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National legislation and jurisprudence on SEA

Avosetta Questionnaire: The SEA Directive

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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) 414final. 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.

Literature:

- Korzeniowski P., Pozwolenia emisyjne w prawie ochrony środowiska, Warszawa 2020;
- Bednarek R. (red.) Strategiczna ocena oddziaływania na środowisko w planowaniu przestrzennym, Poznań 2012;
- Górski M. et al., Prawo ochrony środowiska. Komentarz, Warszawa 2014;
- Rakoczy B., Ustawa o udostępaniu informacji o środowiska i jego ochronie, udziału społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz, LexisNexis 2010;;
- Bar M., Jendrośka J., w: P. Nieznański, Analiza prawna dotycząca prawidłowości wdrożenia wymagań konwecji z Aarhus w Polsce (http://www.ratujmyrzeki.pl/dokumenty/Aarhus_DRUK.pdf, accessed 9.05.2021);
- Iwańska B., Baran M, Judicial review of the requirement to integrate the Natura 2000 sites protection system in sustainable forest economy (illustrated with the example of the Białowieża Forest Management Plan), EEELR, 2019/4, pp. 110-130.

[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.

In the current legal state, Directive 2001/42 is transposed in the Act of 3 October 2008 on the provision of information on the environment and its protection, public participation in environmental protection and environmental impact assessments (hereinafter the EIA Act).

In the system of provisions of environmental protection law, this Act has the nature of a general and horizontal regulation. This is because its subject matter includes separate legal institutions that are important for the entire legal system of environmental protection: access to environmental information, public participation in environmental matters and environmental impact assessment (M. Górski, in: M. Górski et al., 2014, p. 12).

[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.

There are no such proceedings in relation to Poland.

[3] Objectives (Article 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?

Article 1 of Directive 2001/42 has not been directly transposed into the EIA Act.

It is reflected, however**, firstly, in the obligation set out in Article 8 of the Environmental Protection Law (2001) to integrate environmental protection requirements with socio-economic development**. According to this provision, policies, strategies, plans or programmes relating in particular to industry, energy, transport, telecommunications, water management, waste management, spatial management, forestry, agriculture, fisheries, tourism and land use **should take into account the principles of environmental protection** (including, without limitation, legal principles of environmental protection such as the principle of prevention or precaution) **and sustainable development.**

Secondly, in the obligation to take into account the results of the SEA procedure in the adopted strategic document (Article 55(1) of the EIA Act).

There is also no explicitly formulated objective of ensuring a high level of environmental protection in the EIA Act, however, in the literature ensuring a high level of environmental protection is categorised as a (new) legal principle of environmental protection (P. Korzeniowski, 2020, p. 44-65).

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

We are not aware of any such ruling.

[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 EIA Act does not contain a general definition of "plans and programmes" as defined in Directive 2001/42.

The legislator uses the terms “policies, strategies, plans and programmes” or the term “documents”, **thus not narrowing the scope of application of the SEA to strategic documents with the formal name of a plan or a programme**. This is also evidenced by the title of that part of the Act which defines the material scope of the SEA: "Documents requiring a strategic environmental impact assessment".

The literature aptly stresses that the term "policies, strategies, plans and programmes" contained in Article 46 of the EIA Act **should not be treated in a formal way and "when determining the obligation to conduct a strategic assessment in relation to a document, one should take into**

account its features and legal character, not its name" (J. Jendrośka, in: M. Górski et al, 2014, p. 142).

The scope of the SEA includes documents which contain norms of generally binding law (e.g. local plans), although not exclusively (e.g. urban regeneration plans)

The scope of application of the SEA was set out in Art. 46 and 47 of the EIA Act. The Act in the cited provisions describes types of documents, but does not contain an enumerative list of specific documents (R. Bednarek, in: R. Bednarek (ed) 2012, p. 17).

According to the EIA Act (Articles 46 and 47)**, four categories of draft documents (including their amendments)** require conducting an SEA, regardless of **whether their adoption - according to the law - is mandatory or left at the discretion of authorities** (A. Haładyj, 2015, pp. 133 -147). Their distinction refers to the substantive criterion (subject matter of the documents) or the criterion of effect (B. Rakoczy, 2010, commentary to Article 46 of POŚ):

I. **draft spatial planning and regional development documents** setting out the framework for the subsequent implementation of projects likely to have a significant impact on the environment (subject criterion) - Article 46(1)(1);
II. **draft sectoral documents**: draft policies, strategies, plans and programmes in the fields of industry, energy, transport, telecommunications, water management, waste management, forestry, agriculture, fisheries, tourism and land use drawn up or adopted by administrative authorities and setting the framework for the subsequent implementation of projects likely to have a significant impact on the environment (objective criterion); these three conditions must be fulfilled cumulatively - Article 46(1)(2):
III. **draft policies, strategies, plans and programmes, other than those listed in points 1-2, the implementation of which may cause a significant impact on Natura 2000 area**, if they are not directly related to the protection of Natura 2000 area and do not result from such protection (the criterion of effect, open category) - Article 46(1)(3);
IV. **projects of documents other than those listed in points I-III,** if the authority preparing the project, in agreement with the competent public body, determines, taking into account the conditions relating to: a) the nature of the activities envisaged in the documents; b) the type and scale of the impact on the environment and c) the characteristics of the area affected by that impact, that the **implementation of the provisions of a given document (or an amendment thereto) may result in a significant impact on the environment (impact criterion; open category) -** Article 47 in connection with Article 49 of the EIA Act.

Withdrawal from the SEA

The EIA Act - in accordance with the Directive - provides for the **possibility to deviate from conducting the SEA**. Cases and prerequisites for abandonment (apart from documents prepared exclusively for the purposes of national defence or civil defence and financial or budgetary ones) are set out in Articles 48-49 of the EIA Act.

A common premise is that the implementation of the provisions of a given document or its amendment **will not cause a significant impact on the environment, including Natura 2000 sites**.

The additional grounds vary according to the category of document (group I-III) and whether the case concerns a draft document or a draft amendment:

- in case of a **draft document in the field** of spatial planning and regional development (group I) and a draft sectoral document (group II), the withdrawal may concern only the draft document concerning the **area within the borders of one municipality**;

- in the case of a draft amendment to a document in the area of spatial planning and regional development (Group I) and a draft sectoral document (Group II), withdrawal may only concern a change

that constitutes a **minor modification to the already adopted document (e.g. a minor change to the scale of permissible investments; the modification will not affect the extent of the environmental impact) or a change concerning an area within the boundaries of one municipality**

> *In the case ref. II SA/Rz 1275/20, the Provincial Administrative Court in Rzeszów did not find any violation of the provisions of the EIA Act in connection with the abandonment of conducting the EIA of the modifications to the Waste Management Plan for the Voivodeship 2022 due to the minor scope of the changes introduced by the update. They concerned the indication of the place fulfilling the conditions of waste storage.*

- in the case of **a draft amendment to a document** which may have a significant impact on a Natura 2000 site (Group III), a deviation may only concern an amendment which is a **minor modification to the already adopted document.**

In refraining from undertaking a strategic environmental assessment, account shall be taken of considerations relating to: (a) the nature of the activities envisaged in the documents; (b) the nature and scale of the environmental impact; and (c) the characteristics of the area affected.

(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.

Yes, the EIA Act additionally introduces **an open catalogue of draft documents or their changes (group IV), which require an SEA if the body developing the project** (in agreement with the competent authorities) **determines that the implementation of the provisions of the given document or its changes may cause a significant impact on the environment** (Article 47 of the EIA Act).

(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"?

The EIA Act does not define the term "likely to have significant environmental effects". However, on the basis of the provision specifying formal requirements of the strategic environmental impact assessment, the criteria of a significant environmental impact may be indicated.

The subject of the forecast is, inter alia, predicted significant impact, **including direct, indirect, secondary, accumulated, short-term, medium-term and long-term, permanent and momentary, positive and negative impact,** on the objectives and the subject of protection of Natura 2000 area and the integrity of this area, as well as **on the** environment, **in particular on** biodiversity, humans, animals, plants, water, air, land surface, landscape, climate, natural resources, historical monuments, material assets, taking into account the relationship between these elements of the environment and between the impacts on these elements (Article 51(2)(2)(e) of the EIA Act).

The EIA Act defines the notion of "significant negative impact on Natura 2000 area" as the impact on the protection objectives of Natura 2000 area, including in particular actions that may: a) deteriorate the condition of natural habitats or the habitats of plant and animal species for whose protection Natura 2000 area was designated, or b) negatively affect the species for whose protection Natura 2000 area was designated, or c) impair the integrity of Natura 2000 area or its connections with other areas.

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

In relation to the four categories of documents distinguished above - in point 4 (i) - and the premises for withdrawal from the SEA, it should be assumed that:

- for draft spatial planning and regional development documents (group I) within the boundaries exceeding the area of one municipality and setting a framework for the subsequent implementation of projects likely to have a significant impact on the environment**, there is a presumption of their significant environmental impact;**

- Similarly, a **presumption of significant environmental impact** exists for draft sectoral documents extending beyond the area of a single municipality, developed or adopted by administrative bodies and setting the framework for the subsequent implementation of projects likely to have a significant impact on the environment (Group II);

- in the remaining cases, i.e. other than the above-mentioned draft documents and draft amendments to documents from all four groups, determination of the premise of a significant impact on the environment is also made **through an individual examination of the body developing the document in cooperation with the competent authorities (regional director for environmental protection and the health inspection body).**

(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?

Yes, by means of an individual examination carried out by the body developing the document itself or by that body, but in cooperation with the competent regional director for environmental protection and the health inspection body.

At the stage of verifying whether the implementation of the planned document requires SEA, different criteria are taken into account, depending on the category (group) of the draft document (I-IV), its nature (draft document or draft amendment) and the prerequisites for not conducting an SEA.

These may include, depending on the case:

- the subject of the document (e.g. whether it is a draft document in a specific sector)

- its effect (e.g. significant environmental impact)

- its scope (slight modification)

- its spatial scope (does it concern an area within the boundaries of one municipality) or

Is the screening determination available to the public

Yes, information on withdrawal from conducting the strategic environmental impact assessment is announced by the body preparing the draft document and draft amendment to the document, together with the justification, to the public without undue delay (Article 48(7) of the EIA Act).

(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?

The premise "set the framework for future development consent of projects" is a key and at the same time doubtful interpretation premise. **It means that the document must concern and relate to projects likely to have a significant impact on the environment** (A Haładyj, 2015, p. 138), **which are catalogued in the Regulation of the Council of Ministers on projects likely to have a significant impact on the environment**.

In the judgment of 11.02.2021, II SA/Ke 1052/20 (LEX No. 3145033, the case concerned the Multi-Year Plan for Development and Modernisation of Water Supply and Sewerage Facilities for 2021-2023), the administrative court expressed the view that:

"It follows from the wording of Article 46(1)(2) of the Environmental Act, therefore, that a strategic environmental impact assessment will be required for draft documents (policy, strategy, plan and programme) when all of the following conditions are met: - they are developed or adopted by an administrative authority (as defined in Article 3(1)(9) of the Environmental Act),- they concern one of the fields listed in the Act, i.e. industry, energy, transport, telecommunications, water management, waste management, forestry, agriculture, fisheries, tourism and land use,- they ***set the framework for later implemented projects qualified as projects likely to have a significant impact on the environment****" ."*

"In view of the content of the Plan and the disposition of Article 46(1)(2) of the Environmental Act, it is ***not enough*** *- given the content of the Plan and the disposition of Article 46(1)(2) of the Environmental Act -* ***to indicate collectively the provisions of the Regulation on projects likely to have a significant impact on the environment, and then only to state that the Plan concerns such projects*** *(or, as in the reply to the complaint, to indicate collectively the investments to which the Plan relates). The issue is to clarify which specifically and for what reasons the project planned in this Plan is a project catalogued* ***in the Regulation****".*

(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?

One of the prerequisites for not conducting the SEA in relation to documents from groups I and II is the premise concerning the spatial scope of the draft document or its change, **which in Polish law was concretised by the criterion of "area within the borders of one commune".**

(vii) Does your national legislation and practice reflect the CJEU's conclusion that it is the "content" rather than the "form" of the planning or programming act that is decisive?

The literature aptly emphasizes that **the term "policies, strategies, plans and programmes" contained in Article 46 (1)-(3) of the EIA Act should not be treated in a formal way and "when determining the obligation to conduct a strategic assessment in relation to a document, one should take into account its features and legal character, not its name"** (J. Jendrośka, in M. Górski et al, 2014, p. 142).

This is additionally evidenced by the content of Art. 47 of the EIA Act, which contains an open category of draft **documents,** including drafts of their amendments other than the ones specified in Art. 46 points 1-3 of the Act (see above). They require an SEA if the implementation of their provisions may cause a significant impact on the environment.

[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?

As required by Article 4(1) of Directive 2001/42, Polish law provides for an assessment to be carried out **"during the preparation" of a plan or programme**.

In Polish law, SEA is a procedure which concerns certain types of documents (as mentioned above - question 4). Conducting the strategic environmental impact assessment is also required in the case of introducing changes to already adopted documents.

By strategic environmental impact assessment the legislator means the proceedings on the assessment of the environmental impact of the effects of the implementation of a policy, strategy, plan or programme, including in particular

1) agreeing on the level of detail of the information contained in the environmental impact assessment;
2) preparation of an environmental impact forecast;
3) obtaining the opinions required by law;
4) ensuring the possibility of public participation in the proceedings (Art. 3 par. 1 sec. of the EIA Act).

A body preparing a draft document requiring SEA, **at the stage of its adoption takes into account the findings contained in the environmental impact assessment, opinions of other authorities and considers comments and applications submitted within the framework of public participation** (Article 55 par. 1 of the EIA Act).

In Polish law **there are no legal solutions allowing to avoid duplication of the SEA in the case of hierarchy of certain types of plans or programmes** (such duplication of the assessment is visible especially in spatial planning acts adopted at different levels of the country - e.g. the national development concept, development strategy, the study of conditions and directions for spatial development of the commune and the local spatial development plan)

On the other hand, the forecast prepared within the framework of the SEA **contains, among others, information on the content, main objectives of the draft document and its links to other documents** (Article 51 par. 2 sec. 1 letter a of the EIA Act), and it **takes into account information contained in the environmental impact forecasts prepared for other, already adopted documents related to the draft document which is the subject of proceedings** (Article 52 par. 2 of the EIA Act).

[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?

In the SEA procedure, the scope and level of detail of the information required in the environmental impact assessment is agreed.

The body preparing a draft document, depending on its type, agrees with the relevant environmental authority. Then the presented document together with environmental impact forecast is subject to opinions and such opinions are prepared by the same bodies that participated in agreeing the scope and degree of detail of information required in the forecast. Public participation is an obligatory element of the strategic environmental impact assessment.

In the case of most documents subject to the SEA, they do not contain generally applicable standards (they are not legal acts). The exception is the local spatial development plan, which is an act of local law. **In the case of documents which have the nature of acts of local law - as only they are subject to judicial review - the lack of an SEA or significant violations of the SEA procedure provide grounds for declaration of their invalidity by an administrative court, after a complaint is filed by an authorised entity.**

National jurisprudence:

"*Failure to carry out the required strategic environmental impact assessment constitutes a material breach of the local spatial development plan preparation procedure*" (judgment of the WSA in Szczecin of 11 January 2018 , II SA/Sz 1409/17)

"The environmental impact assessment prepared in this case analysed and assessed the anticipated significant impacts of the provisions of the draft study on the individual elements of the natural environment, including inter alia on people, air and climate - detailed findings in this respect are set

out in Chapter 7 (1), (7) and (12). The Court of First Instance rightly observed that the forecast did not contain a summary containing information on the manner in which the comments and conclusions had been taken into account and to what extent. Nevertheless, in the grounds for its judgment, the Court did not explain why this defect was so significant that it should result in the resolution being invalid in its entirety. This is because only a material breach of the principles for drawing up the study may constitute grounds for declaring the study invalid" (judgment of the Supreme Administrative Court of 24 April 2018. II OSK 2743/17).

(ii) Who makes the scoping determination?

The body preparing the project document agrees with the competent authorities (Article 57 and Article 58 of the EIA Act) the scope and degree of detail of the information required in the environmental report.

The formal and substantive requirements for the SEA are set out in the law. Failure to meet them may result in questioning the correctness of the final document adopted, requiring an SEA to be carried out.

The body preparing the draft document, requiring an SEA, is obliged to prepare **an environmental impact forecast (environmental report)**. The author of the environmental impact forecast, and in case of a team of authors - the leader of this team may **be only a person meeting qualifications specified in the provisions (**Art. 74a of the EIA Act).

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

Yes, all documentation is made available to the public. As part of public participation in the SEA procedure, the body preparing the draft document announces to the public, among others, information about the possibility to review the necessary documentation of the case. The necessary documentation of the case include: assumptions or the draft document; attachments and opinions of other bodies required by the regulations, if the opinions are available (39 par. 1 sec. 2 u par. 2 of the EIA Act).

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

One of the obligatory elements of the environmental impact assessment is the indication of "alternatives to the solutions contained in the draft document together with the justification for their selection and a description of the methods of assessment leading to that selection or an explanation of the lack of alternative solutions, including an indication of difficulties encountered due to technical deficiencies or gaps in contemporary knowledge".

However, the authority adopting the document is not bound by the content of findings encompassed by the environmental impact forecast. However, it is obliged - at the stage of adopting the document - to **take into account the findings contained in the impact forecast.**

As pointed out by the Voivodeship Administrative Court in Poznan in its ruling of 16 September 2020, II SA/Po 528/20, LEX nr 3126481, "a *forecast of the impact on the environment is not of a normative nature and therefore does not bind the municipality, but may significantly influence the shape of the local plan. Therefore, in the Court's opinion, adjusting the content of the local plan to the content of the environmental impact forecast cannot be deemed as exceeding planning authority*.

[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?

One of the obligatory elements of the SEA is obtaining opinions required by the EIA Act and ensuring the possibility of public participation in the proceedings. When adopting a document requiring an SEA, the body takes into account - apart from the findings contained in the environmental impact *forecast* -

also the opinions of the authorities and considers the comments and proposals made in connection with public participation.

Public participation is required for plans and programmes:

1) requiring a strategic environmental impact assessment (SEA),
2) other plans and programmes, which do not require strategic assessment, but require - in accordance with national provisions regulating the procedure for their adoption - public participation (e.g. air protection programmes - Article 91, paragraph 9 of the Environmental Protection Act).

Problems:

No obligation to provide for public participation for certain plans and programmes relating to the environment. This group includes, for example, multi-annual hunting management plans and annual hunting plans (drawn up under the Hunting Law).

In Poland, there is a single period - 21 days - for submission of comments and applications by the public within the SEA. There is no time provided e.g. for the public to prepare - the deadline for submission of comments and applications starts to run when the documentation is made available for review.

If available, please provide one example of an SEA with regional or national implications (not just local) to illustrate how consultation is carried out.

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

Provisions of the EIA Act provide for the possibility of cross-border consultations. In case of ascertaining the possibility of significant transboundary environmental impact as a result of implementation of a draft document which requires an SEA, the administrative body preparing the project shall immediately inform the General Director for Environmental Protection, forwarding this draft together with the environmental impact assessment. The results of the cross-border consultations, shall be considered before the adoption of the document requiring an 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 body preparing the draft document **takes into account the results of the SEA** (findings contained in the environmental impact assessment, opinions of relevant authorities and considers comments and proposals made in connection with public participation).

The strategic assessment is a procedure consisting of various stages (consecutive) and is aimed at gathering by the authority information on the environmental effects of the adoption and implementation of the document in the draft shape/content. This means, as a rule, that negative findings of the forecast or opinions of other authorities do not preclude adoption of the document (unless the draft document will have a significantly negative impact on a Natura 2000 site, and there are no special circumstances that would make its adoption impossible despite such an impact).
See also the judgment in paragraph 6 (iv) of the questionnaire.

[10] **Monitoring the significant environmental effects of implementation of plans / programmes (Art. 10)**
Is monitoring a legal requirement in your country?

Yes

If so, how is it organised and who is responsible for monitoring?

In order to be able to properly assess what effects the practical implementation of the provisions of the document has on the environment, the regulations impose an obligation on the body adopting the document to monitor the effects of that implementation.

Is it effective in practice? Are there any specific mechanisms to address the results of monitoring?

We have no information on this.

[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).

Only those plans and documents (which require an EIA) that are acts of local law are subject to judicial review. The remaining plans and documents are not subject to judicial review.
The legislation does not grant the right to challenge plans or programmes to civil society organisations. The lack of procedural legitimacy of organisations in relation to plans and programmes has been repeatedly confirmed in the case law of administrative courts.

The possibility of challenging plans and programmes by other members of the public (individuals) - entities acting in their own interest (i.e. not in the general interest of environmental protection) **is very limited**. The provisions giving rise to a **right of** appeal against adopted strategic documents **grant the right of appeal only to persons whose "legal interest or entitlement has been infringed".** It is therefore necessary to demonstrate the violation of the said "interest". In a number of judgments, the administrative courts have presented such a narrow interpretation regarding the circle of persons entitled to file a complaint and a narrow interpretation of the notion of violation of a legal interest.

E.g. in the judgment of 17 October 2017, the Supreme Administrative Court stated: "*The legitimacy to lodge a complaint against a local plan with an administrative court is vested not in the person who has a legal interest in it, but in the person whose legal interest has been violated by the appealed decision, whereby the violation of the legal interest of the entity lodging the complaint must be direct, individualised, objective and real, and the complainant is obliged to demonstrate the connection between the appealed resolution and his/her individual legal situation*" (II OSK 2559/16).

In its judgment of 30 March 2017. The Supreme Administrative Court indicated: "*The provision of Article 101(1) of the A.s.g.* [the Municipal Self-Government Act] *allows for an effective challenge to a resolution of the municipal council by the one whose legal interest has been violated. Mere possession of a legal interest is not sufficient to effectively challenge a resolution. It is only after it has been established that the conditions set out in Article 101(1) of the Act have been met that it is possible to examine the merits of the complaint.* "(II OSK 1941/15).

(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)?

Judicial review of plans and documents that require an SEA suffers from limitations:

- **first, subject-matter**, as only those plans and programmes which require an EIA and which are acts of local law may be the subject of review by an administrative court; such review is conducted by administrative courts;

- **secondly, subjective**, since a complaint to an administrative court may be lodged either by:

    - an entity with a general right to complain - such as a provincial governor (as the supervisory authority over local government units) or an Ombudsman, Attorney General, Children's Rights Ombudsman or

    - a private entity, but only when it demonstrates that the document complained of infringes its "legal interest or right".

- thirdly, the legislation does not grant the right to challenge plans or programmes to civil society organisations.

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

Yes, **but only indirectly, i.e. at the stage of judicial review of the document** - if there is a judicial route to review for the programme or plan in question (see comments above on limits to judicial review).

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

Yes, but **only indirectly, i.e. at the stage of judicial review of the document** - if there is a judicial route to judicial review for the programme or plan in question (see comments above on the limits of judicial review).

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

Bialowieza Forest dispute - lack of judicial review of the annex to the forest management plan:

The Voivodeship Administrative Court in Warsaw by its decision of 14 March 2017 (ref. no. IV SA/Wa 2787/16) rejected the Ombudsman's complaint on formal grounds, i.e. without examining the legality of the challenged act), holding that the approval of the annex to the forest management plan is not subject to judicial-administrative control. **The court indicated that** - in its opinion - the **act of the Minister of Environment, erroneously called by him an administrative decision, is an internal act and, consequently, there is no possibility to appeal it to an administrative court**.

"The actions taken by the Minister for the Environment concern the property of the State Treasury, which is represented by the State Forests. The actions taken are not of an external nature, as they have no addressee to whom they are addressed. Thus, they do not resolve rights or obligations of a nonexistent addressee. The actions taken by the minister for environmental protection are of internal nature and are connected with management of the State Treasury property. In such circumstances, a public administration body, i.e. the Minister for Environmental Protection, does not take actions of an external, sovereign nature and does not decide about the legal rights or obligations of a specific entity in an individual case. Therefore, the approval of a forest management plan by the Minister for Environmental Protection does not take the form of an administrative decision.

Article 3 § 2 point 4 of p.p.s.a. provides for the control of administrative courts with respect to acts and actions taken in individual cases, i.e. with respect to specific entities, addressees of these acts or obligations. Just as an administrative decision, issued by an administrative body, has the character of an external action, addressed to an individual subject, so also an action or an act referred to in art. 3 § 2 pkt 4 p.p.s.a. must be addressed to an external subject. This condition is not met, however, in the case of approval by the Minister for Environmental Protection of a forest management plan, where the forest is owned by the State Treasury and managed by the State Forests (being a state organisational unit

without legal personality), representing the State Treasury with respect to the managed property, which is supervised by the Minister for Environmental Protection.

The State Treasury is ex lege a state legal person and represents state property whenever by law another state legal person does not do so. In this situation the State Treasury acts as the owner (dominium). This position should be contrasted with the situation in which the State's authority is externalized, i.e. imperium, when the State acts through relevant authorities and exercises sovereignty over other subjects of law, using orders, prohibitions, creating statutory acts, issuing administrative decisions and other legal forms, the execution of which is guaranteed by means of administrative coercion. Approval by the Minister for Environmental Protection of management plans for forests owned by the State Treasury is, therefore, an internal action taken in connection with the performance of ownership tasks and, accordingly, an action falling within the sphere of dominium, not imperium".

The position of the Voivodeship Administrative Court in Warsaw was upheld by the Supreme Administrative Court, which dismissed the cassation appeal filed by the Ombudsman (case number II OSK 2336/17).

[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?

The Directive is correctly implemented and the problem of invoking the directly effective provisions of the Directive does not arise.

[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 our 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.

A study entitled Strategic Environmental Impact Assessment in Spatial Planning was prepared at the request of the Regional Directorate for Environmental Protection in Poznań.

As regards practical problems analysed in the study, it is worth noting the problems concerning the quality of the environmental impact assessment. For example, the identified problems include: a) lack of information on the existing state of the environment or all occurring environmental protection problems in the area covered by the plan, b) lack of reference to all components of the environment, c) use of unclassified or archival data or lack of indication of the source of the data, d) lack of reference to the environmental protection objectives established at the international, EU and national level, relevant from the point of view of the draft document, and indication of the ways in which these objectives and other environmental problems were taken into account in the course of developing the document.

The issue of EIA is also the subject of literature which, among other things, raises restrictions on access to court.

[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.

Pursuant to the EIA Act (Article 128 of the EIA Act), the General Director for Environmental Protection maintains a database of **environmental impact assessments, including information on strategic environmental impact assessments. The database is maintained in a teleinformatic system.**

The authorities responsible for conducting i.a. strategic environmental impact assessment are obliged to enter and update information and data to the database. The entry of information and other data takes place within 30 days from the date of their generation or receipt by the authority.

The manner of maintaining the database, the detailed scope of information and other data, and the manner of entering information and other data into the database are specified in the Regulation of the Minister of the Environment of 17 April 2012 on the detailed scope of information on the conducted environmental impact assessments and strategic environmental impact assessments

The database shows that between 1.01.2021 and 9.05.2021 there are **118 records of Strategic Environmental Assessment proceedings, of which**:

- the vast majority of them concern draft spatial planning and regional development documents (or their amendments) setting the framework for the subsequent implementation of projects likely to have a significant impact on the environment

- other documents included in the list are, for example: the Simplified Forest Management Plan, environmental protection programmes adopted at the local (municipality) level, plans or updates of the Low-Emission Economy Plan adopted at the local (municipality) level (e.g. for 2021-2026), the update of the Local Revitalisation Plan for the city of Sosnowiec for 2016-2023, the Regional Urban Policy of the Silesian Voivodeship, the Local Revitalisation Programme for the city of Katowice for 2016-2023.

[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?

We do not know.

[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?

Among the deficits concerning the SIA, the issues mentioned above should be pointed out:

- lack of access to court for environmentally relevant plans and programmes by environmental organisations;
- limited access to court for plans and programmes of environmental relevance of other entities.

[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?

In order to improve the effectiveness of the SEA, a regulation on guarantees of access to court should be considered in Directive 2001/42 (analogous to Article 11 of Directive 2011/92).