NORWAY – SEA questionnaire

[1] National legislative context

The Planning and Building Act (no. 72, 2008) §§ 4-1 and 4-2 set out general rules on impact assessments of plans adopted under the Act. These rules are further elaborated in the Regulation on impact assessments (no. 854, 2017). The Act and Regulation are not limited to environmental impacts, they include societal impacts. The Regulation covers plans and programmes beyond those regulated by the Planning and Building Act, cf. § 7(b). Other decisions are covered by the Environmental Information Act (no. 31, 2003) § 20. However, the latter provision does not provide detailed substantive or procedural provisions, and is linked only to the Aarhus Convention and not to the SEA Directive. Special rules apply to the petroleum sector according to the Regulation on Petroleum Activities (no. 653, 1997) Chapter 2a. These apply in the context of the Parliament's decision to open new areas for petroleum activities.

[2] EEA proceedings

The EFTA Surveillance Authority (ESA) opened a case against Norway concerning implementation of the Directive in 2011. ESAs legal assessment identified shortcomings in terms of the implementation of articles 2 (sectoral plans), 3(2) (definition of plans and programs for which SEA is mandatory), 5 (content of environmental report), 7 (transboundary consultations), 9 (information on the decision) and 10 (monitoring programmes). Norway adopted a new separate Regulation on SEA (which was subsequently merged with the parallel Regulation on EIA in 2017). ESA accepted the new regulation and closed the case in 2015 (Case No. 69054, https://www.eftasurv.int/search?q=69054).

[3] Objectives (Art. 1)

The objective is not reflected in the Acts or Regulations. It was referred to in the Supreme Court decision in the Arctic oil case (HR-2020-2472-P), and has not been used by national courts. The CJEU has frequently referred to Art. 1 as a starting point for its rather expansive interpretation of various provisions of the Directive. The Court's majority (11) observed that the objective prevented a restrictive interpretation of duties under the Directive (paras. 210-211). The minority (4) came to the conclusion that the SEA could not be postponed to the final permit stage (plan for development and operation), and that the contested permit therefore was invalid.

[4] "Plans and Programmes" subject to SEA

(i) **Art. 2 (a) (Definition of "plans and programmes"):** All planning decisions by regional and municipal authorities under the Planning and Building act are covered, regardless of whether they are mandatory. However, neither state planning decisions nor regional and state general instructions or rules regarding planning are covered. Application to planning and programme decisions under other legislation remains unclear. The distinction between mandatory and non-mandatory plans and programmes has been addressed neither in legislation nor by courts.

(ii) **Art. 3 (Scope):** See (i).

(iii) **"likely to have significant environmental effects"**: This is in not included as any separate criterion in the Norwegian legislation. All plans of certain categories under the Planning and Building Act and the Petroleum Regulation are covered regardless of their environmental impact. Other plans and programmes are only covered to the extent that they set the framework for future development consents of projects listed in the annexes and are adopted at the ministerial level (Regulation § 7(b)).

(iv) **Screening**: Where relevant, screening is left to the ministries, i.e. whether the projects in question will require EIA.

(v) **" … which set the framework for future development consent of projects"**: The official guidance document contains a brief explanation of the concept, but does not offer any details. There is no relevant jurisprudence.

(vi) "Plans and programmes" that **"determine the use of small areas at local level"**: This is only regulated as a factor to be taken into account when determining whether a plan or programme has significant environmental or societal effects. I am not aware that this exception has been used in practice. The main reason is that Norwegian legislation does not distinguish clearly between plans that in reality are project decisions and plans that fall under the scope of the SEA Directive.

(vii) **"content" rather than the "form":** Due to the lack of clear distinction between the SEA and the EIA procedures, this has not been any major issue.

[5] General obligations (Art. 4):

For plans covered by the Planning and Building Act, "during the preparation of" has been implemented in §§ 4-1 and 4-2 of the Act that sets out procedures for drafting a programme for the preparation of (amendments to) the plans. For other plans and programmes, this element of Article 4 would in practice be respected in light of general rules regarding the hearing of proposals prior to adoption.

When the two regulations on EIA and SEA were joined into a general Regulation on Impact Assessment in 2017, the processes of EIA and SEA were to some extent integrated and coordinated. However, provisions allowing exemptions from the duty to carry out EIAs or coordinate EIAs with prior SEAs were in place before this reform. The main effect of the reform does therefore seem to be to make it easier for private parties and public authorities to see links between and coordinate the two processes. Such benefits do not come without costs. It seems to have become harder to distinguish the two processes, and there seems to be a tendency to postpone SEAs so that they in practice get joined with the EIAs.

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

(i) **Problems with the range of data included in the Environmental Report**: The main example in this context is the Arctic Oil case referred above. In this case, the Government consistently overestimated the benefits of opening up the new areas for

petroleum exploration, and downplayed the negative environmental impacts. The majority of the Supreme Court noted the phenomenon, but came to the conclusion that such errors did not lead the Court to quash the permits.

(ii) **Who makes the scoping determination?** The scoping determination is made by the public authorities that are responsible for adopting the plan or programme.

(iii) **Is the scoping determination available to the public?** Yes, but cases might exist where determinations are not actively publicized to those concerned for plans or programmes outside the scope of the Planning and Building Act.

(iv) **"reasonable alternatives":** Due to the tendency of merging SEA and EIA procedures under the current Regulation, the consideration of reasonable alternatives seems frequently not to include alternative locations of proposed infrastructure or activities. This has in particular been a problem associated with wind power developments, which has been a very controversial issue in Norway in recent years. One example is the drafting of a general plan on location of major wind power developments throughout Norway. The plan was drawn up as an identification of where such developments might take place, and was designed so that it should not raise issues regarding SEA (not mandated under legislation and framed in a manner that identified large areas within which it might be relevant to situate developments). The draft plan became so unpopular with the public, municipalities and regional authorities that it was scrapped by the Government before adoption.

[7] Consultations (Art. 6 together with Art. 2 (d))

The Planning and Building Act contains general rules on consultation in § 4-2, and more specific rules can be found in the Regulation on Impact Assessments Chapter 6. Such consultations have been a long-time feature of the planning and building legislation, and do raise few significant challenges. Some criticism has been raised where exemptions have been made regarding deadlines for comments (normally, the deadline is six weeks) and in cases where hearings have been announced just before major holidays. This is particularly problematic where plans raise significant controversies. As such plans frequently take time to prepare, public authorities might tend to give priority to the need to timely conclusion of the process over spending significant time on public hearings.

[8] Transboundary consultations (Art. 7)

I am not aware of significant cases under the planning and building legislation, as the main border areas are sparsely populated and there are limited developments. Plans and programmes under other legislation might be a more significant issue. One example is management plans for carnivores involving common populations among Norway, Sweden, Finland and Russia. Another example is management plans for protected areas involving cross-border cooperation or that are located close to the borders. A third example is the national plan on wind power development mentioned above. There might seem to be some

inconsistencies in how transboundary consultation is carried out in such contexts, but I am not aware of relevant examples or studies.

[9] "Taken into account" (Art. 8)

Article 8 is reflected in § 29 of the Regulation on Impact Assessments. It calls for planning authorities to take properly into account the SEA and input during the hearing, and fort the planning decision to set out significant environmental and societal impacts and how input received during the hearing has been taken into account. Corresponding rules are included in the Regulation on Petroleum Activities § 6d. There are no specific mechanisms in for the monitoring of compliance with these provisions.

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

Monitoring is not a legal requirement, but it might be a requirement set out in the final planning decision. However, it is probably much more common to include such conditions in project decisions. I am not aware of any systematic examination of inclusion of such requirements in planning decisions. There exists no mechanism specifically for the monitoring of the environmental effects of plans and programmes.

[11] Access to justice:

(i) **deficiencies in the SEA process dealt with by your national courts**: Except for the Arctic Oil Case mentioned earlier, I am not aware of any court cases regarding SEAs. In general, there seems to be a tendency in EIA and SEA cases to come to the conclusion that if there are strong reasons to believe that the final decision would have been the same regardless of errors associated with EIA or SEA, courts would come to the conclusion that such errors do not have consequences for the validity of the decision and there is no obligation to rectify the errors.

(ii) **restrictions / limitations on access to justice**: The main restriction is that decisions regarding SEAs are regarded as intermediate administrative decisions, and access to courts is limited to challenging the final decision and not intermediate decisions. This means that decisions during the SEA process cannot be challenged as such. Moreover, plans and programmes that are subject to SEAs are not in general be subject to administrative complaints procedures. This means that the validity of such plans can only be challenged through court proceedings.

(iii) **Is it possible to challenge a negative screening determination?** No.

(iv) **Is it possible to challenge the scoping determination?** No.

(v) **Is there significant national jurisprudence on access to justice in the SEA context?** No.

[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? No.

[13] SEA for proposed policies and legislation:

The relevant rules in this regard are § 20 of the Environmental Information Act, as well as rules regarding environmental considerations to be carried out during the preparation of a broad range of decisions, including decisions of a general character, in Chapter 2 of the Nature Diversity Act and the provision on right of access to information in Article 112(2) of the Constitution. These rules are largely ignored during the preparation of policies and legislation. One example is the extensive regulatory regime that has been established in recent years for sustainable expansion of salmon farming. When preparing regulations for the massive reform that has been introduced since 2017, no SEA was carried out, and hardly any attention was paid to the duty to consider fulfilment of principles such as ecosystem based management, the precautionary principle and polluter pays, as mandated under the Nature Diversity Act.

[14] National studies: No significant studies of SEAs have been carried out.

[15] National databases:

(i) **any national database on the number and categories of SEAs**: No

(ii) **any national database of SEA reports, Environmental Assessments and the relevant decisions made by the competent authority:** No.

[16] Impact of SEA in practice:

I am not aware of plans or programmes that have been significantly amended due to SEAs carried out during their preparation. This does not mean, however, that such examples do not exist. Most SEAs are carried out at the municipal level, and these processes are political, hard to trace, rarely studied, and do rarely make significant news.

[17] Any other significant issues? No

[18] General assessment and / or any recommendations: No