Avosetta Questionnaire: The SEA Directive

Cork, 28-29 May 2021

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.

*Legislation specifically transposing Directive 2001/42/EC has been in force since October 2006. It has been amended quite a few times to (better) align with EU law. Chapter 7 of the Dutch Environmental Management Act (Wet milieubeheer) regulates the environmental impact assessment for both projects and plans. In the underlying Decree on EIA (Besluit mer), the Government provides the concrete legal framework to assess for which specific categories of plans (and programmes) a strategic environmental impact assessment (*plan-mer*) is required (and for which specific categories of projects an EIA (*besluit/project-mer*) is required). This is required for many categories of activities listed in the annexes C and D of the Decree on EIA (both include thresholds that are deemed indicative). An EIA is required for many different plans and programmes when they are adopted and set the framework for future development consent of projects that require an EIA. Most referred to plans and programmes are the policy documents on spatial planning, the regulations such as zoning schemes, but there are many plans and programmes mentioned that are based on different legislative acts, like plans on the basis of the Water Act (Waterwet) and the Traffic and Transport Planning Act (Planwet verkeer en vervoer). When an appropriate assessment is required in light of the Habitats Directive, an EIA assessment of the plan or programme is also required.*

Three general remarks seem relevant here. 1) It should be noted that the scope of the provisions on EIA in chapter 7 of the EMA are not restricted to plans and programmes based on the EMA. 2) delegated legislative acts not listed. The most important in this respect is the Activities Decree (specifying e.g. some of the applicable norms for wind turbines); the Council of State decided in 2019 that an SEA/EIA was not necessary (ECLI:NL:RVS:2019:1064); the judgement of the ECJ in June 2020 (ECLI:EU:C:2020:503; Belgium case C-24/19) has recently changed that decision, see ECLI:RVS:2021:1395). 3) plans (and programmes) are usually considered non-reviewable administrative acts in the sense that legal protection by administrative courts is usually offered only against decisions that allow a specific project (in a zoning scheme; by approving a licence application et cetera); this means that case law that is specifically and only relevant for the implementation of the SEA Directive is rare.

[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.

Regarding the SEA Directive specific there have been several close calls (caused by lacking transposition) but no specific cases come to mind (see INFR(2004)1220 and INFR(2009)2237). In 2006 one of those was referred to the ECJ but was later discontinued (ECLI:EU:C:2006:664).

[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?

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

(i) No, not to my knowledge. (ii) It is highly likely that it has as there is a close relation between Dutch legislation and the Directive. However, I have not found an explicit reference to either the text of or to Article 1 of Directive 2001/42 itself.

[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 Dutch legislation only refers to plans (but that is meant to include / includes programmes). The transposition considers irrelevant whether adopting a specific plan (or programme) is mandatory or not. Case C-567/10 did not provide the Netherlands with a problem. Only those plans listed in the Decree on EIA can be considered 'plans and programmes' and adopted plans that are not listed or that are not regulated at all will not be.

There has been doubt and discussion on the consequences of Case C-24/19 and in June 2021 there was a change in the case law of the Council of State that concluded (without requesting a preliminary ruling of the ECJ) that a SEA was in fact required for a similar decree in the Netherlands (because the ECJ did in the Belgian case not refer to the requirement that the plan must provide the framework for future developments). See question 1.

(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.

See question 1. The Dutch legislator did not use the possibility provided in Article 3(3).

(iii) "likely to have significant environmental effects" – is this concept elaborated on in national legislation? Is there official guidance and / or national jurisprudence on the meaning of the phrase "likely to have significant environmental effects"? Who determines whether a particular plan or programme is "likely to have significant environmental effects"?

It may be astonishing but for the SEA (EIA for plans) the Dutch legislator has chosen to have a mandatory SEA for any plan which sets the framework for future development consent of projects that require an EIA (activities that meet the thresholds in the annexes C and/or D of the Decree on EIA). For the implementation of the SEA Directive, the phrase 'likely to have significant environmental effects' is relevant only for listed activities that do not meet the threshold of annex D and then an assessment whether or not an SEA is required is made by the competent authority (the assessment is considered to have no formal form/requirement).

(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?

In most cases: no as it is clear when SEA is mandatory (see question 4(ii), 4(iii)). However, when an assessment is necessary, the competent authority should state the reasons and take its duty of care into consideration when preparing the screening determination, which will be included in the adopted plan/programme.

(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?

*Legislation provides that it concerns *) a plan listed in the annexes of the Decree of EIA, and *) a plan that concerns a category of activities listed in the annexes of the Decree of EIA, and *) a plan that sets the framework for a future decision permitting the project that is subject to an EIA (referring to Annex I and II of the EIA Directive). The last requirement is highly relevant. In general it is assumed such a framework is set in the plan, for example, when the plan designates a site or a (new) route for that project or if one or more locations or routes are considered. No framework is set in the plan, for example, when the plan only designates search areas or announces further investigation into a problem.*

(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 Dutch legislator did not make full use of the possibility provided in Article 3(3). However, it will in a general manner (when the Planning and Environmental Act will be introduced; 1 July 2022) and it already did as an experimental possibility in the Decree that underlies the Crisis- and Recovery Act. Dutch legislation required a SEA/IEA in any case an appropriate assessment is required on the basis of the nature protection legislation (implementing the Habitat Directive), but from 18 December 2020 this is no longer the case for small areas or small changes within (zoning) plans for future developments or for plans that require no SEA/EIA according to a decision by the competent public authority.

(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?

I am unsure what to answer. Only those plans that are based on specific provisions in specific legislative acts can be considered plans and programmes that require a SEA (see question 4(v)). However, within that framework the content is decisive.

[5] **General obligations (Art. 4):** How has this provision been transposed? In particular, has the obligation to carry out the assessment "during the preparation of" the plan or programme been respected? Are there any practical examples demonstrating the avoidance of duplication of assessment where there is a hierarchy of plans and programmes?

Article 7.10 EMA provides that an SEA report is completed when the draft plan is made publicly available for the public to participate. The environmental impact report may be included in or with the plan, provided that it is identifiable as such in or with the plan. Article 7.7(3) EMA explicitly states that the competent authority shall tailor the report, including its level of detail, to the level of detail of the plan and to the stage of the decision-making process in which the plan is situated and, if the plan is part of a hierarchy of plans, in particular to the place the plan occupies in that hierarchy. It may also make use of other environmental impact assessments reports which comply with the provisions of the EMA. In SEA there usually is a mandatory advice/opinion of the Netherlands Commission for Environmental Assessment (see this youtube video in English).

[6] **Environmental Report (Art. 5, together with Art. 2 (b) and Annex I)**

(i) Is there national jurisprudence and / or practical examples demonstrating significant problems with the range of data included in the Environmental Report and the evaluation presented?
(ii) Who makes the scoping determination?
(iii) Is the scoping determination available to the public?
(iv) How is the concept "reasonable alternatives" considered in practice – either in national legislation, official guidance and / or national jurisprudence?

(i) No. The plan may however not be adopted if it is changed significantly and the data of the report are not updated. There is case law on EIA, but I am not aware of any case law on SEA.

(ii) The public authority that will adopt the plan. Article 7.8 EMA: Before drawing up the environmental impact report, the competent authority shall consult the advisers and the administrative bodies who are involved in the preparation of the plan pursuant to the statutory provision on which the plan is based on the scope and level of detail of the information which is relevant to the plan and which must be included in the environmental impact report pursuant to Article 7.7 EMA. An advice from the Netherlands Commission for Environmental Assessment is possible, highly valued and appreciated (but in many cases voluntary).

(iii) As soon as possible after the competent authority has conceived the intention to prepare a plan, but no later than at the time when it applies Article 7.8 EMA, it shall notify that intention (and allow the public to view the underlying documents).

(iv) It is mentioned in article 7.8 EMA but I am not aware of relevant case law concerning SEA (there is more when it comes to EIA).

[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.

The legal arrangement for the extended EIA procedure provides for an opportunity to submit views at two stages: 1) in the preliminary stage, after publication of the public announcement that a plan and a SEA report will be drafted and before the drafting of the SEA has started. 2) after completion of the SEA report (and the draft plan): in the phase in which the SEA report is made available for the public together - or in any case at the same time as – with the draft of the plan. No problems as far as I know (taking into account the Dutch system of SEA and access to justice). There has been a SEA report (see here) for our recent (draft) National Strategy on Spatial Planning and Environment.

[8] **Transboundary consultations (Art. 7):** Has this provision come into play in your country? Who decides about initiating transboundary consultations? At what stage are transboundary consultations usually initiated? Is there any significant national jurisprudence and / or practical examples? Does the UN ECE SEA Protocol play a role here?

The EMA provides a specific provision on transboundary consultations: Article 7.38a EMA. Also, if there is a potential significant adverse cross-border impact on the environment, the SEA report shall discuss it and the Netherlands Commission for Environmental Assessment (and SEA) shall, if it issues an opinion, address this in its opinion.

[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?

See question 8. There is an obligation to inform and consult (and to notify draft and SEA report in the other country) but no (effective) instrument to monitor compliance.

[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).

There is no explicit reference in the EMA on monitoring concerned with SEA reports on plans/programmes. There are however a lot of references and obligations concerning EIA reports. I'm inclined to add that a plan/programme usually has no other legal effects than that it is binding for the public authority that adopts the plan/programme. A consent/permit/licence for developing any project is necessary in a later stage (and for that a EIA is required.

[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?

No administrative court in the Netherlands is competent to directly review plans/programmes for which a SEA is required. There is one exception and that concerns zoning schemes. A SEA is required if the zoning scheme only sets the framework for a project that requires an EIA in the future (if it allows the project itself, an EIA is required for those aspects of the zoning scheme). However, in a judicial review procedure against a (single-case) reviewable administrative decision (usually the consent for the project), an administrative court may indirectly review the lawfulness of the underlying plan/programme (a plea of illegality) which could lead to the annulment of the decision allowing the project on the basis of – as far as I would guess – the conclusion that the SEA report is insufficient. This does not happen often (also because an EIA is required for the project development consent). Also, scope and intensity of the indirect judicial review is not the same as in a normal judicial review although there have been some developments in that respect. In the same way one could argue that the screening or scoping was not up to par. Furthermore, in theory the ordinary courts are always competent but they will rule any claim inadmissible when the administrative courts provide sufficient legal protection; in many cases the possibility of indirect judicial review by the administrative courts is deemed sufficient by the (ordinary) Supreme 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?

Recently this has (sort of) been established for delegated acts that hold general binding rules (see question 1). In other cases: not that I know of concerning the SEA Directive.

[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).

There has been doubt and discussion on the consequences of Case C-24/19 and that has led to a change in the case law of the Council of State in June 2021 (see question 1)

[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 was a relevant research paper about the implementation of the SEA Directive in the Netherlands (in Dutch): research paper University of Amsterdam. There is a website in English on the Netherlands Commission for Environmental Assessment with all sorts of relevant publications on SEA/EIA.

[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.

Although I am not entirely sure, I think there is not. All SEA reports are notified to the public and can be studied and commented on (usually in a 6 weeks period) and should be available in court procedures on reviewable administrative acts that rely on the plan/programme. However, to my knowledge there is no national database with all SEA-reports or data on how many of them have been drafted. The centre of data and expertise on SEA and EIA in the Netherlands is the Netherlands Commission for Environmental Assessment. It provides advice (on screening but mostly on scoping on a voluntary basis) and it can review a SEA report and will then assess the quality of the report. This is mostly mandatory for SEA-reports. Many of the advices and assessments can be found on the website of the commission (website is available in English; reports in Dutch).

[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 SEA report for the National Strategy on Spatial Planning and Environment was very relevant for the final strategic plan, but I'm not sure whether the draft was amended significantly. Somewhat further in the past I think the SEA report for the Maasvlakte 2 (Port of Rotterdam) had an serious impact on the planning process.

[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?

If I am not mistaken than I would guess that there are not that much SEA cases in the Netherlands. Usually they concern policy documents that have no direct legal effect for citizens and usually there is no direct judicial review available. Judicial review is allowed when a permit was granted for the project that requires an EIA; the focus is than on the permit and the EIA (and less attention is paid to the SEA).

[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?

As an environmental lawyer I would say that the role of the Netherlands Commission for Environmental Assessment probably should be larger and more intense. But the fact is that its role is declining in light of other incentives (expediting procedures). Also, one could argue that (direct) judicial review of plans/programmes should be provided for in order to allow for legal protection (and effective implementation of the SEA Directive). However, this is – in my opinion – highly unlikely to be realised any time soon.

Please be advised that this report was drafted in 2021 at a time the Dutch Environment and Planning Act was not yet in force but was anticipated for July 2022.