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

[1] National legislative context

Identify and summarise the relevant national legislation transposing Directive 2001/42/EC. In 2017, the Commission concluded that all Member States have transposed the Directive (COM(2017) 234 final, 5 May 2017), but some have transposed it by means of specific national legislation while others have integrated its requirements into existing laws.

The directive has been transposed by a specific law almost 3 years after the due deadline. The Decree Law n. 232/2007 of 15th June by the Ministry of the Environment, Spatial Planning and Regional Development (http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1204&tabela=leis) establishes the regime of the assessment of the effects of certain plans and programmes on the environment is subject, transposing into Portuguese law Directives 2001/42/EC of the European Parliament and of the Council of 27 June 2009 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2009. This Decree law was amended in 2011 by another Decree-law (58/2011 of 4 may) with only one article on the obligation of disclosing to the public the decisions on the weather the plans or programs are likely to have significant environmental impacts.

[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.

Yes, it was the Judgment of the Court (Sixth Chamber) of 24 May 2007 – Commission v Portugal (Case C-376/06). The deadline for transposition was July 2004 and in December 2004 the Commission notified Portugal of the alleged failure but received to answer. In July 2005 the Commission gave the State 2 months to adopt the necessary measures. The State asked for 1 more month but the answer was that the project had been elaborated and meeting for the approval by the Council of Ministers was about to be scheduled. In September 2006 the Commission started the infringement procedure, Portugal presented no reasons for the delay and the ruling concludes, in May 2007, that Portugal had not transposed the Directive in due time.

[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?

There is no article corresponding to article 1 of the Directive in the Portuguese law but similar considerations can be found in the preamble: "thus, the environmental assessment of plans and programmes may be understood as a process integrated in the decision-making procedure, which aims at incorporating a series of environmental values in the decision. More precisely, the environmental assessment of plans and programmes is a continuous and systematic process, which takes place from an early stage of the public decision-making process, of assessing the environmental quality of alternative visions and development prospects incorporated in a planning or programming that will serve as a framework for future projects, ensuring the overall integration of relevant biophysical, economic, social and political considerations that may be at stake. The carrying out of an environmental assessment at the planning and programming level ensures that environmental effects are considered during the preparation of a plan or programme and before its approval, thus contributing to the adoption of more effective and sustainable innovative solutions and control measures which avoid or reduce significant negative effects on the environment arising from the implementation of the plan or programme. In other words, the possible negative environmental effects of a certain development option will now be weighed in a phase that precedes the environmental impact assessment of projects already in force in our jurisdiction».

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

Not to my knowledge .

[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 national law transcribes *ipsis verbis* the definition of the directive and does not go further in explaining the concept of plan or programme. But the Portuguese Environmental Agency (PEA) edited two guidance documents in

2007 (https://apambiente.pt/_zdata/AAE/Boas%20Praticas/Guia%20Boas%20Prticas%20para%20a%20AAE.pdf) and 2013 (https://apambiente.pt/_zdata/AAE/Boas%20Praticas/GuiamelhoresAAE.PDF) on good methodologies and practices of SEA where the interpretation is as broad as that of the European Court. Strategic document is authored by an acclaimed expert in EIA and SEA (Professor Maria do Rosário Partidário) but is assumed and presented by the PEA as an official guidance document to be known, considered and followed both by the public administration at the central and local level, and by the experts/technicians in charge of preparing SEA reports.

(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.
The article is transcribed, *ipsis verbis* and no additional categories of projects were added.
"likely to have significant environmental effects" – is this concept elaborated on in national legislation? No Is there official guidance Yes, 2 guidance documents mentioned before and / or national jurisprudence on the meaning of the phrase "likely to have significant environmental effects"? Only on projects (in the context of EIA) Who determines whether a particular plan or programme is "likely to have significant environmental effects"? The administrative entity responsible for making the plan or programme itself shall determine if the PP is likely to have significant environmental effects (article 3 n.2)

(iii) Is there screening? Screening is optional If yes, in what context(s) and how does it operate? The administrative authority responsible for making the plan or programme shall use a form (see a translated version attached to this report) to determine whether significant impacts are likely or not. In the motivation of the decision to apply SEA or not the arguments and guidelines provided by the PEA
(https://apambiente.pt/_zdata/AAE/Planos%20e%20Programas%20sujeitos%20a%20AAE/Instrumentos%20de%20Gestao%20Territorial/Circular%20DGOTDU.pdf) are to be considered.
Who makes the screening determination? By joint order of the minister for the environment and the competent minister considering the subject matter of the plan, considering the criteria established in the annex and having heard all the entities who may be interested on the environmental effects of the programme, considering their environmental responsibilities. These entities

include at least the PEA, The Institute for Nature Conservation and biodiversity, the Water institute, the Regional Development authorities, the health authorities, the municipalities affected by the plan or programme. They are given 20 days to give an opinion and all the opinions received after this short deadline will not be considered in the final decision on the submission of the plan or program to SEA Is the screening determination available to the public? Yes, since 2011 a new article was included in the SEA Law which established the obligation of disclosure of the decision to submit or not to submit a plan or programme to an SEA along with the motivation that lead to the decision, in the webpage of the competent authority.

(iv) " … 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?

Yes, the law explains that the plans or programmes that set a framework for future projects are the "plans and programs that contain relevant provisions for the subsequent approval decision making, namely regarding their need, size, location, nature or operating conditions" (article 3 n.5).

(v) "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 case of small plans or programmes has been transposed by a reversal of the burden of proof and the establishment of a relatively short deadline for issuing an opinion demonstrating the need for a SEA.

> "Article 4 Exemptions: 1 - The plans and programs referred to in paragraphs a) and b) of paragraph 1 of the previous article in which the use of small areas at local level and minor changes to the plans and programmes referred to therein should only be subject to environmental assessment if it is determined that the aforementioned plans and programs are likely to have significant effects on the environment, under the terms provided for in paragraph 6 of the previous article. 2 - The entity responsible for drawing up the plan or programme may request the issuing of an opinion, within 30 days, on the matter referred to in the preceding paragraph to the entities to whom, due to their specific environmental responsibilities, they may be interested in the resulting environmental effects of the implementation of the plan or programme".

In the words of the PEA, "the automatic application of the environmental assessment shall be avoided".

(vi) 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?

It is not so clear in the legislation as it is in the Guidance documents. In practice 87,5% of all the SEA performed (302) were focused on territorial plans and only 12,5% (38) are on other areas of planning or programming. In the case of non-territorial management strategic documents they are all called either plan or programme and to my knowledge there was never a case of a strategic instrument with a different name being discussed.

[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?

In the case of plans and programs integrated into a system that comprises a hierarchy in decision making, any environmental effects that are likely to be more adequately assessed in relation to the environmental assessment of plans or programs located at different levels of that scope are excluded from the scope of the Environmental Assessment system. This is particularly the case of town and country plans where there is a clear hierarchy among the planning levels between the National Territorial Plan (1), the Regional Territorial Plans (a few dozens), the Municipal Territorial Plans (around three hundred), Detail Plans (few thousands).

> «Article 5 Content of the environmental assessment
> 1 - The entity responsible for preparing the plan or program is responsible for determining the scope of the environmental assessment to be carried out, as well as determining the scope and level of detail of the information to be included in the environmental report.
> 2 - Any environmental effects that are likely to be more adequately assessed in relation to the environmental assessment of plans or programs located at different levels of that system are excluded from the scope of the environmental assessment of a plan or program»

Very often the Detail Plans are not submitted to SEA because the Municipal Plan, which is a type of plan higher in the hierarchy, was already submitted and the area is overlapping.

[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?

There are minor problems nor significant ones.

(ii) Who makes the scoping determination?

The authority responsible for the plan or programme

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

Yes.

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

Still a very narrow concept of reasonable alternatives, sometimes fake alternatives, not real ones.

[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.

Consultations must include "the entities to which, by virtue of their specific environmental responsibilities, the environmental effects resulting from its application may be of interest" (Article 7 n.1). Besides, "depending on the nature and complexity of the plan or programme, the entity responsible for its preparation may also consult institutions or specialists of recognised merit in the activity or area that is the object of the consultation" (Article 7 n.2). This raises questions of impartiality when the consulted entities are holders of economic interests in the area.

An example: For the Environmental assessment of the national strategic plan transport and infrastructure (2015) there were 10 entities consulted: the Portuguese Environment Agency; the Northern Regional Development and Coordination Commission; the Centre Region's Coordination and Development Commission; the Alentejo's Regional Development and Coordination Commission: the Algarve Regional Coordination and Development Commission; the Directorate-General for Cultural Heritage; the Directorate-General for Sea Policy; the Directorate-General for Natural Resources, Security and Maritime Services; the Directorate-General for Territory; the Institute for Nature Conservation and Forests.

During the public consultation, spontaneous comments and suggestions were received from by the following entities: Administration of the Port of Lisbon; Intermunicipal Commission of Alto Minho; Portuguese Confederation of Construction and Real Estate; National Railway Network; Quercus (ENGO); Geota (ENGO).

[8] **Transboundary consultations (Art. 7):** Has this provision come into play in your country? Who decides about initiating transboundary consultations? The PEA decides, the Minister of foreign affairs communicates At what stage are transboundary consultations usually initiated? Simultaneously with public consultation. Is there any significant national jurisprudence and / or practical examples? Only a few Does the UN ECE SEA Protocol play a role here? Not much.

[9] **"Taken into account" (Art. 8):** How is this provision understood? Any solution is valid as long as there is a credible justification. Is there any significant national

jurisprudence? There are a few examples, yes. The most emblematic being the "National Program for Dams having High Hydroelectric Potential" Are there any specific mechanisms in place to monitor compliance with this particular obligation? Not at all.

[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 it is organised and who is responsible for monitoring? The authority responsible for making the plan or programme. Is it effective in practice? No. Are there any specific mechanisms to address the results of monitoring? The results of monitoring are published in the website of the public authority and communicated to the PEA.

(**Note:** The REFIT examination suggests that monitoring is poorly executed in many countries).

[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).

The courts usually consider that there is a broad marge of discretion on the part of the administration. They would only declare a plan or programme void in cases of very flagrant illegality. If they see a slight hint of participation, or sense the smell of a "scientific" study, that is enough to exempt the court from any other analysis legitimating a decision favourable to the plan or programme.

(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)?

In theory, no.

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

In theory, yes.

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

In theory, yes.

(vi) Is there any 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, but considering the late transposition, it should.

[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).

No.

[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 were reports prepared in the context of the Aarhus Convention (https://unece.org/fileadmin/DAM/env/pp/mop6/NIR_2017/2017_NIR_Portugal_port_FINAL.pdf) produced for the purpose of demonstrating compliance with the e Convention.

[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.
The full list of SEA is available online. Between 2007 and 2021, 302 SEA were produced.
264 are territorial management plans. The rest (38) are plans on huge dams, National Road Plan, the New Airport in Lisbon, Pan for the development of an Energy Transport Network; River basin management plans (several); Coastal recovery plans (several); Plan for fighting desertification; Operational programme for competitiveness and internationalization (several); Strategic Plan for transport and infrastructures; Operational Programme for the European fund for fisheries and maritime affairs; Strategic Plan for water supply and wastewater treatment; Flood management plan; plan for nuclear waste management; Plan for the investment in natural gas; Strategic plan for Harbour development.

(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.
The list is exhaustive but only the final reports are available in the online database. https://siaia.apambiente.pt/AAEstrategica/.

[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?

There have been amendments mainly in territorial management plans.

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

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

Yes.

The creation of an ombudsman dedicated to SEA and EIA.

The adoption of European wide guidelines on good practices.

Duties of periodical reporting of results.

Revision of national reports by specialists and NGOs.

ANNEX

Strategic Environmental Assessment

Scope of application

Directive No. 2001/42 / EC, of the European Parliament and of the Council, of 27 June, aims to establish a high level of environmental protection and to contribute to the integration of environmental considerations in the preparation and approval of plans and programs, with a view to promoting sustainable development. To this end, it aims to ensure that certain plans and programs, which are likely to cause significant effects on the environment, are subject to an environmental assessment in accordance with its provisions.

This Directive was transposed into national law through Decree-Law no. 232/2007, of 15 June, which established the regime to which the assessment of the effects of certain plans and programs on the environment is subject.

In this context, it is the responsibility of the entity responsible for preparing the plan or program to ascertain whether it is subject to environmental assessment, and for that purpose it may consult the Entities with Specific Environmental Responsibilities.

The present document intends to constitute not only a model for the decision on the need to subject a plan or program to environmental assessment, but mainly to serve as a guide for this decision making.

ENVIRONMENTAL ASSESSMENT OF PLANS AND PROGRAMS

Verification of the applicability of Decree-Law no. 232/2007, of 15 June

1. Plan or Program identification and typology	
1.1. Designation	
1.2. Promoter	
1.3. Company responsible for environmental assessment	
1.4. Territorial scope of the Plan or Program	☐ National Please specify: ☐ Regional Please specify: ☐ Intercity Please specify: ☐ Municipal Please specify: ☐ Other Please specify:
1.5. Type of Plan or Program	☐ National program ☐ Sectoral program ☐ Special program ☐ Regional program ☐ Intercity program ☐ Inter-municipal master plan ☐ Inter-municipal urbanization plan ☐ Inter-municipal detail plan ☐ Municipal master plan ☐ Urbanization plan ☐ Detail plan ☐ Sectoral plan ☐ Other Please specify:

2. Definition of Plan or Program in the context of DL 232/2007	
2.1. Preparation and / or approval	Is the preparation and / or approval of the Program / Plan carried out by an authority at national, regional or local level, or is it prepared by another authority, for approval through legislative procedure, by the Assembly of the Republic or by the Government? ☐ Yea ☐ No
2.2. Legal requirement	Is it required by laws, regulations or administrative provisions? ☐ Yea ☐ No
2.3. Exclusions	Does it refer only to national defense or civil protection? ☐ Yea ☐ No Is it solely of a financial or budgetary nature or is it financed under the programming periods covered by Council Regulations (EC) Nos 1989/2006, 21 December, and 1257/99? ☐ Yea ☐ No

Guidance notes for the decision

Programs and Plans contemplated in the legislation are:

- *those resulting from legal, regulatory or administrative requirements or whose approval must be carried out, by legislative procedure, by the Assembly of the Republic or by the Government;*
- *those whose elaboration, alteration or revision is carried out by authorities at national, regional or local level or by other entities that exercise public powers;*

Programs and plans included in the legislation include those co-financed by the European Union.

I excluded the Programs and Plans that only concern National Defense or civil protection or that are programs of a financial or budgetary nature or financed by structuring funds.

If the option Yes was checked in field 2.1 and / or in field 2.2 it is considered a Program / Plan and may be subject to SEA.

If the option Yes is checked in field 2.1 or field 2.2 and also in field 2.3 it is considered a Program / Plan but will not be subject to SEA.

3. Scope of application	
3.1. Sector referred to in the Plan or Program (subparagraph a) of paragraph 1 of Article 3 of DL 232/2007)	☐ Agriculture ☐ Forest ☐ Fisheries ☐ Energy ☐ Industry ☐ Transportation ☐ Waste Management ☐ Water management ☐ Telecommunications ☐ Tourism ☐ Urban and Rural Planning or Land Use
3.2. Framework for project approval	It constitutes a framework for the future approval of projects mentioned in Annexes I and II of theDecree-Law no. 151-B / 2013, of October 31? ☐ Yea ☐ No
3.3. Effects on classified areas (subparagraph b) of paragraph 1 of Article 3 of DL 232/2007)	☐ Sites on the national list of sites ☐ Site of Community Interest ☐ Special conservation area ☐ Special protection zone
3.4. Significant effects (paragraph c) of paragraph 1 of Article 3 of DL 232/2007)	Is it not covered by the paragraphs described above? ☐ Yea ☐ No Does it constitute a framework for the future approval of projects? ☐ Yea ☐ No Are you qualified as likely to have significant effects on the environment according to the annex to DL 232/2007? ☐ Yea ☐ No

Guidance notes for the decision

Plans and Programs for the framing of future projects:

Plans and programs that contain relevant provisions for the subsequent approval decision making, namely, regarding their need, size, location, nature or operating conditions:

If field 3.1 was checked. and the Yes option in field 3.2 is considered a Program / Plan that must be subject to SEA.

The Sites and Zones are those mentioned in Decree-Law no. 140/99, of 24 April, amended by Decree-Law no. 49/2005, of 24 February, changed by Decree-Law no. 156-A / 2013, of 8 November.

If field 3.3 was checked, it is considered a Program / Plan that should be subject to SEA.

The qualification of a Program / Plan as likely to have significant effects on the environment, for the purposes provided for in paragraph c) of paragraph 1, is carried out by joint order of the Government member responsible for the environment area and the competent Government member due to matter, in accordance with the criteria set out in the Annex to Decree-Law no. 232/2007, of 15 June

If the option Yes is checked in all fields in 3.4, it is considered a Program / Plan that must be subject to SEA.

4. Exemptions	
4.1. Small areas or small changes to the Plan or Program	Does the Plan or Program determine the use of small areas at the local level? ☐ Yea ☐ No Is it a small change to a plan or program? ☐ Yea ☐ No
4.2. Significant effects (paragraph c) of paragraph 1 of Article 3 of DL 232/2007)	Are you qualified as likely to have significant effects on the environment according to the annex to DL 232/2007? ☐ Yea ☐ No
Guidance notes for the decision *They should only be subject to environmental assessment if it is determined by joint order of the member of the Government responsible for the area of the environment and the member of the competent Government on the grounds that the said plans and programs are likely to have significant effects on the environment, according to the criteria set out in the annex to the diploma.* ***If the option Yes was checked in one of the fields 4.1. or both, and the option No is checked in field 4.2, the Program / Plan should not be subject to SEA.***	

5. Rationale for the qualification of the Plan or Program in the environmental assessment regime

6. ERAE pronunciation	
Designation	
Is the Plan or Program subject to environmental assessment under the terms of Decree-Law no. 232/2007, of 15 June? ☐ Yea ☐ No Rationale:	
Date and signature	

ATTACHMENT

(referred to in Article 3 (6))

Criteria for determining the likelihood of significant effects on the environment:

1 - Characteristics of plans and programs, taking into account, namely:

a) The degree to which the plan or program establishes a framework for projects and other activities with regard to the location, nature, size and operating conditions or the allocation of resources;
b) The degree to which the plan or program influences other plans or programs, including those within a hierarchy;
c) The relevance of the plan or program for the integration of environmental considerations, in particular with a view to promoting sustainable development;
d) The environmental problems relevant to the plan or program;
e) The relevance of the plan or program for the implementation of environmental legislation.

2 - Characteristics of the impacts and the area likely to be affected, having in particular:

a) The probability, duration, frequency and reversibility of the effects;
b) The cumulative nature of the effects;
c) The cross-border nature of the effects;
d) Risks to human health or the environment, in particular due to accidents;
e) The extent and spatial extent of the effects, in terms of geographical area and size of the population likely to be affected;
f) The value and vulnerability of the area likely to be affected due to:
i) Specific natural characteristics or cultural heritage;
ii) Exceeding the standards or limit values in terms of environmental quality;
iii) Intensive land use;
g) Effects on areas or landscapes with protected status at national, community or international level.