

Recent developments on the scope of SEA: when is SEA required?

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CASE LIST

Cases I will discuss dealing with scope of SEA:

- (1) *Bard Campaign v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin) (*);
- (2) *R. (Hillingdon LBC) v S/S for Transport* [2010] J.P.L. 976 (HC, 26/03/10) (*)
- (3) Cases C-105/09 & C-110/09 *Terre Wallonne ASBL v Region Wallonne* (CJEU, 17 June 2010)
- (4) *R (Cala) v S/S for Communities & Local Government (No. 1)* [2011] B.L.G.R. 204 (HC, 10/11/10) (*)
- (5) *R (Cala) v S/S for Communities & Local Government (No. 2)* [2011] 1 P. & C.R. 22 (HC, 07/02/11) (*)
- (6) *Central Craigavon Ltd's Application for Judicial Review* [2011] NICA 17 (CANI, 7/06/11)
- (7) Case C-295/10 *Genovaitė Valčiukienė and Others v Pakruojo rajono savivaldybė and Others* (CJEU, 22/09/2011)
- (8) Case C-567/10 *Inter-Environnement Bruxelles ASBL v Region de Bruxelles-Capitale* [2012] 2 C.M.L.R. 30 CJEU, 22/03/12) (*)
- (9) *R (Wakil) v LB of Hammersmith & Fulham* [2013] Env. L.R. 3 (HC 25/5/12)
- (10) Case C-177/11 *Sillogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos, Chorotaxias & Dimosion Ergon and Others* (CJEU, 21/06/12)
- (11) Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others* (CJEU 11/09/12)
- (12) *Walton v The Scottish Ministers* [2013] P.T.S.R. 51 (SC, 17/10/12)
- (13) *Alternative A5 Alliance's Application for Judicial Review* [2013] NIQB 30 (HCNI, 12/3/13)
- (14) *R (Buckinghamshire CC) v Secretary of State for Transport* [2013] EWHC 481 (Admin) (HC, 15/3/13) (*)
- (15) *R (Buckinghamshire CC) v Secretary of State for Transport* [2013] EWCA Civ 920

Cases concerning SEA where no issue as to application:

- (1) *Seaport Investments Ltd's Application for Judicial Review, Re* (HCNI) ([2008] Env. L.R. 23) and CJEU (Case C-474/10; [2012] Env. L.R. 21) - Draft Northern Area Plan 2016 and Draft Magherafelt Area Plan 2015 - also went to CJEU Case C-474/10 [2012] Env. L.R. 21 (*)
- (2) *R. (Howsmoor Developments Ltd) v South Gloucestershire CC* (HC) [2008] Env. L.R. 38 - a supplementary planning document - Emersons Green East Development Brief.
- (3) *St Albans City and DC v S/S for Communities & Local Government* [2010] J.P.L. 70 (HC) - Revision of the East of England Plan.
- (4) *Save Historic Newmarket Ltd v Forest Heath DC* [2011] J.P.L. 1233 (HC) - Forest Heath Core Strategy
- (5) *Heard v Broadland* [2012] Env. L.R. (HC) - Joint Core Strategy.
- (6) *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin) (11/1/13) - Thetford Area Action Plan (*).

One further case: *R (Boggis) v Natural England* [2010] PTSR 725 (CA): case re “plan” in Habitats Directive, but considers SEA also. Holds that SSSI notification of OLDs not such a plan.

(*) Cases in which I have appeared

Relevant parts of the SEA Directive (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)

“Article 3

Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
 - (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
 - (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.
4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.
5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.
6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.
7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.
8. The following plans and programmes are not subject to this Directive:
 - plans and programmes the sole purpose of which is to serve national defence or civil emergency,
 - financial or budget plans and programmes.
9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods⁽¹¹⁾ for Council Regulations (EC) No 1260/1999⁽¹²⁾ and (EC) No 1257/1999⁽¹³⁾.”

The relevant parts of the SEA Regulations (Environmental Assessment of Plans and Programmes Regulations 2004/1633)

Article 2

““plans and programmes” means 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 ...”

Article 5

“5. – Environmental assessment for plans and programmes: first formal preparatory act on or after 21st July 2004

(1) Subject to paragraphs (5) and (6) and regulation 7, where-

- (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
- (b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which-

- (a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC 1.

(3) The description is a plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.

(4) Subject to paragraph (5) and regulation 7, where-

- (a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;
- (b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects, the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(5) Nothing in paragraph (1) or (4) requires the carrying out of an environmental assessment for-

- (a) a plan or programme the sole purpose of which is to serve national defence or civil emergency;
- (b) a financial or budget plan or programme; or
- (c) a plan or programme co-financed under-
 - (i) the 2000-2006 programming period for Council Regulation (EC) No. 1260/1999; or
 - (ii) the 2000-2006 or 2000-2007 programming period for Council Regulation (EC) No. 1257/1999.

(6) An environmental assessment need not be carried out-

- (a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or

(b) for a minor modification to a plan or programme of the description set out in either of those paragraphs,
unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, or it is the subject of a direction under regulation 10(3)."

Relevant materials

(i) The travaux préparatoires

1. Commission's 1996 proposal for the SEA Directive (COM(96) 51) part of the travaux préparatoires: included indicative list of the plans and programmes which might be covered for UK "Structure plans & unitary development plans part one; Local plan & unitary development plan (UDP) part two". It also said:

"The Proposal [...] restricted to the plan and programme level of decision-making. It does not apply to the more general policy level of decision making at the top of the decision-making hierarchy. Whilst it is important that general policy decisions take account of the environment, the procedural requirements of the present Proposal may not be a suitable way of achieving this goal. General policy decisions develop in a very flexible way and a different approach may be required to integrate environmental considerations into this process ...

The Proposal is restricted to town and country planning plans and programmes and to plans and programmes which are adopted as part of the town and country planning decision-making process for the purpose of setting the framework for subsequent development consent decisions which will allow developers to proceed with projects. Such town and country planning plans and programmes define the use of land and contain provisions on nature, size, location or operating conditions of installations or activities in different sectors relevant to town and country planning ..."

2. Committee of the Regions opinion on 20 November 1997:

"4.5 It is also important to clarify how widely the words "plan" and "programme" would be interpreted in determining the scope of the proposed directive. The COR understands and shares the desire of Member States not to fetter the political process with restrictions to their respective ability to formulate and adopt general policies.

4.6 However, as soon as policies become clothed in quantified detail- for example, by specifying total levels of a particular type of development which are envisaged with a Member State or other area, or how such development should be distributed within that state or area - they become in effect plans or programmes which clearly need to be subject to the provisions of the proposed directive. Once they attain that degree of specificity, they begin to pre-empt subsequent decisions on individual projects in precisely the way which justifies the introduction of the proposed new requirements.

4.7 It is accordingly vital in the COR's view that the proposed directive should define its scope in such a way that any instrument or pronouncement, no matter how it was entitled or described, would be regarded as a "plan" or "programme" if it specified the total levels, or the distribution which were envisaged for any relevant type of development."
3. European Parliament's Committee on the Environment, Public Health and Consumer Policies in its recommendations to the European Parliament for the Second Reading (issued on 13 July 2000) recognised that it had not been possible to get an agreement on including policies in the Common Position, and so sought an amendment to allow the review of the Directive which was proposed to be undertaken 5 years after the Directive came into force, to consider the inclusion of policies at a later stage. This proposal was voted out at the plenary meeting of the European Parliament and was therefore not one of the Parliament's amendments put forward following second reading. The issue was not raised again after that.

(ii) **Relevant guidance**

1. ODPM “A Practical Guide to the Strategic Environmental Assessment Directive” (September 2006): Appendix 1 Indicative list of plans and programmes subject to the SEA Directive: includes Structure Plans; Local Plans; UDPs amongst list. No national policy save for National policy statements on planning for waste management (currently PPS 10 “Planning for sustainable waste management” in England and TAN21 “Waste” in Wales). Why part of Article 7 waste plans for the purposes of the Waste Framework Directive.
2. Commission Guidance “IMPLEMENTATION OF DIRECTIVE 2001/42 ON THE ASSESSMENT OF THE EFFECTS OF CERTAIN PLANS AND PROGRAMMES ON THE ENVIRONMENT”
http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf:

“3.2 The first requirement in order for plans and programmes to be subject to the Directive, is that they must meet the conditions of both indents in Article 2(a). In other words, they must be both 'subject to preparation and/or adoption by the prescribed authorities' and 'required by legislative, regulatory or administrative provisions'.

3.3. Plans and programmes are not further defined. The words are not synonymous but they are both capable of a broad range of meanings which at some points overlap. So far as the Directive’s requirements are concerned, they are treated in an identical way. It is therefore neither necessary nor possible to provide a rigorous distinction between the two. In identifying whether a document is a plan or programme for the purposes of the Directive, it is necessary to decide whether it has the main characteristics of such a plan or programme. The name alone ('plan', 'programme', 'strategy', 'guidelines', etc) will not be a sufficiently reliable guide: documents having all the characteristics of a plan or programme as defined in the Directive may be found under a variety of names.

3.4. In considering the concept of ‘project’ under the EIA Directive in case C-72/95 Kraaijeveld, the ECJ noted that that Directive had a wide scope and a broad purpose. In view of the language used in Directive 2001/42/EC, the related purposes of that Directive and the EIA Directive, and the conceptual similarities between them, Member States are advised to adopt a similar approach in considering whether an act is to be considered a plan or a programme falling within the scope of Directive 2001/42/EC. The extent to which an act is likely to have significant environmental effects may be used as one yardstick. It may be that the terms should be taken to cover any formal statement which goes beyond aspiration and sets out an intended course of future action.

3.5. The kind of document which in some Member States is thought of as a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development. Waste management plans, water resources plans, etc, would also count as plans for the purposes of the Directive if they fall within the definition in Article 2(a) and meet the criteria in Article 3.

3.6. In some Member States, programme is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete. One good example of such a programme could be the Icelandic Integrated Transportation Programme which is planned to take the place of independent programmes for road, airport, harbour and coastal defence projects. The transport infrastructure is defined and policy on transport infrastructure is laid out for a period of 12 years (identifying projects by name, location and cost). But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry

out a policy' – the sense in which 'plan' was used in the previous paragraph. In town and country planning in Sweden, for instance, the programme is thought of as preceding a plan and as being an inquiry into the need for, and appropriateness and feasibility of, a plan.

3.7. Plans and programmes include those co-financed by the European Community. The Directive is of course addressed only to the Member States and not to the institutions of the Community. Regardless of the decision making process within the Community institutions regarding funding (and whether or not there is SEA – or an analogous form of assessment - by those institutions) there will need to be an assessment by the Member State if the plan or programme is subject to the Directive.

3.8. If the criteria in Articles 2 and 3 are met, the Directive would apply in principle to co-financed plans in several sectors, including transport and regional, economic and social development (Structural Funds). Article 11(3) prescribes expressly that for plans and programmes co-financed by the European Community, the environmental assessment under Directive 2001/42/EC must be carried out in conformity with the specific provisions of the relevant Community legislation. Hence the assessment must comply with each requirement of the applicable legislation; an assessment adequate for one Directive may not be adequate for any other which applies. Plans and programmes co-financed under the current respective programming periods of Regulations 1260/1999/EC and 1257/1999/EC are exempted from the scope of the SEA Directive. This is because plans and programmes under those Regulations will almost certainly have been agreed before the Directive is due to be transposed in the Member States (i.e. 21st July 2004) and will have undergone prior environmental assessment. The exemption does not apply to future programming periods under those Regulations and Article 12(4) requires the Commission to report on the relationship between the Directive and the Regulations before the expiry of the current programming periods.

3.9. The definition of plans and programmes includes modifications to them. Many plans, especially land use plans, are modified when they eventually become outdated rather than being prepared afresh. Such modifications are treated in the same way as plans and programmes themselves and require environmental assessment provided the criteria laid down in the Directive are met. If such modifications were not given the same importance as the plans and programmes themselves, the field of application of the Directive would be more restricted. The adoption of such modifications will be subject to an appropriate procedure. It is important to distinguish between modifications to plans and programmes, and modifications to individual projects, envisaged under the plan or programme. In the second case, (where individual projects are modified after the adoption of the plan or programme), it is not Directive 2001/42/EC but other appropriate legislation which would apply. An example could be a plan for road and rail development, including a long list of projects, adopted after SEA. If, in implementing the plan or programme, a modification were proposed to one of its constituent projects and the modification was likely to have significant environmental effects, an environmental assessment should be made in accordance with the appropriate legal provisions (for example, the Habitats Directive, and/or EIA Directive).

3.10. Under Article 5 of Directive 2001/42/EC, the likely significant effects on the environment of implementing the plan or programme must be identified, described and evaluated. Thus it is logical to consider that a modification of a plan or a programme during its preparation must be subject to assessment under Article 5 if the modification in itself involves significant environmental effects not yet assessed. This might arise if a modification was made as a result of consultation, or of reconsideration of elements of the plan or programme, or if the state of the environment had changed so as to make assessment necessary. Even minor modifications can generate significant environmental effects, as foreseen in Article 3(3) of the Directive. Delays might ensue in the adoption of the plan or programme but these should be kept to a minimum, subject to the overriding requirement to assess the likely significant environmental effects.

3.11. The element subject to preparation and/or adoption by an authority stresses that plans and programmes need to fulfil certain formal conditions in order to be covered by

the Directive. The main idea of this element is that in the end a plan or programme would always be formally adopted by an authority. However, the phrase would also include the situation where a plan is prepared by one authority (or natural or legal person who works on behalf of the authority) and is adopted by another authority.

3.12. The concept of an 'authority' has been given a large scope in the case law of the ECJ. It can be defined as a body, whatever its legal form and regardless of the extent (national, regional or local) of its powers, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State, and it has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals (case C-188/89 Foster and others v British Gas). For example, privatised utility companies may be required to carry out some tasks or duties (such as preparing long-term plans for ensuring water resources) which in non-privatised regimes would be carried out by public authorities. In respect of those functions they would be treated as authorities for the purposes of the Directive. In other respects (such as providing consultancy services overseas) they would not be considered to be authorities in the sense of the Directive.

3.13. Plans and programmes which private bodies draw up for their own purposes (i.e. when not acting as authorities as described above, nor as agents of authorities, and when not preparing them for adoption by authorities) are not subject to the Directive.

3.14. Preparation of a plan or programme covers a process which lasts right through to its adoption. Adoption through a legislative procedure by Parliament or Government is one procedure for adopting plans and programmes in some Member States. For example, in Italy regional and local Territorial and Urban plans are adopted and approved in a two-stage procedure by the relevant regional or local authorities. The final approval is often by means of a regional law. 'Government' is not restricted to the level of the State. In some countries, plans and programmes may be adopted by primary or secondary legislation of any State, regional or local legislature. These cases, too, are subject to environmental assessment when the other requirements of the Directive are met. One example at national level is the French Schémas de services collectives which are prepared at national level, with consultation at regional level, and approval by the Government after consultation with Parliament.

3.15. Another important qualification for a plan or programme to be subject to the Directive is that it must be required by legislative, regulatory or administrative provisions. If these conditions are not met, the Directive does not apply. Such voluntary plans and programmes usually arise because legislation is expressed in permissive terms [#], or because an authority decides to prepare a plan on an activity which is unregulated. On the other hand, if an authority is not required to draw up a plan unless certain preconditions are met, it would probably be subject to the Directive once those preconditions had been met (and the other requirements of Articles 2 and 3 had been fulfilled). It is of course open to Member States, in respect of their own national systems, to go further than the minimum requirements of the Directive should they so desire.

3.16. Administrative provisions are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions"

Footnote in original says "'The authority may prepare a plan', rather than 'The authority shall prepare a plan'." But this must be regarded as wrong in the light of *Inter-Environnement Bruxelles*.

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