Avosetta Questionnaire: The SEA Directive

Report on Germany – Bernhard Wegener

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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 legal framework is found in Federal Environmental Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung - UVPG), especially in Part 3 of this Act.

[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.

No.

[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?
The objective has been only partly and rather restrictively transformed in § 3 UVPG. The overall approach of the legislation is a "containment"-strategy, that tries to limit the scope and the impact of SEA as much as possible.

(ii) Has the Objective been used by your national courts to assist them in the interpretation of relevant provisions of national law?
The national courts regularly refer to the jurisdiction of the ECJ and its wide interpretation of the SEA-directive. Whenever they tend to expend the SEA beyond the wording of the relevant national legislation, they refer the case to the ECJ.

[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?
Most plans and programmes subject to a SEA are listed in an annex to the Environmental Impact Assessment Act. The list differentiates between those plans and programmes for which a compulsory SEA is foreseen and those plans and programmes for which a SEA has to be carried out only if they provide a framework for projects requiring an EIA.
A compulsory SEA is inter alia foreseen for the following Plans and programmes (here SEA is - in principle - always required):

 Transport infrastructure plans at Federal level,
 Certain expansion plans pursuant to the Air Traffic Act (Luftverkehrsgesetz),
 Risk management plans pursuant to the Federal Water Act (Wasserhaushaltsgesetz) and updating of such plans,
 Programmes of measures pursuant to the Federal Water Act,
 Spatial plans drawn up by the states (Länder) pursuant to the Federal Regional Planning Act (Raumordnungsgesetz),
 Spatial plans drawn up by the Federal Government pursuant to the Federal Regional Planning Act,
 Development plans pursuant to the Federal Building Code (Baugesetzbuch),
 Federal Requirements Plans pursuant to the Energy Industry Act (Energiewirtschaftsgesetz),
 Federal Sectoral Plans pursuant to the Grid Expansion Acceleration Act (Netzausbaubeschleunigungsgesetz),
 National action programmes pursuant to Council Directive 91/676/EEC,
 Spatial Offshore Grid Plan pursuant to the Energy Industry Act,
 Establishment of regions and sites for above-ground exploration pursuant to the Repository Site Selection Act (Standortauswahlgesetz),
 Establishment of sites for underground exploration pursuant to the Repository Site Selection Act.

According to § … the Environmental Impact Assessment Act there is also a SEA requirement for plans and
programmes, for which an impact assessment is required under the Federal Nature Conservation Act.

A SEA for plans and programmes setting a framework for the future development consent of projects subject to EIA is foreseen inter alia for:

 Noise abatement plans pursuant to the Act on the Prevention of Harmful Effects on the Environment caused by Air Pollution, Noise, Vibration and Similar Phenomena (Bundes-Immissionsschutzgesetz),
 Air pollution control plans pursuant to the Act on the Prevention of Harmful Effects on the Environment caused by Air Pollution, Noise, Vibration and Similar Phenomena,
 Waste management concepts pursuant to the Closed Cycle Management Act (Kreislaufwirtschaftsgesetz),
 Updating of waste management concepts pursuant to the Closed Cycle Management Act,
 Waste management plans pursuant to the Closed Cycle Management Act,
 Waste avoidance programmes pursuant to the Closed Cycle Management Act,
 Operational Programmes under the European Regional Development Fund, the European Social Fund, the European Cohesion Fund and the European Maritime and Fisheries Fund, along with rural development programmes under the European Agricultural Fund for Rural Development.

The Environmental Impact Assessment Act also contains provisions under which a case-by-case examination must be carried out for plans and programmes setting a framework for future development consent of projects not listed in the above mentioned Annex of the Environmental Impact Assessment Act. A case-by-case examination must also be carried out for minor modifications of plans and programmes and for plans and programmes that establish the use of small areas at local level.

For those plans that are prepared according to state law, the Länder either have similar regulations or refer to federal law.

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 former version of the law governing the SEA (§ 2 UVPG) required a SEA only for those plans or programmes which the planning authorities were legally obliged to prepare. The law (now § 2 para 7 UVPG) has been changed with explicit reference to Case C-567/10.

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 earlier decision of the ECJ concerning the same matter (Case C-290/15) has created some concern in German literature (see *Faßbender*, Die Strategische Umweltprüfung: Anspruch und Wirklichkeit, ZUR 2018, 323, 326) and jurisdiction (see OVG Münster, 29.11.2017 – 8 B 663/17, ZUR 2018, 159, 162 f.; Bay VGH, 21.2.2018, Vf. 54-VI-16). The decisions of the ECJ are considered by some as (too) far reaching, because the included decisions/"programmes" of a rather political or standard-setting nature such as the famous TA Luft and the TA Lärm.

(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.

I tried to give an overview of the plans and programmes subject to SEA above. From a technical point of view, there is a general definition in § 2 (7) UVPG. This general definition is accompanied by a long but non-exhaustive list of P+Ps in Annex 5 of the UVPG. Case C-300/20 is a pending reference for a preliminary ruling by the German Bundesverwaltungsgericht (Az. 4 CN 4.18). The case concerns a substantial reduction of the area of an old "Landschaftsschutzgebiet" (protected area with reduced options for economic development). The category of the "Landschaftssschutzgebiet" has until now

been regarded as rather weak and flexible. No SEA concerning the reduction (and similar reductions in the past) has been carried out. The ECJs answer to the reference by the BVerwG could substantially alter that. It would also have substantial implications for the standing of Env-NGOs in such cases and for the general procedures of spatial planning ("Raumordnung") in Germany. The general practice has been, that the designation of protective areas (and their reduction) does not have to be subject of a SEA. The BVerwG warns that a SEA-obligation for the establishment (and reduction) of such protective areas could lead to legal uncertainty concerning their current legal status and could thereby weaken their protective quality. This concern seems somewhat exaggerated and is probably meant to "nudge" the ECJ into not establishing an SEA-obligation in such cases. The BVerwG argues that the establishment of specific spatial areas has no sufficient link to projects subject to an EiA and therefore do not require a SEA. However, such spatial planning can have significant effects on the (non-)admissibility of such projects and the reference shows again the legal uncertainty and the many open questions concerning 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"?

For the P+P in Annex 5 UVPG a significant environmental effect is generally established by law. For other P+P such an effect must be considered (and potentially established) in a scoping-process according to § 35 (2) UVPG. Guidance for the deciding administration is given in Annex 6 UVPG. The administration shall consider the limiting effects of avoidance- and compensation-measures when deciding about the SEA-obligation.

(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?

Criteria for screening are listed in Annex 6 UVPG. The competent administrative authority. Publication only on request.

(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 seems to be the decisive element in limiting the scope of the SEA in the jurisdiction of the BVerwG. The concept is under actual consideration of the ECJ in case C-300/20 (see 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?

According to §§ 13 et seq. BauGB a SEA is not required for P+P concerning less then 20000 square meters (in some cases less then 70000 square meters) of space inside already populated areas. The same is true for P+P concerning areas of less then 10000 square meters that intend to establish housing in a direct connection to already populated areas. According to the BayVGH, Beschluss v. 09.05.2018 – 2 NE 17.2528, Para 24 these provisions are in accordance with the SEA-directive.

(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?

Rather the practise then the legislation. The latter follows a rather formalistic approach and intents legal clarity and restriction. The practise of the courts is somewhat more open in so far as the courts follow the decisions and the approach of the ECJ.

[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?

According to § 33 UVPG the SEA is an integral part of the planning process. To avoid the duplication of assessments, § 39 (3) stipulates: "If plans and programs are part of a multi-stage planning and approval process, in order to avoid multiple tests, when defining the examination framework, it should be determined at which of the stages of this process certain environmental impacts are to be examined primarily. The nature and extent of the environmental impacts, technical requirements as well as the content and decision-making object of the plan or program must be taken into account. In the case of subsequent plans and programs as well as the subsequent approval of projects for which the plan or program sets a framework, the environmental assessment should be limited to additional or other significant environmental impacts as well as necessary updates and in-depth information."

[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?

Rather a non-issue in the national jurisprudence.

(ii) Who makes the scoping determination?

§ 39 (1+2+4) UVPG: "(1) The authority responsible for the strategic environmental assessment defines the scope of the strategic environmental assessment including the scope and level of detail of the information to be included in the environmental report according to § 40. (2) The scope of

assessment, including the scope and level of detail of the information to be included in the environmental report, is determined taking into account Section 33 in conjunction with Section 2 Paragraph 1 according to the legal provisions that are decisive for the decision on the preparation, acceptance or modification of the plan or program. The environmental report contains the information that can be determined with reasonable effort and takes into account the current state of knowledge and public statements known to the authority, generally recognized test methods, content and level of detail of the plan or program as well as its position in the decision-making process. (4) (4) The authorities, whose environmental and health-related area of responsibility is affected by the plan or program, are involved in determining the scope of the strategic environmental assessment and the scope and level of detail of the information to be included in the environmental report. On the basis of suitable information, the competent authority shall give the authorities to be involved the opportunity to discuss or comment on the stipulations to be made in accordance with paragraph 1. Experts, affected communities, authorities to be involved in accordance with Section 60 (1), environmental associations recognized in accordance with Section 3 of the Environmental Remedies Act and other third parties can be called in. If the authorities to be involved have information that is useful for the environmental report, they shall pass this on to the competent authority."

(iii) Is the scoping determination available to the public?
Only on request or indirectly via the later SEA-report.

(iv) How is the concept "reasonable alternatives" considered in practice – either in national legislation, official guidance and / or national jurisprudence?
Gerd knows probably much more about this, than I. As far as I can see, the usual problems of the nature, the scope, the location and the quality of alternatives arise. Different from other legal regimes, a zero-alternative is formally always part of the assessment. In all studies that I could get my eyes on, the "strategic"-element of the SEAs has been described as lacking or deficient. Alternatives of a more substantial nature are not really considered. I could find not a single study indicating a SEA that led to a substantial change in the planning.

[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.

I do not see particular problems with the consultation process, which is rather clearly structured mainly in §§ 42 et seq UVPG. As with other early stage or high level consultation, the SEA tends to be a consultation of special interests, NGOs and other stakeholders.

[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?

There is a standard procedure for transboundary SEA in §§ 60-63 UVPG. Germany has signed and ratified an special agreement with Poland about transboundary SEAs.

[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?

§ 43 (2) UVPG: "The result of the review in accordance with paragraph 1 must be taken into account in the procedure for drawing up or amending the plan or program."

[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).

§ 45 UVPG: (1) The significant environmental impacts resulting from the implementation of the plan or program are to be monitored, in particular in order to identify unforeseen adverse effects at an early stage and to be able to take appropriate remedial measures. The necessary monitoring measures are to be determined with the adoption of the plan or program on the basis of the information in the environmental report. (2) Insofar as federal or state legislation does not stipulate any deviating responsibility, monitoring is the responsibility of the authority responsible for the strategic environmental assessment. (3) On request, other authorities shall provide the competent authority in accordance with paragraph 2 with all environmental information that is necessary for the performance of the tasks in accordance with paragraph 1. (4) The results of the monitoring shall be made available to the public in accordance with the federal and state regulations on access to environmental information and the authorities named in Section 41 and shall be taken into account when the plan or program is re-established or changed. (5) Existing monitoring mechanisms, data and information sources can be used to meet the requirements of Paragraph 1. Section 40 (4) applies accordingly.

[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).

As mentioned above, the BVerwG is generally of the opinion, that at least the total omission of an obligatory SEA renders the administrative decision void. General considerations could limit these effects to a certain extend.

(iii) 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)?

After ECJ C-137/14 the German legislator had to abolish the "Präklusion" (the exclusion of access to justice for parties which had not taken part in administrative proceedings or had not brought forwards certain arguments during those proceedings. The "Präklusion" however has not been abolished for SEAs. The EU-law-conformity of this "resistance" by the German legislator is strongly disputed in the literature (*Jachmann*, page 24 et seq, https://tietje.jura.uni-halle.de/sites/default/files/BeitraegeEVR/Heft%2017_cc.pdf).

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

Only in court proceedings against the decision about the P+P carried out without a SEA.

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

Only in court proceedings against the decision about the P+P carried out without a SEA.

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

Some implications have been mentioned above with reference to the pending Case C-300/20.

[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?

Nothing extraordinary.

[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 to my knowledge.

[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.

There exists a rather limited number of articles by legal scholars but a large number of studies by the administration itself, notably by the Umweltbundesamt (German EPA). They can be assessed via the UBA-homepage umweltbundesamt.de. There is even a study about the SEA-"trends" in other countries (https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2018-10-18_texte_82-2018_internationale-trends-umweltpruefungen.pdf – in German).

[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.
As far as I can see, there is no national database. There is however a study on all 18 SEAs carried out on the federal planning level until 2017: https://www.umweltbundesamt.de/sites/default/files/medien/1410/publikationen/2018-10-18_texte_81-2018_sup-bundesplanung.pdf. Note that these SEAs represent only a friction of the total number of SEAs carried out in Germany.

[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?

The general impression in the literature is that of a disappointment of high hopes initially attributed to the directive (see *Faßbender*, Die Strategische Umweltprüfung: Anspruch und Wirklichkeit, ZUR 2018, 323). SEAs generally seem to have a very limited practical impact. They are often not more than "patient (non-consequential) paper", normally carried out by private consulting firms. Main reasons for this bleak picture are the political unwillingness to strategic environmental planning and the "annex"-nature of the SEA which is normally integrated in an existing planning process following its own well established and often environmentally "non-strategic" approach. Often the SEA is carried out at stages where fundamental decisions have already been well established. Public participation in the SEAs is often large in numbers but limited in effect. Main reasons are the abstract and complex nature of many SEA and the time and resource-limits for public participation.

[17] Any other significant issues? Are there any other significant issues concerning the implementation of provisions of the Directive in your country which you consider are worth mentioning here?

[18] **General assessment and / or any recommendations:** Do you have any overall view of the effectiveness of SEA in Europe and / or any recommendations for improvement?

The practical effects of the SEAs is unclear and often doubtful. Are authorities really doing more or different things than before? At least they now have a structured programme of environmental impact assessment for P+P. But they regularly "outsource" its conduct to institutionally weak and economically dependent private consulting firms eager to get the next SEA-contract and therefore all the more willing to testify positive SEA-results.