Avosetta Questionnaire: The SEA Directive, 28-29 May 2021 – UK Response

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

The UK has transposed the SEA Directive by means of specific laws, with different laws implementing the Directive in the UK's devolved administrations. Two different approaches to transposing the Directive can be seen in England and Scotland:

- England (minimal transposition) – The Environmental Assessment of Plans and Programmes Regulations 2004 SI 2004/1633 (secondary legislation) transposes the EU SEA regime very precisely. The Welsh regulations are similar.
- Scotland (gold plating) – the Environmental Assessment (Scotland) Act 2005 (primary legislation) transposes SEA more widely to most public plans and programmes.

[2] EU infringement proceedings? No.

[3] Objectives (Art. 1)

(i) Is the Objective of the Directive reflected in your Member State's national legislation? No.

(ii) Has the Objective been used by your national courts to assist them in the interpretation of relevant provisions of national law? No.

[4] "Plans and Programmes" subject to SEA

(i) **Art. 2 (a) (Definition of "plans and programmes"):**

'plans and programmes'

In England (and very similar in Wales), these are defined as follows:

plans and programmes, including those co-financed by the European Community, as well as any modifications to them, which—
(a) are subject to preparation or adoption by an authority at national, regional or local level; or
(b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
(c) are required by legislative, regulatory or administrative provisions;

Scotland's definition does not include being 'required by legislative, regulatory or administrative provisions' – this aspect is picked up in a subsequent provision on what constitutes a 'qualifying plan or programme', which includes this qualification but also widens the scope of SEA beyond such plans or programmes (see next question).

'required by legislative, regulatory or administrative provisions'

R (Friends of the Earth) v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518 (Admin) was a controversial decision, which found that the central national planning policy framework (NPPF) in England was not within scope of SEA obligations as there are **no** statutory provisions regulating its creation. This is despite court recognising that the NPPF set the framework for future planning decisions in a very influential way, including as to green belt policy. This interpretation is arguably consistent with C-567/10 *Inter-Environment Bruxelle*'s expansive interpretation of 'required, but it means that the central national planning document in England is not included within the scope of SEA due to a quirk of English planning legislation which works against the backdrop of this national policy but does not legally require or regulate it.

(ii) **Art. 3 (Scope):** England and Wales have transposed the Directive scope requirements very literally. The Scottish SEA regime extends to a much wider class of public policies, requiring that all public policy and programmes applying within Scotland (except those that apply to individual schools or are likely to have no or minimal effect in relation to the environment) are subject to SEA. This is achieve by some convoluted statutory drafting in section 5, Environmental Assessment (Scotland) Act 2005.

(iii) **"likely to have significant environmental effects"**: No notable jurisprudence. The responsible public body (developing the plan or programme) determines whether it is likely to have significant environmental effects. If it determines that it is unlikely to have significant effects, they must give reasons, and those reasons should be made available to the public (English reg 9(3)). The Secretary of State (government Minister) can, after consulting with environmental regulators and applying the Annex 1 criteria, override this and find that a plan or programme is likely to have significant environmental effects, and thus requires an EIA (English reg 10).

(iv) **Screening** is conducted by the relevant public authority developing the plan or programme. Screening decisions are to be kept available for inspection by the public (i.e. they are not required to be publicly disseminated), and 'appropriate' steps must be taken to notify the public that the determination has been made and where the documentation can be inspected (English reg 11).

(v) **"setting the framework for future development consent of projects"**: A leading UK Supreme Court case considers this requirement. In *HS2 Action Alliance Ltd, R (on the application of) v Secretary of State for Transport* [2014] UKSC 3, Lord Carnwath held that:

'One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects.'

In this case, the 'Decision and Next Steps' document at issue (the relevant plan or programme, which committed the Government to its proposed 'High Speed 2' (HS2) rail strategy and set out a procedure for protecting its planned route and empowering its approval) did not set the framework for the decision to approve the final HS2 project was that the DNS was *more like a planning application, since it contained extensive information about the options for the*

proposal and its merits, but crucially did not constrain the ultimate decision-maker who would have to approve the scheme. This was particularly because Parliament was the ultimate decision-maker in relation to the HS2 scheme. The constitutional supremacy and independence of Parliament was critical in determining whether or not the DNS 'set the framework' in the *HS2* case. This finding sets a bright-line limit to the application of the SEA Directive, in relation to policies and related consent decisions that are so 'controversial and politically sensitive' that they are ultimately decided by Parliament.

(vi) **"Plans and programmes" that "determine the use of small areas at local level"**: this is transposed literally into all UK SEA legislation. Not known how applied in practice.

(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?

Not really, at least in England. See *Friends of the Earth* (2019, High Court, above) excluding from scope of SEA the quintessential type of strategic planning policy for town and country planning in England.

[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?

No Adastral New Town Ltd v Suffolk Coastal District Council [2015] EWCA Civ 88 is an example where the SEA was unlawful because carried out too late. The case concerned a local council core planning strategy, which set housing targets. The SEA process was carried out before the Council's preferred option for housing development was confirmed (which increased a proposed housing allocation in the preferred area from 1050 to 2000 dwellings).

On avoiding duplication of assessment, SEA often overlaps with 'Sustainability Appraisal' of development plans in the English town planning context. Both types of assessment (SA and SEA) can be required in some cases and are usually done by the same document/process. SA is more focused on 'sustainable development' in the sense of balancing environmental, economic and social considerations and thus risks muting the 'environmental' focus of SEA in practice.[1]

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

Scoping determinations

Scoping determinations are made by the public bodies developing the relevant plan or programme. The relevant public body must consult on the 'scope and level of detail' to be included in the report with the main environmental regulators, for a period of at least 5 weeks (English reg 12(5) and (6)).

[1] See Jack Connah and Stephanie Hall, 'From SA to SEA: Sustainability Appraisals and Strategic Environmental Assessment' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment: A Plan for Success?* (Hart Publishing 2017).

Environmental reports

No notable jurisprudence but a very interesting example in the 'Appraisal of Sustainability' (AoS) for the 'Airports National Policy Statement' (June 2018), which was a highly controversial plan for expanding national airport capacity, and recommending a third runway at Heathrow Airport. There is extensive analysis of environmental issues in the AoS – with all three airport expansion options showing 'red' on the traffic light system of environmental impacts – but the overriding economic goal of airport expansion effectively justifying these impacts.

Reasonable alternatives

The UK Supreme Court has held that the role of 'reasonable alternatives' with an SEA environmental report is as follows: '*It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives* ***by which the public need for development in accordance with the proposed plan or project could be met****'* ([2020] UKSC 52 [146]). That is, the need for development is assumed, and reasonable alternatives to this need are not considered.

Thus, in relation to the National Airports Policy SEA example, narrowing down of the scope of reasonable alternatives (dismissing from the environmental assessment options including high speed rail, redistribution of airport capacity, new technologies – i.e. no airport expansion) was done very briefly by referring to earlier work by the Airports Commission showing that 'none of these schemes delivered a sufficient increase in capacity and many required investment far in excess of the cost of runway expansion'. (AoS 46)

[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?

In the English regulations, every draft plan or programme for which an environmental report has been prepared shall be opened for consultation to the statutory consultation bodies (main environmental regulators) and to 'public consultees', for as long as 'will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents' (reg 13(3)).

For an interesting decision on inadequate SEA consultation, see *No Adastral New Town Ltd v Suffolk Coastal District Council* (discussed above).

[8] **Transboundary consultations (Art. 7):** No notable examples.

[9] **"Taken into account" (Art. 8):** It is literally transposed into the relevant domestic legislation. No UK jurisprudence or monitoring.

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

Ongoing monitoring of signfican environmental effects is a legal requirement (e.g. reg 17 below, English regs, similar in Wales and Scotland), with the plan-making body responsible for doing the monitoring. There are no mechanisms for recording this monitoring activity.

17.—(1) The responsible authority shall monitor the significant environmental effects of the implementation of each plan or programme with the purpose of identifying unforeseen adverse effects at an early stage and being able to undertake appropriate remedial action.
(2) The responsible authority's monitoring arrangements ***may comprise or include arrangements established otherwise than for the express purpose of complying with paragraph (1)****.*

[11] Access to justice:

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

In *Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd* [2020] UKSC 52, which involved a challenge to the SEA of the National Airports Policy described above (see also UK climate change update on this case), the UK Supreme Court held that review of SEA by the courts should involve 'limited judicial review' in light of the complex assessments, finding this to be consistent with the approach in EU law (citing AG Leger in Case C-120/97 *Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968*) and explaining that:

[146] The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. ***Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them.*** *In the sort of complex environmental report required in relation to a major project like the NWR [North West Runway] Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.*

Plans or programmes are not necessarily declared void if SEA requirements are not respected. See *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88 (above)

where the unlawfulness in the original consultation process was found to be remedied by a subsequent, more thorough consultation considering all alternatives and so the deficient SEA process did not void the controversial housing plan under review.

(ii) Are there any restrictions / limitations on access to justice as a result of national provisions concerning either legitimacy or jurisdiction of (administrative) courts (i.e. are plans / programmes excluded from judicial control on the basis of any rule on jurisdiction of courts or legitimacy)? No.
(iii) Is it possible to challenge a negative screening determination? Yes.
(iv) Is it possible to challenge the scoping determination? Yes.
(v) Is there any significant national jurisprudence on access to justice in the SEA context? No.

[12] Direct effect: No direct effect challenges.

[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: No.

[15] National databases:

No national databases of SEA or all environmental assessments. There is an interesting database (predating the SEA Directive) of sectoral strategic environmental assessments (SEAs) of the implications of further licencing of the UK Continental Shelf (UKCS) for oil and gas exploration and production, maintained by the British Geological Survey. See link.

[16] Impact of SEA in practice:

There have not been any significant amendments to plans or programmes after SEA, although there are several examples of major policy changes or infrastructure projects being challenged on failure to comply with the SEA Directive's processes or requirements, particularly in an attempt to prioritise environmental impacts in policymaking or to force the consideration of alternatives. None have been successful in changing policies, despite some major litigation (see above the litigation concerning a major new high speed rail line, *HS2*, and the expansion of Heathrow airport with a third runway, *Friends of the Earth* (2020)).

There was one notable amendment to an SEA procedure: when the SEA Directive was being transposed, the UK government was in the process of a major reorganisation of the English planning system, abolishing the regional level (between local and national) of planning. After litigation on the issue (*Cala Homes (South) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639), the government consulted again and amended its environmental reports to ensure it was complying with the SEA Directive, however the changes to the planning system nonetheless went ahead.

[17] Any other significant issues? No.

[18] General assessment and / or any recommendations:

The SEA Directive is inherently very controversial, intruding into national executive policy making power.[2] Its aims are laudable (upstream assessment of environmental effects so as to embed a high level of environmental protection in policymaking) but any guarantee of ensuring better environmental outcomes will be hard to entrench in national law unless a government is proactive in using its processes for those purposes. There is also a risk that SEA still leads to 'salami slicing' policy in relation to environmental problems as it is ex post facto review of policies designed for other purposes (eg transport, planning), rather than requiring policies to be designed to promote environmental protection in a more integrated way (eg what policies need to be coordinated to address biodiversity challenges?). We are dealing with this very debate at the moment in England as we contemplate how to implement environmental principles into legal requirements for policymaking (post-Brexit).

[2] See Eloise Scotford, 'SEA and the Control of Government Environmental Policy' in Gregory Jones and Eloise Scotford (eds), *The Strategic Environmental Assessment: A Plan for Success?* (Hart Publishing 2017).