Avosetta Questionnaire: The SEA Directive

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Environmental Management and Law Association

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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.

The provisions of the SEA Directive have been transposed by Act LIII of 1995 of the on environmental protection ('the EPA') and Governmental Decree No. 2/2005 (I.11) on the environmental assessment of certain plans and programmes ('the SEA Decree') into the Hungarian legal system. The definition of 'plans and programmes' is set out by Article 43(4) of the EPA and further specified by the SEA Decree. The SEA Decree is setting out the acts which shall be subject to an SEA, it is laying down the conditions under which a plan or programme has to undergo an environmental assessment and this legislation is stipulating the conditions for a case-by-case determination on the significance of the likely environmental effects and thereby on the necessity of an 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.

With respect to the transposition of and/or compliance with the SEA Directive, there were no infringement proceeding brought against Hungary. (source:https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=01%2F03%2F2010&decision_date_to=30%2F04%2F2021&EM=HU&DG=ENV&title=&submit=Search)

[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?

Nor the EPA neither the SEA Decree refer to the objective of the SEA Directive explicitly.

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

Court proceedings and decisions are rarely based on the national provisions transposing the SEA Directive (https://eakta.birosag.hu/anonimizalt-hatarozatok). In a case of 2012, the Curia stated an SEA should have been conducted in relation to the modification of the local building code, which modification would affect Natura 2000 sites (https://kuria-birosag.hu/hu/onkugy/kof502320129-szamu-hatarozat). Objectives of the SEA Directive have not been mentioned by the Curia either.

[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 legal definition of plans and programmes according to Article 2(a) of the SEA Directive has been transposed in the EPA under the title "Integration of environmental protection into legislation and different state decisions" (Article 43 of the EPA). Furthermore, this Act provides for the main responsibilities of the developer of the SEA report and the body adopting the plan or programme. According to the EPA, where the preparation of a plan or programme is required by a specific piece of legislation or by a resolution of the Parliament, the Government or a local government, and if it is prepared or adopted by an administrative agency or the Parliament, it shall undergo an SEA. The national term of 'plans or programmes' refers to all elements of the Directive's terminology.

(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.

Art. 43 of the EPA and provisions of the SEA Decree transpose the requirements of the Directive and specify which plans and programmes shall or may be subject to an SEA.

An SEA is obligatory for plans and programmes listed in Annex 1 of the SEA Decree, and plans and programmes not listed in Annex 1 that:

- are prepared for agriculture, forestry, fisheries, energy, industry, transport, traffic, waste management, water management, electronic telecommunication, tourism, regional development and set a framework for the future development consent of activities or facilities listed in any appendix of specific other legislation on environmental impact assessments but are independent from the threshold values and territorial restrictions laid down in specific other legislation; or

- may have significant adverse effects on Natura 2000 areas, on designated water bodies or on protected areas.

The SEA Decree applies both approaches mentioned in the SEA Directive's Article 3(5) in order to determine whether a plan or programme shall be subject to an SEA. Beside listing specific plans and programmes and setting out conditions under which an SEA is mandatory, the SEA Decree provides the cases where the necessity of an SEA procedure is determined by a case-by-case examination.

(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"?

In accordance with Article 43(4) of the EPA, in connection with plans and programmes specified in specific other legislation, which are likely to have a significant impact on the environment, including those plans and programmes which are co-financed by the EU, and in connection with the amendments of these, an SEA shall be conducted containing an environmental report in accordance with specific other legislation. Taking into account the criteria listed in Annex 2 to the SEA Decree and Article 5(1) and (2) of this legislation, the decision on the significance of the likely environmental effects of the plan or programme has to be made by the developer.

(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?

Where an SEA is not obligatory, decision on the significance of the likely environmental effects of the implementation of a plan and programme is made taking into account the criteria listed in Annex 2 to the SEA Decree. For the purpose of decision-making, the developer shall place a request for the opinion of the administrative bodies responsible for the protection of the environment, as defined in Annex 3 to the SEA Decree. When placing such a request for opinion, the developer provides at least the following information in order to ensure that the opinion is suitably founded:

a) terms of reference of planning (title, type, content of the plan or programme, planning area);

b) objectives of the plan or programme;

c) in the case of an amendment, the essence of the amendment and the significance of the amendment within the entire plan or programme;

d) information available and necessary for the application of the criteria listed in Annex 2 to the SEA Decree.

For making a decision on the significance of the likely impacts, the developer shall take into account the opinions received before the deadline fixed by it. If the opinion of the developer

on the necessity of environmental assessment is different from that expressed in the opinions received from the environmental bodies, the developer – to clarify the reasons of such difference in opinion – shall consult with the concerned bodies before making a final decision. The developer shall disclose the decision together with its justifications in his official journal or via other media suitable for informing the general public, and through its homepage, if there is one. In case the developer decides that there is no need for environmental assessment and this decision is at variance with the opinions received from the environmental bodies, the developer shall also disclose the fact of difference of opinions.

(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?

This provision is reflected by Article 1(2)(b) of the SEA Decree which refers to the activities listed by the Annexes the national EIA Decree (Gov.Decree 314/2005) transposing the EIA Directive.

Plans and Programs that **set a framework for the future authorisations** are which

- include provisions or conditions to be compulsorily applied, or criteria to be compulsorily considered during the authorisation procedure, in particular as regards the location, nature, size and operational conditions of such activities, or the direct use of, load to or other uses of, natural resources by such activities;

- require the implementation of any such activities; or

- affects the location, nature, size and operational conditions of such activities, or the direct use of, load to or other uses of natural resources by such activities in other ways (by facilitating, encouraging or restricting them).

(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?

Article 1(3) of the SEA Decree provides that the necessity of an SEA is to be decided on a case-by-case determination of the significance of the likely environmental effects in the case of:

a) regulatory plans , or local construction codes being prepared for a part of a settlement, or other Plans and Programs that determine the use of small areas at the local level;

b) a minor amendment to a plan or programme;

c) plans and programmes other than those mentioned under Point (ii) that set a framework for the future authorisation of activities or facilities representing environmental uses.

(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?

The national SEA legislation does not reflect this conclusion of the CJEU. Relevant example from national court decisions has not been found.

[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 EPA requires that a plan or programme may not be presented in the absence of an environmental report. Further, the SEA Decree provides that the environmental assessment is an independent part or working document of the plan or programme documentation. The Developer has to submit the draft Plan or Programme together with the environmental evaluation and at least a summary of the opinions and comments received during the environmental assessment to the approving body, or, in case the approving body is the Parliament, to the Government. During the approval or submission of the Plan or Programme, or proposal to be submitted to the Parliament, due account shall be taken of the environmental evaluation and the opinions and comments received during the environmental assessment.

[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?

Based on discussions conducted with environmental NGOs, the description and evaluation of reasonable alternatives is not effective in practice, developers often present unrealistic alternatives in order to justify the plan or programme they want to carry out.

(ii) Who makes the scoping determination?

To identify the specific contents and the level of detail of the SEA Report, the developer has to place a request for opinion of the environmental authority as soon as the necessary information becomes available to it and shall fix a deadline for formulating the opinion.

If the opinion of the developer on the contents is different from that expressed in the opinions received from the authority, the developer – to clarify the reasons of such difference in opinion – shall consult with the concerned bodies before making a final decision.

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

Yes, the developer shall forward the contents of the SEA, the corresponding schedules, and the proposals for additional consultations with the environmental authorities, as well as the proposed ways of informing the general public, to the environmental authorities and shall also disclose it to the general public.

With regard to significant adverse environmental effects that are potentially transboundary, the concerned public shall also be informed by the developer.

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

Taking reasonable alternatives into account is required by the SEA Decree, and Annex 4 of this legislation requires that – in relation to the reasonable alternatives - the SEA Report shall cover:

- short description thereof, including the justification of the selection of the given alternatives together with a brief description of the assessments forming the rationale thereof;

- a description of the environmental effects and consequences of the implementation of the plan or programme, or its alternatives, including an evaluation of the plan or programme and the alternatives on the basis of the environmental consequences, and an identification of the environmentally acceptable alternatives.

[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.

Provisions of the SEA Directive on consultation have been transposed into the SEA Decree correctly. One of the main problems is that developers do not carry out an SEA, however, if the SEA procedure is conducted, the relevant authorities and the public are also consulted.

Example: Resolution No. 1146/2016 (III.25) of the Government on the National Flood Risk Management Plan of Hungary. According to pt. a) of Article 1(2) of and pt. 7 of Annex 1 to the SEA Decree, an SEA is mandatory for national programmes concerning waters which is required to be prepared under Article 2 of Act LVII of 1995 on water management. (Government Resolution: http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/mk16042.pdf , documentation of the SEA procedure: https://www.vizugy.hu/index.php?module=vizstrat&programelemid=145)

[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?

Provisions of the SEA Directive on transboundary consultation has been transposed into the SEA Decree correctly. With regard to significant adverse environmental effects that are potentially transboundary, the concerned public shall also be informed by the developer durin scoping.

[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?

In this regard no relevant national jurisprudence or guidance was identified.

[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 SEA Decree requires that the plan or programme should include measures on the monitoring of the significant environmental effects arising from the implementation thereof. Monitoring measures specifically include an identification at an early stage of unforeseen adverse effects during the preparation of the plan or programme and an identification of the actions to be taken in case adverse effects occur.

The SEA Decree provides that the existing detection, measuring and monitoring network/systems may be used, and the monitoring provisions already in force or the revision of the plan or programme may be applied.

[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?

Decision on SEA screening, scoping or on the adoption of the SEA Report does not have a form of administrative act which could be subject of appeal or judicial review.

The plans and programmes subject to an SEA can be adopted by different public bodies and by norms which can be legally not binding or can have the force of law. Where the conditions stipulated by Act CLI of 2011 on the Constitutional Court ('Act CLI/2011') are met, the legal review of laws and normative resolutions can be initiated before the Constitutional Court.

[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?

Such national court decision has not been identified.

[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).

Such development has not been identified.

[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.

http://beszamolo2010.jno.hu/JNO_beszamolo_2010.pdf

Regarding the practical application of the provisions of the SEA Decree - in line with the findings of the investigations conducted by the office of the Ombudsman for Future Generations in individual cases - it was stated that during the elaboration of the town planning tools the local governments mostly do not carry out an SEA procedure. Further, in the case of a county town it was stated that the SEA was not prepared during the elaboration of the settlement structure plan, local building regulations and regulatory plan for the entire territory of the settlement although it was required by the SEA Decree.

http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2021/SEA_EA-Team_JE_recommendations_2021.pdf

http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2020/Making_the_green_transformation_happen_october2020final.pdf

The SEA is indeed "fit for purpose", however, its implementation should be improved. SEA should be applied on broader level (e.g. for energy networks) and it should be binding and more transparency should be ensured.

[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.

Such database has not been identified.

(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.

Such database has not been identified.

[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?

No.

[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?

Most important problems in the implementation of the national legislation transposing the SEA Directive are:

- lack of effective legal remedy against the decisions or omissions of the developer and against the SEA report,

- failure in the presentation of real and reasonable alternatives of the plan or programme.

[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?

Based on the research of the lawyers of Association Justice and Environment[1], it was concluded that the SEA is "fit for purpose". Overall, the SEA Directive brings benefits to the EU, is coherent with other legislation and does not cause disproportionate costs. However, in order to unleash the full potential of the SEA Directive, its implementation should be improved as follows:

- provide clarity and a harmonised approach as regards the scope of application of the Directive;

- improve the public participation in SEA and strategic planning procedures, by providing early and effective opportunities to participate;

- ensure that a wide range of alternatives are assessed depending on the level of the plan or programme at issue.

[1] http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2021/SEA_EA-Team_JE_recommendations_2021.pdf