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Avosetta Questionnaire: The SEA Directive – Italy Report

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[1] National legislative context: Identify and summarise the relevant national legislation transposing Directive 2001/42/EC.

The SEA Directive has been primarily transposed into national law through Legislative Decree of 3 April 2006, No 152 (specifically, Part II, titles I and II), also referred to as 'The Environmental Code', as subsequently amended and integrated by Legislative Decree 16 January 2008, No 4 and by Legislative Decree 29 June 2010, No 128.

Further norms related to SEA for instruments implementing urban plans *('strumenti attuativi di piani urbanistici'*) can be found in the Decree No 70 of 2011.

Additionally, provisions regarding SEA – particularly with respect to specific procedural aspects of implementation – can be found in legislation adopted by the Regions and the Autonomous provinces. This is because in Italy, competences regarding the adoption and implementation of plans and programmes which may be subject to SEA are divided between the central State and the Regions. Accordingly, the Environmental Code [article 7(6) and (7)] distinguishes between two levels of SEA procedures: the State level and the regional level, depending on the administration who is competent for the final adoption of the plan or programme.

On the limits of regional legislative competences regarding SEA, the Constitutional Court (No 58 of 2013) affirmed that Regions cannot deviate *in peius* compared to the standards and requirements set by national law (in the specific, Regional law cannot exclude certain plans from SEA when this is mandatory in national law). They can, however, introduce more stringent requirements than those set by national law (*principio di maggior tutela*).

Regarding the actual transposition of the SEA requirements into the domestic system, in Italy these have mostly been integrated into the existing procedures for the adoption of plans and programs.

As for the subjects who are competent for the SEA evaluation (i.e. competent authorities, or 'environmental authorities'), these are: at state level, the competent authority for the SEA is the Ministry for the Ecological Transition (which has recently substituted the former Ministry for the Environment), which gives the final opinion in agreement with the Ministry for Cultural Heritage; at the regional level, the role of the competent authority is vested in either the Region or at the local level (Municipalities) depending on the competence for the approval of the plan/program which is subject to SEA.

It is to be noted that the Legislative Decree distinguishes between the competent authority (autorità competente) which corresponds to the so-called 'environmental authority', and the planning authority (autorità procedente), who is the authority proposing the plan or programme.

For a more detailed outline of the tasks of these respective authorities, see answer to questions n. 1 and n. 2 of the Addendum to the present questionnaire (in the final part of this document)

Other actors involved in the SEA procedure in Italy are the 'subjects with specific environmental responsibilities'. On this, see answer to question n. 5 of the Addendum to the present questionnaire.

[2] EU infringement proceedings?

In 2004, the Commission had started an infringement action against Italy for failure to transpose the SEA Directive. This was then suspended following the adoption of Legislative Decree No. 152/2006. Meanwhile, Italian courts had denied that the Directive could have direct effect in the absence of its implementation (TAR Lazio, Roma ter, No 82/2006). The lack of direct effect of Directive 2001/42 was recently reaffirmed in the decision of Administrative Court for the Veneto region (TAR Veneto, decision 1366/2014). In that decision the court declared invalid an order of the Municipality which disapplied regional legislation because in contrast with EU law (i.e. Directive 2001/42). To this end, the Court considered that the SEA Directive does not have direct effect, since 'it is not possible to consider as self-executing the EU directives that, albeit in a detailed fashion, introduce in the legal order a new legal instrument, since these new instrument must necessarily be transposed and implemented in the domestic legal system'.[1]

So far, at least since 2010 no new infringement proceedings have been launched against Italy in relation to the SEA Directive. However, the 2018 Report on the implementation of the SEA Directive in Italy noted that the Directive's application, particularly at the regional level, was over the years the object of a few 'EU Pilots' (an informal pre-litigation procedure that allows to address possible divergences through a collaborative dialogue between the Commission and the Member States). According to the Report, these 'EU Pilots', which have now been closed, have contributed to solve some of the inconsistencies between the Italian normative and procedural framework and the Directive (source: Rapporto sull'attuazione della VAS (ie. SEA) in Italia, Ministero Ambiente, 2018).

[3] Objectives (Art. 1)

(i) Is the Objective of the Directive (Article 1) reflected in your Member State's national legislation?

Yes. Article 4(4) of Legislative Decree No. 152/2006, in indicating the objectives of the SEA, reproduces almost literally the objectives indicated in article 1 of the Directive.

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

The objectives of the SEA are often stated in national courts decisions, although the relevance that the court attach to these may vary. In some decisions [eg. Consiglio di Stato, 20 May 2014,

[1] The original Italian text of the decision reads: 'La prevalente giurisprudenza esclude che la Direttiva n 42/2001 abbia effetto diretto, non potendo considerarsi self executing le direttive comunitarie le quali, ancorché in modo dettagliato, introducono un nuovo istituto nell' ordinamento degli Stati membri, dovendo questo necessariamente essere recepito e disciplinato dal legislatore interno'.

No. 2569], SEA objectives have been recalled with a view to highlight the difference between the scope and purpose of SEA and those of the EIA, and on this basis reach a determination of whether or not the amendment of a plan with respect to the location of a given development project was to be subject to SEA, or whether the fact that an EIA was carried out for the project was sufficient. It must be noted that this is now envisaged in a specific provision of the Environmental Code (art 6.12).

In another decision, the court makes explicit reference to the scope and objectives of the SEA in order to underline the need of the environmental assessment for a specific plan or programme, even where this concerns a relatively small area [see TAR Molise, 6 June 2019, No 209].

Finally, in another interesting decision, the objective and purposes of the SEA were recalled to reaffirm the need for a distinction between the authority competent of carrying out the SEA (competent authority) and the planning authority (i.e. the authority which proposes and subsequently approves the plan or programme). Legislative Decree 152/2006 distinguishes the two authorities, but this has in practice gave rise to controversies: see on this: TAR, Milano sez II, 15 Maggio 2010, No 1526, affirming the importance that competent authorities are not internal to the administration which is proposing the plan/programme; but this decision was subsequently reversed on that point in appeal (Consiglio di Stato, 12 January 2011, No 133).

[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?

The definition of 'plans and programmes' in Art 2(a) is transposed almost literally in Italian law through article 5(1)(e) of Legislative Decree No. 152/2006.

(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))?

Article 3(2) is transposed almost literally. For what concerns the plans and programmes which are subject to screening pursuant to article 3(4) and (5) of the Directive, Italian legislation [art 6(3) and 6(3-bis) of Legislative Decree 152/2006] provides for an assessment on a case by case basis, according to a specific procedure envisaged in article 12 of the Decree. For the screening, the competent authority shall take into account the criteria listed in the relevant Annexes to the Decree (which reproduces Annex I to the Directive).

Additionally, more detailed regulation of SEA for plans and programmes can be found in Regional Laws, often including mandatory SEA or screening for specific types of plans and programmes. For example, in several Regions SEA is mandatory for all land management plans (*Piani Regolatori generali*) independently on whether they include projects subject to EIA.

(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"?

Legislative Decree 152/2006 refers to significant effects on the environment and on *cultural heritage*. This has been interpreted in both regional legislation and case-law to include plans significant impacts on landscape.

Furthermore, article 5(1) (c) offers a specific definition of environmental impacts in the context of environmental assessments, as 'significant impacts, direct or indirect, of a plan, programme or project, on the following factors: population and human health; biodiversity, with special attention on species and protected habitats under Directives 92/43/CEE and Directive 2009/147/CE; territory, land, water, air and climate; property, cultural heritage, landscape; and the interaction among the above listed factors'.

Beyond this, there is no specific guidance in Italian law regarding the concept of significant environmental effects, although some technical guidance has been prepared by ISPRA (the Italian institute in charge with the technical and scientific support to the Ministry for the Ecological Transition (formerly Ministry for the Environment) regarding environmental assessments).

With respect to case-law, it is worth mentioning a ruling of the TAR (Regional Administrative Tribunal) of the Sicily Region (judgment No. 2152/2011), in which the tribunal read the definition of significant impacts in article 5(1)(c) (see above) as including not only the negative or adverse effects on the environment, but any 'alteration, qualitative or quantitative, direct or indirect… *positive* or negative of the environment'; according to the tribunal, SEA needs to be carried out 'anytime there is an interaction (even positive) between the plan or programme and the environmental components'. The ruling in question concerned the legality of a landscape plan. In that respect, it contrasts previous jurisprudence which tended to exclude landscape planning from SEA, since it usually only involves positive alterations of the environment, that enhance the level of environmental protection.

Who determines whether a particular plan or programme is "likely to have significant environmental effects"?

According to Italian law, unless otherwise agreed with the planning authority, it is the competent authority (= the authority competent for the environmental assessment) that determines whether the plan or programme may have significant environmental impacts. In making this determination, the competent authority takes into account the results of the consultation and expert opinion provided by the technical commission, which is competent to assess the technical aspects of the plan or programme.

(iv) Is there screening? If yes, in what context(s) and how does it operate? Who makes the screening determination?

Italian legislation does provide for the screening procedure. In that respect, articles 6(3) and 6(3bis) of Legislative Decree 152/2006 transpose article 3(3) and (4) of the Directive.

In both cases, the screening determination is made on a case-basis, and is carried out by the competent authority, which evaluate on a case by case basis whether the plan/programme is likely to produce significant environmental effects.

Is the screening determination available to the public?

Yes, the screening determination, including the rationales, are made available to the public by means of publication on the relevant websites.

(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?

Italian case-law clarified that for the plans/programmes for which SEA is mandatory this must be carried out also where there are no projects subject to EIA.

With specific respect to the provision in article 6(3bis), which corresponds to article 3(4) SEA directive, it is interesting to note that Italian law does not include the reference to EIA projects, but simply refers to plan and programmes which set the framework for future development consent of projects.

This aspect was also touched in a ruling of the Italian Constitutional Court. In its judgment No 58/2013 (ECLI:IT:COST:2013:58) the Court asserted that the screening procedure provided in article 6(3bis) also apply when the plan does not have as its object projects for which EIA is required. On this point, the Court stressed the difference between SEA and EIA, and considered that a plan may need SEA when, although it refers to project(s) which does not require EIA, it nevertheless has a significant impact on the environment.

(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?

The interpretation of the 'small areas' concept has been frequently raised in litigation before administrative courts. The case-law on this point is consistent in considering small dimension of the area affected as irrelevant if the plan/programme is likely to have a significant environmental impact. Therefore, plans/programmes cannot be automatically excluded from SEA or from screening procedure simply on the basis that they only affect small areas at local level [See Consiglio di Stato No 4926/2012; see also TAR Marche, Sez I No 737/2020; see also confirmed by Constititutional Court, No 178/2013].

More specifically, the upper administrative court (Consiglio di Stato no 4926/2012) considered that the significance of the environmental impact of a certain programme, which concerned a relatively small area, did not derive from hypothetical or abstract elements, but it emerged from the dimension of the project, the fact that it concerned a wide intervention on the road network and traffic mobility in the area, involved more than one municipality, and caused a considerable

modification of the area concerned, changing the destination and use of the land from being predominantly used for agricultural purposes to a centre for the distribution of goods.

(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?

Omissis

[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?

Article 11 of Legislative Decree No. 152/2006, which outlines the modalities for the carrying out of the SEA, specifies in paragraph 3 that 'the evaluation phase shall be made prior to the approval of the plan/ programme, or at the start of the relevant legislative procedure'.

In addition, the Consiglio di Stato has, in a series of consistent decisions, further stressed the requirement that SEA—which forms a phase internal and integral to the procedure for the approval of plans or programme ('*passaggio endoprocedimentale'*) must be carried out prior to the approval, so to identify as soon as possible environmental interests and relevant impacts (see, eg. : Consiglio di Stato, Sez IV, 26 February 2015 No 975; Consiglio di Stato, Sez IV, no 6438/2019).

However, the 2019 Ministry of Environment Report on the implementation of SEA Directive in Italy (p 37) highlights several difficulties in the integration of the SEA in the planning process, noting that SEA procedure is often started when the planning process is already advanced, and this undermines the possibility that sustainability objectives are effectively integrated and considered in the final decision.

Are there any practical examples demonstrating the avoidance of duplication of assessment where there is a hierarchy of plans and programmes? How has this provision been transposed?

Article 12(6) of Legislative Decree 152/2006 addresses the need to avoid a duplication of assessments by providing that 'the screening or SEA procedure for modifications of plans or programmes, or the instruments that implement plans and programmes, that have already been subjected to screening or SEA, is limited to consider only those environmental impacts that have not been previously identified in the normative instruments adopted at a different (higher) hierarchical level'.

In practice, this provision is relevant especially for the relationship between the General Regulatory Plan ('*Piano Regolatore Generale' - PRG*) and the implementation plans ('*piani attuativi'*), concerning territorial and land management. Courts have tended to interpret narrowly this provision, often affirming that any planning choice contained in an implementation plan (implementing a PRG) had to be subject to SEA or at least to screening wherever they present elements of significant environmental impact; this principle must be asserted *a fortiori* wherever the general regulatory plan had not been itself subject to SEA, and

where the implementation plan contained significant divergences compared to what foreseen in the general planning instrument (PRG) (see on this point, TAR Liguria, sez I, 2 Luglio 2013, no 982; TAR Umbria Sez. I n. 362/2020).

With respect to urban planning instruments (*strumenti attuativi di piani urbanistici che comportano variante a piano sovraordinato*), article 16 of Law 1150/1942 has been amended by Law 106/2011 in the attempt to further simplify and avoid duplication of tasks and procedures. Accordingly, article 16 excludes from the requirements of SEA the instruments implementing urban plans, where those plans have already been subject to SEA. Specifically, SEA is not needed when the urban implementation plan does not modify the general plan. Conversely, SEA or screening are needed if the implementing instrument modifies some elements of the general plan, although in that case limitedly to the aspects that have not been considered during the assessment of the general plan.

[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?

The 2019 Report containing the study on the implementation of SEA in Italy (this is the most recent report made publicly available) has highlighted specific weaknesses in the SEA documents (presumably including the environmental report) produced by the planning/proponent authority, as these often lack the minimum contents required by the Decree or are not coherent with the progress made in relation to the approval of the plan.

(ii) Who makes the scoping determination?

In Italy, the scoping phase is carried out by the proponent/planning authority, which is responsible for the drafting of a preliminary report (scoping report) including a description of the plan/ programme and the necessary data to verify the possible significant environmental impacts arising from the implementation of the plan or programme; in this phase, the planning authority also is required to consult the competent authority and the other subjects which are competent in the environmental field with a view to define the scope and level of details of the information to be included in the environmental report.

Subjects competent in environmental issues include public administrations and public bodies (regional or local) that, for their specific competences and responsibilities in the field of environment, may be interested in the environmental impacts due to the implementation of the plans/programmes.

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

The law does not expressly provide that the scoping determination, and the preliminary report, are made available to the public. Normally, information made publicly available include the proposal of the plan or programme, the environmental report and a technical summary.

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

There is no official guidance in Italian law on the identification of reasonable alternatives. However, ISPRA has published some informal guidance, recommending that alternatives be identified according to the scope of the plan and programme. In particular, once defined the scope of the plan/ programme, the alternatives can relate to the structure or design of the plan/programme, particularly with respect to the allocation of financial resources, typologies of actions, the location, technological solutions, and the modalities for the implementation and management of the plan/programme, including its temporal development (this list of examples is however not exhaustive). Moreover, a comparison of the alternatives must take into account the evolution of the state of the environment as a result of the implementation of the plans/programmes; the zero alternative must also be considered [Source: ISPRA, 2015: Indicazioni operative a supporto della valutazione e redazione dei documenti della VAS (i.e. SEA)].

[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.

Italian legislation (Legislative Decree No. 152/2006) envisages consultations in at least two stages:

- On the preliminary report (scoping phase), whereby the proponent authority enters consultation since the very beginning with the competent authority and other subjects competent and/or responsible on environmental issues. This consultation is for max 90 days from the date when the preliminary report is sent.
- On the environmental report (article 13(5) Legislative Decree and article 14): The environmental report, and the proposal of plans and programmes subject to SEA must be made publicly available on the website of the Environmental Evaluations for public information and consultation.
- Furthermore, a specific feature envisaged in the legislation is the Technical assessment performed by the Technical Commission for the Assessment of Environmental Impacts. The Commission, in dialogue with the planning authority, assess the plan/programme and the environmental report, also in the light of and in the light of the comments and remarks raised by the public or arising from the transboundary consultation.

[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?

Transboundary consultations (article 32 Legislative Decree 152/2006) are initiated by the Ministry for the Ecological Transition, who, in agreement with the Ministry for Cultural Heritage and the Ministry of Foreign Affairs and International Cooperation, notifies the other state(s) potentially affected of the opportunity to indicate its interest in participating to the SEA procedure. In case of SEA of plans and programmes adopted by Regions and that may have transboundary effects, the Regions or the autonomous provinces inform promptly the Ministry that provides to activate the request of expression of interest from the foreign states affected.

According to a report on SEA implementation, during the period 2011-2017, 24 transboundary consultation have been carried out for plans and programmes at both regional and national level. Italy also has participated in SEA procedures carried out by other states (including Montenegro, Croatia, Greece, France and Slovenia). In those cases, the procedure followed is that envisaged in article 7 of the SEA Directive and in art 10 of the UNECE Kiev Protocol. The report suggests/indicates that there is currently a consolidated practice of collaborative relationship between Italy and neighbouring countries in relation to SEA.

[9] **"Taken into account" (Art. 8): How is this provision understood? Is there any significant national jurisprudence? Are there any specific mechanisms in place to monitor compliance with this particular obligation?**

The opinions and remarks expressed by the public, and those resulting from the transboundary consultation, are taken into account by the Commission when drafting the Technical assessment (see point 7 above). The Commission's technical assessment, together with the opinion formulated by the Ministry for Cultural Heritage, provide the basis on which the Direction for Environmental Assessments (within the Ministry for the Ecological Transition) drafts the reasoned opinion on the SEA of the plan/programme. This reasoned opinion will then lead to the subsequent adoption of the inter-ministerial decree by which the SEA decision is adopted.

[10] Monitoring the significant environmental effects of implementation of plans / programmes (Art. 10)

Monitoring is a requirement expressly provided in article 18 of Legislative Decree No. 152/2006. Monitoring is performed also with the support of environmental agencies and institutes (typically the above mentioned ISPRA).

As to the application and effectiveness of monitoring, the 2018 and 2019 reports on the Implementation of the SEA in Italy highlight problems related to the lack of relevant data necessary for an appropriate monitoring, especially when the SEA is carried out at the regional and local level, as well as the absence of a consistent and effective activity of monitoring and reporting and difficulties to collect reliable data. [Rapporto 2018 VAS (i.e. SEA) Italia, p 36 – similar issues are also found in the 2019 Report].

[11] Access to justice:

(i) **How are alleged deficiencies in the SEA process dealt with by your national courts?**

Deficiencies in the procedure of environmental assessment can be legally reviewed according to the general provisions on challenging administrative acts (i.e. Law 7 August 1990, No 241 (on grounds such as violation of the law, irrationality, abuse of power).
Article 11 of Legislative Decree 152/2006 also expressly provides that decisions concerning plans or programmes adopted without the SEA, when this was required by the law, can be declared invalid for violation of the law. This provision has led the jurisprudence to regard SEA not as an autonomous procedure but as a necessary passage which is integral to the planning procedure ('*passaggio endoprocedimentale'*). From this, it has also been implied that questions concerning the legality of the SEA procedure (including challenges to the SEA decision by the competent authority) can be raised for the first time at the same time as the definitive approval of the planning instrument (see on this, Cons. Stato, sez. IV, 12 gennaio 2011 No. 133; TAR Piemonte, No. 1165/2016; TAR Molise No. 209/2019).

In particular, is a plan or programme declared void if a court determines that the SEA process was deficient / unlawful?

Yes, a plan or programme for which the SEA was declared unlawful can be challenged and declared void by the Administrative court (see answer to question above).

(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)?**

There is extensive jurisprudence on this issue with respect to EIA, but in which the courts seem to refer generally to environmental assessments, including those related to the SEA procedure. One of the main limitations of the administrative court's jurisdiction on SEA for plans and programmes concerns the scope of administrative margin of discretion, and the distinction often made between *technical discretion* and *administrative discretion*. Specifically, aspects that fall within administrative margin of discretion are excluded from judicial scrutiny – in those cases, the scope of court's scrutiny is only possible when the grounds relate to more 'objective' reasons, such as violation of the law, or incorrect exercise of administrative power (absence of reasons, manifest irrationality, errors in the factual requisites and lack of coherence of the assessment procedure and relevant outcome; in this sense, TAR Lazio, No. 7774/2019).

As we shall see in the point below, this aspect is relevant particularly with respect to the judicial review of the screening determination.

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

Yes, it is possible to challenge a negative screening determination concluding for the exclusion of a certain plan/programme, or modification thereof, from SEA. However, the challenges (and the scope of the court's judicial review) are limited to the grounds for violation of an administrative acts, such as violation or incorrect application of the law, abuse of power, irrationality. See, for instance, TAR Milano No. 2239/2018, in which the court declared unlawful the administrative act which, concluding the screening determination, excluded a programme from the SEA (in that case, it was a programme which was not subject to mandatory

SEA, but the court upheld the claimant's argument whereby, for the specific features and characteristics of the project, the screening should have concluded for the necessity of the SEA).

As noted above, however, one of the limits to the administrative court's jurisdiction is the public administration's margin of discretion.

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

Omissis

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

In terms of access to justice, there is extensive jurisprudence concerning the standing to challenge administrative acts. On this point, it must be noted the distinction in Italian Law, between the existence of an individual right (*diritto soggettivo*) and legitimate interest (*interesse legittimo*). The latter concept, which is often a pre-requisite for standing against administrative acts and decisions, refers to the fact that the individual claimant must demonstrate that it has a specific interest in challenging the act – i.e. that he/she has a specific and concrete interest that the plan/programme is in compliance with the law, with regard to both substantive and procedural requirements. In order to be in that position, the legitimate interest must be different from the general and abstract interest that citizens may have in the correct application of the law, i.e. the claimant must demonstrate that the unlawfulness of the SEA procedure is likely to affect him in a specific manner.

In that respect, consolidated case-law indicates that the mere quality of being a resident in a given area, it is not sufficient to grant standing against administrative acts – the same jurisprudence often specifies that in Italian law there is not such an institute as the 'actio popularis' (see Consiglio di Stato, sez. IV, 28 agosto 2001, No. 4544; Consiglio di Stato, sez. IV, 6 dicembre 2013, No. 5830; Consiglio di Stato, 13 dicembre 2012, No. 6411).

Consiglio di Stato, sez. V, 22 marzo 2016 No. 1182: according to which in order to challenge territorial planning decisions is not sufficient to prove the *vicinitas* to the projects envisaged in the plan, but it needs to be demonstrated that the acts or planning instruments affect the claimants directly.

The situation is, however, different for environmental associations, as these are granted standing by the law (i.e. Law No 349/1986 and in implementation of EU requirements and Aarhus Convention).

[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?

In a number of decisions in the past (see among others TAR Lombardia – Brescia No. 983/2009 e TAR Campania Napoli sez IV, No. 3550/2008), the administrative courts have denied direct effect to the SEA directive with respect to territorial planning instruments. It was noted in particular that article 3 of the SEA cannot have direct effect because it leaves to each Member State the duty to define the conditions whereby plans/programmes in a given sector can have

significant environmental effects. The court also considered that articles 13 and 14 required Member States to adopt implementing measures.

[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.

Every year the Ministry for the Environment (recently substituted by the Ministry for the Ecological Transition) drafts a report on the implementation of SEA directive in Italy, and this is published on the Ministry of the Environment website [https://va.minambiente.it/it-IT/DatiEStrumenti/StudiEIndaginiDiSettore].

The last report was published in 2019 (and presenting data of 2018). It highlights a prevalence of SEA and screening procedures at the local level (in 2018, these represents the 90% of all SEA and 97% of the screening procedures). Frequent issues relate to the modification of plans/programmes and planning related to the use of small areas. A further recurring aspect concerns the application of Law 106/2011 which relates to urban planning, and relevant issues that have arisen with respect to the circumstances in which SEA or screening procedure can be excluded for instruments which implement urban plans (i.e. '*strumenti attuativi di piani urbanistici generali*'). It is to be recalled that Law 106/2011 has provided for the exclusion from SEA of instruments implementing urban plans "where the plan has already been subject to SEA*"*. However, administrative courts have subsequently clarified that this exclusion does not apply when the implementing instruments modifies the plan or programme and the modification is likely to have a significant environmental impact (see Consiglio di Stato, No. 4926/2012).

The said report also highlights the activity of guidance and training performed by the Ministry for the Environment (now Ministry for the Ecological Transition), particularly with a view to share SEA best practices and to promote the integration of sustainability objectives in the context of planning procedures, and the implementation of new methodologies.

A specific operational programme has been put in place (*Programma Operativo Nazionale Governance e Capacità Istitituzionale*) financed by EU funds, in order to promote and strengthen the expertise and capacities of the public administration.

Main problematic aspects evidenced in the report include the interpretation by the local planning authorities of the definition of "small areas" and "minor modifications" (particularly with respect to the screening of instruments implementing urban plans). Further controversies surround the interpretation of article 6(12) of Legislative Decree No. 152/2006, concerning the exclusion from the SEA of the modification of urban planning instruments resulting from the authorisations of individual projects that, by law, result in a modification of the plan. This last issue has been the object of several proceedings before administrative courts.

Another problem relates to the trend to delegate the functions of competent authorities to local administrations; the report notes that while this is in line with the subsidiarity principle, it also entails difficulties related to the organizational and financial weaknesses of local administrations, especially for the smaller municipalities or in the case where the territory presents specific environmental issues.

[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.

Yes, there is a specific website on environmental assessment and authorization which concerns the EIA and the SEA, and which makes available to the public the various environmental assessment procedures pending (divided between screening procedures and SEA procedures).

The link is here: https://va.minambiente.it/it-IT

[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?

Omissis

[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?

Please, see answer to question n 14.

[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?

Omissis

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Supplementary Questionnaire: "Who does what in the SEA process"?

In the light of your national (or more relevant) scheme for SEA, please describe briefly:

1. Who has the overall responsibility for the SEA procedure: planning authority (i.e. authority responsible for the preparation of the plan/ programme) or environmental authority?

It is the competent authority. At the national level this is the Ministry for the Ecological Transition (*Direzione Generale per la Crescita Sostenibile e la qualità dello Sviluppo*)

2. **What is the role of the planning authority in screening, scoping, public participation, consultation with other authorities, taking into account the results of SEA and in monitoring etc.):**

The **planning authority** ("autorità procedente") **starts the strategic assessment procedure**. This is done in parallel with the drafting of the plan or programme (art 11 Legislative Decree No 152/2006). In order to start the procedure, the planning authority **submits a preliminary report** to the competent authority (art 13), where it identifies the possible significant impacts arising from the implementation of the plan or programme. The preliminary report forms the basis for the start of the consultations between the planning authority and the competent authority and with the other subjects with environmental responsibilities (soggetti competenti in materia ambientale) in order to define the scope and level of details of the information to be included in the environmental report.
The planning authority is also the body in charge of drafting the environmental report (art 13.3 Legsl. Decree). The environmental report shall also include the feedback and comment received during the consultation phase and it shall explain how the comments of the subjects with specific environmental responsibilities will be taken into account (see answer to question 3 below).

3. **What is the role of the authorities having "specific environmental responsibilities" in screening, scoping, public participation, consultation with other authorities, in taking into account the results of SEA in the plan/ programme, and in monitoring?**

The authorities or subjects having specific environmental responsibilities are identified by the competent authority in collaboration with the planning authority (see in particular answer to question n. 5 below). They are formally consulted during the assessment procedure and are expected to comment on the preliminary report. In particular, pursuant to article 13, the consultation phase starts with the submission of the preliminary report and lasts 90 days. The authorities with special environmental responsibilities have 30 days to comment on the preliminary report (art 13.1).

The results of the consultation with these authorities and entities are included and taken into account in the drafting of the Environmental Report (article 13(4) of the Legislative Decree). This is prepared by the planning authority (see answer to question n. 2 above and question n. 6 below).

4. **Are there any other bodies (independent commissions etc.) having a role in screening, scoping, public participation, consultation with other authorities, in taking into account the results of SEA in the plan/ programme, and in monitoring?**

There is a technical commission for SEA and EIA (article 8 legislative decree) that provides the technical-scientific support to the competent authority. Members of the commission include university professors and researchers and are appointed for a period of 4 years, renewable. In

case of plans and programmes where there is a regional interest, there is also an expert designated by the Regions or Autonomous provinces.

5. **Is there only one or more authorities having "specific environmental responsibilities" involved in SEA procedure? If only one - which agency or body performs usually the role of the "environmental authority"?**

Subjects having specific environmental responsibilities (defined in the Italian legislative decree as 'soggetti competenti in materia ambientale) are mentioned in article 5(1)(s) of LD 152/2006, and correspond to the authorities or agencies in article 5(3) of the Directive.

These are the public administrations and the public agencies that, for their specific competences or expertise in the environmental field, can be interested in the environmental impacts arising from the implementation of the plans or programmes.

Indicatively, these may include:

- Other Ministries different from the Ministry of Ecological Transition (this is the competent or environmental authority)
- Basin authorities (at the national, regional or inter-regional level)
- Authorities responsible for parks and other protected areas
- Authorities competent for cultural heritage and landscapes protection.

On the difference between the subjects with environmental responsibilities and the environmental authority, see answer to question n. 1 of the main questionnaire and question n. 3 of this Addendum.

6. **Which authority is responsible for the preparation of the "environmental report" provided for at art. 5 of the SEA Directive? What is the name given in your legislation to that "report" (original version and in English, if possible)?**

It is the planning authority. The Italian name of the report is 'Rapporto Ambientale'.

7. **What is the legal form (binding or non-binding) of consultations with authorities having "specific environmental responsibilities" in screening (art.3.6), in scoping (art. 5.4) and in expressing "their opinion on the draft plan or programme and the accompanying environmental report" (art.6.2)?**

The law says that results of these consultations with authorities having specific environmental responsibilities have to be taken into account by the planning authority when drafting the environmental report (art 13 Legislative decree (especially art 13(4)).

8. **Is there any specific document serving as the "conclusions" derived from the SEA process and documenting due account taken of the results of SEA (art. 8)? If yes – please give its name (original version and in English, if possible). Who prepares it? What is its legal status?**

Yes. The conclusions of the SEA are in the form of a reasoned opinion ("parere motivato"). Specifically, pursuant to Article 15 of the Legislative Decree the competent authority in collaboration with the planning authority examines and assesses all the documents presented and any comments, objections and observations raised (as well as the results of the transfrontier consultations) and provides its reasoned opinion. The reasoned opinion is then adopted in the form of an inter-ministerial decree and it is sent to the planning authority. The reasoned opinion is also made public. Finally, the final decision regarding the plan or programme is published on the Official Gazette of the Italian Republic with the indication of the place where it is possible to examine the plan or programme that has been adopted.

9. **If there is a separation of roles among the "planning" and the "environmental" agencies, what happens in case of a disagreement between them as to the conclusions (or conditions) derived from the SEA or about the way in which the proposed plan should be amended accordingly?**
10. **Is it possible that the role of the "planning authority" and that of the "environmental authority" coincide in the same body or agency? Could you please provide a practical example thereof?**

In Italy there has been discussion both in doctrine and case-law as to whether the competent authority and the planning authority may coincide. On this point, a decision of TAR Lombardia stated that the two bodies should be distinct in order to guarantee impartiality (TAR Lombardia Milano, sez II, N 1526/2010). In that case, it was the fact that both authorities belonged to the same municipal administration. The Tribunal in its reasoning, and in support of its statement, made reference also to the text of the Legislative decree. The Tribunal's decision on this point was however revised in a subsequent decision of the Consiglio di Stato (the administrative appeal court), in decision N 133/2011. Thus, at the moment, there seem to be no preclusion to a possible coincidence of the two tasks within the same administrative authority (i.e. two organs within the same administration).