on the regularization in the course of proceedings concerning conclusions against a plan or programme in the Environmental Code. The new decree 2020/844 of 3/7/2020 (Law 2019/1147 on energy and climate) distinguishes the authority responsible for the case-by-case examination and the environmental authority. The competence of the prefect is maintained for the case-by-case examination. The decree introduces a system for preventing conflicts between these authorities (R 122-24.1 & R 122-24.2 of the Environmental Code).

[**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?

We are not aware of a national jurisprudence on this specific issue

[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.

We are not aware of the publication of an official study. However, at least one Phd Thesis was dedicated to the SEA directive and its implementation in France: Tristan Aoustin, L'évaluation environnementale des plans et programmes : Vers l'ouverture d'un cadre stratégique au pilier procédural du droit de l'environnement, Limoges, 2015.
The English abstract reads as follows : "The environmental assessment of plans and programes : Towards the opening of a strategic framework to the procedural pillar of environmental law
The Environmental Impact Assessment has proven itself as a tool for prevention of environmental damage and as a tool for public information and participatory democracy. However, experience gained in the implementation of the Directive EIA of 27 June 1985 and of the Espoo Convention of 25 February 1991, has quickly highlighted that in many cases, environmental assessment intervened too late in the decision making process, at a stage where the possibilities for significant changes are limited, so that it is possible to doubt the existence of an impartial administrative authorization taking full account of any impact assessment on the environment and public comments since the responsible political authorities have already decided clearly in favor of a project. You had to go further, because it is in fact at the level of strategic options that structural choices, often irreversible, are carried out, in other words at the level of documents such as town and country planning, to mention only the most current. That's why were adopted Directive SEA of 27 June 2001 on the assessment of certain plans and programmes on the environment, as well as the Kiev Protocol of May 2003 on "Strategic Environmental Assessment", two very ambitious texts concerning a large pan of decision making in the public sector. It is also, only after having carefully determined the scope of the procedure and many difficulties it raises, it will then be possible to appreciate, in a more circumspect way, the "strategic" contributions or legal perspectives of the new requirement, the French ten years experience and a groping transposition, revealing in this regard that the path could still be long to go before full compliance with European and UN constraints."

[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.

The opinions of the environmental authority related to the environmental impacts of national plans, programmes and projects can be found on the website of the Conseil géneral de l'environnement et du développement durable (opinions issued by the authority since 2009) http://www.cgedd.developpement-durable.gouv.fr/les-avis-deliberes-de-l-autorite-environnementale-a3039.html - The decree 2016/519 related the reform of the environmental authority created regional environmental authority missions (MRAe) : see also the order 11/8/2020 on the reference framework of organisational and operational principles of these entities- we also could find all their opinions on their website. http://www.mrae.developpement-durable.gouv.fr

There also is a platform that lists all the projects subject to impact studies (interactive mapping) https://www.projets-environnement.gouv.fr/pages/home/

[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?
See above

[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?
-Ensuring effective autonomy of the environmental authority at local scale and assigning the responsibility to the environmental authority to carry out the case-by-case examination of plans and programmes also at local level (and not the prefect as it is still the case)
- Allowing sufficient time to realize the impact assessment, to make it available to the public (at the earliest possible stage) and to give due consideration to opinions and comments
- Strengthening the training of authorities and the information sharing on environmental assessments through a platform accessible to public
- Ensuring an effective and transparent monitoring of the implementation of the measures identified in the environmental impact assessment
(…)