JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

J&E Workplan 2007: SEA in transport sector

Legal analysis on SEA implementation with regard to infratstructure projects ELF – Estonia

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1. General information on transposition of SEA Directive in transport sector

a. Names of acts

There is no specific regulation about SEA in transport sector. SEA Directive has been transposed into Estonian national legislation via **Environmental Impact Assessment and Environmental Management Systems Act**[1] (hereinafter referred to as the EIA Act), adopted 22nd Februar 2005, in force since 3rd April 2005.

With the new EIA Act, amendments were also adopted for **Planning Act**[2], regarding SEA for spatial plans.

b. Transposition in time?

Transposition has not been carried out in time. EIA Act is in force only since 3 April 2005, whereas the deadline for transposition of the SEA Directive was 21 July 2004.

Before the new EIA Act, the environmental impact assessment was regulated by Environmental Impact Assessment and Environmental Auditing Act (old EIA Act). The old EIA Act did foresee an obligation to carry out SEA for certain plans, but no procedural requirements were established for SEA. Moreover, SEA as such was not required for spatial plans at all (there was only general requirement mentioned in Planning Act, that purpose of spatial plans is, among other things, to assess impacts of realisation of the spatial plan (and even this vague requirement was not applied to all spatial plans).

c. Overall framework of SEA in legal system

SEA is obligatory for strategic planning documents that create basis for activities with significant environmental impact or that are certain spatial plans. Strategic planning document in the meaning of EIA Act can be any kind of plan, programme or strategy that is established by the legal act of the Riigikogu (Parliament), the Government of the Republic, a governmental authority, a county governor or local government body. Concerning transport sector, most significant plans are development plans and spatial plans.

Thematic development plans are composed by relevant ministries and they create a basis for State Budget. Such development plans are adopted by governmental decision. The basis for adopting and procedural requirements for such plans are regulated by Regulation No 302 of the Government from 13 December 2005[3] which determines that thematic development plans are supposed to "reflect" objectives of one or several fields of development and measures, necessary for reaching those objectives. This definition is quite vague so it is not possible to determine what kind of plans can

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[1] Keskkonnamõju hindamise ja keskkonnajuhtimissüsteemi seadus – Riigi Teataja (Official Journal) I 2005, 15, 87
[2] Planeerimisseadus – RT I 2002, 99, 579
[3] Vabariigi Valitsuse 13. detsembri 2005.a. määrus "Strateegiliste arengukavade liigid ning nende koostamise, täiendamise, elluviimise, hindamise ja aruandluse kord" – RT I 2005, 67, 522

and which cannot be thematic development plans. Also, the procedural requirements for adopting such plans are rather vague, for example there are no specific requirements about public participation and no reference to obligation to carry out SEA.

Spatial plans determine conditions for land-use. There are four levels of spatial plans: national spatial plan, county plan[4], comprehensive plan[5] and detailed plan[6]. The plan of more detailed level must be in correspondence with the plan of more general level. All of these plans determine conditions for establishment of infrastructure projects, including routes for roads and railways etc (with different level of generalisation). Planning Act sets detailed procedural requirements for the spatial plans, including requirements for public participation. As for SEA, Planning Act refers to obligation to take SEA results into account while adopting a plan.

Since 27 March 2007, there is a specific regulation in Planning Act for "line-constructions" which include several municipalities – this term covers roads and railways, but also other type of technological constructions. According to these special provisions, location for a line-construction shall be determined in a county plan and it is required that several alternative locations must be considered in decision-making process.

From legal nature, SEA proceeding is not independent proceeding with a separate final decision, but a procedural stage in decision-making process about a plan. The two main stages in SEA proceedings are stages of scoping SEA and carrying out the assessment. In first stage, the result is **SEA programme** which should determine the coverage of the SEA and name persons and authorities who should be consulted, as well as timeplan for SEA. In second stage, the result is **SEA report**, which is approved (or not) by the Ministry of Environment or its county departments (the approving authority depends on territorial extent of possible effects).

According to subsecion 1 of Section 35 of EIA Act, SEA shall be initiated by the relevant authority *at the same time with initiation of preparation of the strategic planning document*. According to subsection 1 of Section 40 of the EIA Act, the SEA report is a part of the strategic planning document – so the plan itself is ideally result of an integrated process of planning and SEA where conclusions of SEA have been taken into account in course of forming the plan.

It must be noted, however, that such integrated process has fallen under heavy criticism from behalf of practitioners. Therefore, amendments of EIA Act are in preparation by Ministry of Environment. It is likely that in result of these amendments, the legal relation between SEA and the plan will change (SEA proceedings will still be part of planning proceedings, but SEA report will no longer be part of the plan, but rather annex to the plan as a separate document.[7]

2. **Reasonable alternative assessment and significant effects (Article 5/1, Annex 1 (f) and (h))**

   a. **Transposition**

      i. List in detail transposition provisions on article 5/1 and Annex 1

Article 5(1) of the SEA Directive has been transposed into national law with Section 40 of the EIA Act which states that "*SEA report is part of the planning document*" (Section 40 (1) of EIA Act) and that "*upon a strategic environmental assessment, it is required to explain, describe and assess*

[4] There are 15 counties in Estonia
[5] Comprehensive plan determines land-use conditions for a municipality
[6] Detailed plan establishes land-use conditions usually for single lot or several lots
[7] The conclusions of current analysis have been made on basis of current legislation, not taking into account the possible future amendments and their consequences

the significant environmental impact resulting from implementation of the strategic planning document and the main alternative measures, activities and tasks, having regard to the objectives and territory of the strategic planning document" (Section 40 (2) of EIA Act).

Requirements of Annex 1 (f) and (h) have been transposed by Section 40 (4) of the EIA Act which provides list of aspects that need to be reflected in the SEA report. This list includes:

- *a description of the potentially affected environment during preparation of the strategic planning document and in the case of alternative development scenarios, including the comparison of alternatives and the probable development if the strategic planning document is not implemented (Section 40 (4) 3));*
- *an assessment of the potential significant direct, indirect, cumulative, synergistic, short and long-term, positive and negative environmental impacts, including impacts on human health and social needs and property, biological diversity, populations, flora, fauna, soil, water and air quality, climate changes, cultural heritage and the landscape, an assessment of the possibilities of waste generation and a description of the methods for impact prognosis (Section 40 (4) 6);*
- *an outline of the reasons for selecting the alternative development scenarios dealt with (Section 40 (4) 9));*
- *an overview of how the best alternative development scenario was achieved (Section 40 (4) 10)).*

ii. <u>All provisions transposed?</u>

In general, the transposition seems to be complete. There are some minor differences between Directive and national legislation.

First, Annex 1 (h) requires that the SEA report should include not only information on the likely significant effects to listed environmental factors, but also to the interrelationship between these factors. Section 40 (4) 7) of EIA Act requires that SEA report should include information about the "*interconnection between different impacts*" which might not be quite same.

Secondly, Section 40 (4) 6) of EIA Act does not include requirements of information on "permanent" and "temporary" effects which are required in Annex 1 (h) of SEA Directive.

b. Analyse framework, quality and application of

i. <u>"reasonable alternatives"</u>

Section 40 (2) of the EIA Act prescribes alternatives as "***main alternative measures, activities and tasks**, having regard to the objectives and territory of the strategic planning document*". However, in more specific requirements to the SEA report, EIA Act does not use the term "*reasonable alternatives*" or even just "*alternatives*" in SEA proceedings. Instead, the term "*alternative development scenarios*" is used. There are no further specifications as to what kind of alternatives should be under consideration.

According to Planning Act, the establishment of "line-constructions" (including roads and railways) through several municipalities requires consideration of several locations on county plan level – it must be concluded that SEA of such county plan should consider different kind of locations as alternatives. However, this raises questions whether different means of transport can be considered in such SEA as alternatives at all.

In practice, the construction of roads as such (which in Estonia involves mainly reconstruction of roads, but sometimes also new bypasses) is usually not subject to SEA, but EIA, so no alternatives

for location (at least not in very wide area) or different means of transport are considered. The reason could be that the SEA is made to the spatial plans that are composed for the whole territory of a municipality or county and include routes for roads and railways. In such cases, different location alternatives are assessed.

For example, in proceedings of comprehensive spatial plan of Rae municipality[8], different location alternatives for Tallinn railway detour were assessed. The objective of this detour is to direct the railway traffic of dangerous substances out of Tallinn; currently the traffic of dangerous substances (oil, chemicals) goes via railway through Tallinn to Kopli harbour, but the purpose is to build another railway to another harbour outside Tallinn. The detour covers wide area of Estonia and several municipalities. In SEA proceedings, Rae local government considered only these location alternatives which were designed in expert "pre-assessment" (not SEA) for the whole concept of this detour.

However, in many cases the spatial plans that establish routes for new roads or railways have been adopted already years ago when SEA was not obligatory. This is also the case with Tallinn detour, the route for which was already set in place in Harjumaa county spatial plan in 1990s and is thus already reflected in comprehensive plans of relevant municipalities.

ii. description of respective *"significant effects"*

We don't have sufficient information about SEA practice to give adequate overview about how the concept of significance is analysed in practice (especially regarding different environmental factors). We can say that in general, SEA experts tend to focus on short-term rather than long-term effects, and that assessment of cumulative, secondary and synergetic effects might get less attention.

3. Public participation (PP, Article 6 and 7)

a. "Early and effective opportunity within appropriate time frames" to express opinion on "draft plan"? (transposition and in practise?)

i. At what stage in planning procedure does PP take place?

Art 6 of the SEA Directive has been transposed by Section 37 of EIA Act, subsection 1 of which foresees that *notification of the public display of and public consultations regarding the strategic environmental assessment programme in the official publication Ametlikud Teadaanded, in a newspaper and on the webpage and electronically or by sending an unregistered letter or a registered letter to authorities and persons specified in clause 36 (2) 3) of this Act, the organisation uniting non-governmental environmental organisations and agencies and persons specified in subsection 36 (3) of this Act.* So, the notification must be:

- published in specific website for official announcements (Ametlikud Teadaanded)[9];
- published in newspaper
- published at the webpage
- sent to authorities and persons, specified in Section 36(2) of EIA Act by e-mail or ordinary mail or registered mail
- sent to organisation uniting environmental NGOs by e-mail or ordinary mail or registered mail

[8] The SEA report was on public display in June 2007; the plan itself has not been adopted yet
[9] www.ametlikudteadaanded.ee

- sent to agencies and persons specified in Section 36(3) by e-mail or ordinary mail or registered mail.

Section 41 of the EIA Act which regulates publication of the SEA report, also refers to Section 37 as procedural requirements for publication.

Therefore, the public and relevant authorities have a possibility to participate in two stages of SEA proceedings: in stage of SEA programme and in stage of actual public display of the SEA report. At the stage of SEA programme, public has to have access to the draft plan or at least terms of reference of the plan (Section 37 (2) 3) of the EIA Act provides that notification about public display of SEA programme shall include "*the time and manner of accessing the terms of references or draft strategic planning document*").

It must be noted, that participation in SEA proceedings does not necessarily mean opportunity to express opinion on draft plan. In stage of SEA programme, everybody has right to express opinion about the SEA programme (Section 37 (4) of EIA Act), but SEA programme is just determining structure and relevant issues for the SEA report. As for the plan itself, in spatial planning proceedings the draft plan shall be publicly displayed before its adoption, but for development plans there are no specific requirements for public participation at all. However, in practice SEA proceedings are used to receive comments on plan itself as well (but there have been cases where authorities restricted the right to express opinion in SEA proceedings only to SEA programme or report (ie only to conclusions of expert on the effects, but not to the plan itself – because the plan might go through separate public display and procedure).

ii. Does legislation provide for early and effective PP at a stage when all options are open?

Taking into account the fact that public is actually involved already in stage of SEA programme, it can be concluded that this means early public participation at a stage when all options are open (usually, the SEA programme also determines alternatives that need to be considered in SEA report).

The effectiveness of public participation is, however, questionable.

First, there is question whether public is effectively informed about the SEA proceedings. When notifying about the public display, the notification should include information about *the time and manner of accessing the terms of references or draft strategic planning document* (Section 37 (2) 3) of the EIA Act). There is interesting difference between regulation about EIA and SEA proceedings, regarding means of publication of the documents: In the EIA proceedings, both EIA programme and report must be published electronically on the webpage of the decision-maker (Section 16 (6) of the EIA Act), whereas there is no such obligation concerning SEA programme and report. In practice, the electronic publication is nevertheless used and the documents are usually (with exceptions of some small municipalities with probably limited IT capacities) published on webpage of the decision-maker, SEA supervisor or even SEA expert[10]. However, in case the SEA documents and draft plan are made public only in the local municipality or environmental authority, it may be difficult for public to participate at the SEA proceedings.

Secondly, there is question whether legislation provides sufficient time-frames for participation. The public display of SEA programme shall last at least 14 days (Section 37 (3) of EIA Act) and public display of SEA report at least 21 days (Section 41 of EIA Act). This is sufficient only in

[10] Of ca 70 SEA reports, published until September 2007, less than 10 were not published electronically

cases of simple plans, involving smaller areas or strategies, but definitely not for more complicated plans which might have great environmental impacts.

b. PP in transboundary context (transposition and in practise)

i. How is the public of another country informed about transboundary SEA?

According to Section 46 (6) of EIA Act, "*the competent authorities of states shall ensure that the public and authorities of the state which is likely to be significantly affected are notified and allow them sufficient time for the submission of opinions and agree on all the necessary procedures and an actual schedule for relevant consultations*". It is not completely clear what exactly are the obligations of Estonian authorities in this regard, or even, if there are any obligations. The provision seems to leave this matter up to the authorities to agree upon.

However, Section 46 (7) of the EIA Act provides that "*the strategic assessment of transboundary environmental impact originating in the territory of the Republic of Estonia shall be organised and the Republic of Estonia participates in the strategic assessment of transboundary environmental impact originating in the territory of another state pursuant to the procedure provided for in international agreements*". Therefore, should any obligations towards involvement of public of another country into the consultation proceedings rise from international agreements, Estonian authorities should fulfil these obligations.

ii. Are all important documents translated?

The EIA Act does not refer to this matter in any way. Again, more specific obligations may rise from international agreements.

4. Decision Making (Article 8 and Article 9)

a. How are Article 5/1 and Annex 1 (f) and (h) considered in decision?

i. Transposition in general, practice in general

Section 43 of the EIA Act requires that ***upon preparation*** *of a strategic planning document*, the following shall be taken account of:

1) the results of the SEA and the adopted monitoring measures;

2) the opinions submitted by authorities and persons to the extent possible;

3) the results of transboundary consultations.

This approach is clearly corresponding to the meaning of SEA Directive in best way as Art 8 of the Directive provides that the SEA results shall be taken into account "***during the preparation*** *of the plan or programme and before its adoption or submission to the legislative procedure*".

However, this approach has proven to be difficult to be put into practice as the separately regulated planning and SEA procedures are not compatible one-for-one. As indicated, SEA should be initiated together with initiation decision for the plan so the preparation of planning document and SEA should actually run parallel – which makes it difficult to understand how and in which stage of decision-making the SEA **results** should be taken into account. In practice, the SEA is carried out to the draft plan, whereas the draft is often at stage where it is difficult to add additional alternatives into consideration.

It is also not clear what the consequences would be in case the SEA results would not be taken into account. In this regard, the regulation of SEA procedure is different of EIA procedure, in which the decision-maker has to give reasoned justification in its decision in case it does not take into account the results of EIA (subsection 2 of Section 24 of EIA Act). It is questionable whether such regulation is in line with SEA Directive. However, as said, the integrated procedure of SEA within

planning procedure might create difficulties in defining how and in which stage of decision-making could the evaluation be given about whether SEA results have been taken into account or not.

ii. Does (and to what extent) the decision have to take into account the environmental report in particular with regard to alternative assessment and significance of effects?

As mentioned, SEA is part of the planning procedure and the SEA report is a part of the strategic planning document and upon of preparation of a plan, the results of SEA shall be taken into account of (Section 43 of the EIA Act).

According to subsection 4 of Section 40 of the EIA Act, the SEA report must reflect inter alia comparison of alternatives (if there are any) as well as the probable development if the strategic planning document is not implemented, also an outline of the reasons for selecting the alternative development scenarios dealt with, and an overview of how the best alternative development scenario was achieved. Therefore, ideally the decision about the plan should already express the final solution that takes into account all considerations in SEA (including comparison of alternatives).

Also, there are some requirements to the information that needs to be notified about the decision after it has been adopted (Section 44 of EIA Act); this information includes inter alia:

- an overview of how environmental considerations have been taken into account in the strategic planning document;
- an overview of how the results of the strategic environmental assessment have been taken into account in the strategic planning document;
- an outline of the reasons for selecting the alternatives dealt with.

Therefore, the plan definitely has to take into account the alternatives and significant effects – in fact, the plan must be designed according to SEA conclusions.

b. How are Articles 6 and 7 considered in decision?

i. Transposition in general, practise in general

According to Section 43 of EIA Act, upon preparation of a plan, the opinions submitted by authorities and persons must be taken into account to the extent possible, as well as the results of transboundary consultations.

In practice, the results of consultations with public are to some extent taken into account while determining the scope of SEA and the possible environmental impacts, but more rarely in the formulation of final plan itself.

The transboundary consultations have been rare in practice so there is little experience.

ii. Does (and to what extent) the decision refer to the national and transboundary PP process

SEA report, being legally part of the plan (and finally part of the decision about the plan), must contain an overview of carrying out the strategic environmental assessment, the results of public involvement and transboundary consultations (Section 40 (4) 11) of the EIA Act).

The SEA report must also contain part where the proposals and objections from authorities and persons consulted shall be described and refusal to take account of the proposals and objections justified (subsection 5 of Section 37 in concurrence with Section 41 of EIA Act). However, it must be emphasized that requirements to the information that needs to be notified about the decision after

its adoption (Section 44 of EIA Act) do not include overview of the public participation or transboundary consultations.

There are no specific requirements to the decisions about enacting plans as administrative acts – this includes also references to public participation process.

From legalistic point of view, the adopted plan is part of the administrative act that adopts the plan. Therefore, since the SEA report is part of the plan, it is also part of the final decision about adopting the plan, although the final decision itself is naturally formulated in specific administrative act, which nature depends more precisely on the nature of plan and authority, taking the decision (eg it can be decision of local municipality, county governor or the government).

All administrative acts have to correspond to requirements of the Administrative Proceedings Act (in force since 01.01.2002) which requires that "*written reasoning shall be provided for the issue of a written administrative act and refusal to issue an alleviating administrative act. The reasoning for the issue of an administrative act shall be included in the administrative act or in a document accessible by participants in proceedings and the administrative act shall contain a reference to the document*" (Section 56 (1) of APA). Moreover, APA states that the reasoning of an administrative act issued on the basis of the right of discretion shall set out the considerations from which the administrative authority has proceeded upon issue of the administrative act (Section 56 (2) of APA). These considerations should therefore include information about expressed opinions and interests and reasons why these interests were not taken into account (if this is the case).

In practice, the administrative acts are often poorly justified, so the implementation might not be in line with SEA Directive.

iii. <u>How is public informed on decision?</u>

Notification of adoption of the plan is regulated by Section 44 of the EIA Act which requires: "*A person responsible for the preparation of a strategic planning document shall give notification of adoption of the strategic planning document by electronic means or by sending an unregistered letter or a registered letter within fourteen days after the decision on the adoption is made to:*

1) the authorities and persons specified in subsection 35 (4) and clause 36 (2) 3) of this Act;

2) a supervisor of the strategic environmental assessment;

3) the affected state which participated in transboundary consultations."

The authorities and persons specified in the referred provisions are:

1) Ministry of Social Affairs, the Ministry of Culture, the Ministry of the Environment, the county environmental department and a local government body (Section 35 (4) of EIA Act);
2) persons and authorities which may be affected or which may have reasoned interest in the strategic planning document (Section 36 (2) 3) of EIA Act).

It is clear that EIA Act does not foresee obligation to notify public concerned about the adoption of the plan (even if general public would be considered as "affected" or having "reasoned interest", the notification about plan would only be possible via public notification which is not required in Section 44 (1)). In practice, there have been only few cases where public has in fact been notified about adoption of the plan via *Ametlikud Teadaanded*.

It is worth mentioning that there is no obligation to notify public or other persons or authorities that participated in SEA proceedings, about approval to SEA report. This is another significant difference between SEA and EIA proceedings (in EIA proceedings, the approval of environmental authority to EIA report must be notified publicly).

However, there is specific regulation about notification of adoption of spatial plans according to Planning Act. Notifications about adoption of such plans must be published in newspapers (in state-wide newspaper in case of National Spatial Plan, in regional newspaper in case of county plan, in local newspaper in case of comprehensive plan or detailed plan). This should guarantee that public is informed about the decisions about spatial plans. In practice, these notifications are often published as very short texts in small font so the efficiency of such notification is really questionable.

There is no obligation to inform public about adoption of the development plans.

We conclude that the SEA Directive has not been transposed properly in this regard.

iv. Does the information to the public include the information provided in Article 9/1?

According to Section 44 (2) of the EIA Act, upon giving notification of establishment of a strategic planning document, it shall be ensured that persons that have to be notified have access to the following:

1) adopted strategic planning document;

2) an overview of how environmental considerations have been taken into account in the strategic planning document;

3) an overview of how the results of the strategic environmental assessment have been taken into account in the strategic planning document;

4) an outline of the reasons for selecting the alternatives dealt with;

5) a description of the measures proposed for the monitoring of potential significant environmental impact resulting from implementation of the strategic planning document.

However, as mentioned before, there is no direct obligation to inform public about adoption of the plan.

The Planning Act does not foresee any specific requirements for the information to be published about the adoption of spatial plans.

c. Is it assured that Articles 5 to 7 are effectively being taken into account before the adoption of the plan?

i. Is there a difference in time between the formal adoption and the actual political decision on a plan?

As it is difficult to determine when a political decision on plan is actually made, it is also difficult to say whether the political decisions are actually already made before initiating the plan. However, regarding big infrastructure projects, the political decisions are indeed often made already before the relevant plans are formally initiated.

For example, in the Action Programme of the current government for period 2007-2011, it is promised that government will build the Tallinn-Tartu road partly 4-line by year 2011, that government starts construction of fixed link between Saaremaa and main land with goal to establish the fixed link by year 2015 etc. Formally, SEA for the fixed link has just been initiated and there is no SEA initiated for the Tallinn-Tartu road yet – so it is not clear whether these projects can be carried out at all or what should be best alternatives. Also, the government has already decided to participate at Rail Baltica project, although there has been no public participation or any SEA proceedings yet. One could argue, however, that such political decisions express only goals of the government and not the final decisions about establishment of projects.

In past, there has been threatening tendency to make political decisions on basis of unofficial feasibility studies. In Fixed Link case, Ministry of Economic Affairs and Communications (MoEAC) clearly expressed opinion[11] that the decision about whether fixed link shall be established or not, will be made by the government on basis of the feasibility study – MoEAC stated that necessary official planning proceedings (including environmental impact assessment) shall be initiated only after this decision. Only after protest of environmental NGOs to such approach did government change its position and agreed to initiate SEA, in course of which all alternatives shall presumably be considered.

ii. Have any political plans been substantially changed after an SEA?

We have no experience that political plans have substantially changed after an SEA. There are very few examples from transport sector, but in other sectors, especially concerning development plans, the usual practice is that SEA is only a formality in planning process (there are examples of plans being adopted by the government already before public display of SEA report).

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d. Is there a possibility for legal review (appeal) SEA decisions (and respectively the final plan) as well as for the case that an SEA has not been carried out for the public concerned?

SEA proceedings are just one stage of the proceedings of the plan the SEA is carried out to. Therefore, the possibilities for legal review are presumably limited. Presumably, the procedural acts and omissions cannot be disputed separately from the final administrative act (in case of SEA, the final act is the administrative act which adopts the plan in question). Such legal review is, however, according to judicial practice[12] possible, in case the procedural rules have been violated to the extent that makes it clear already in the stage of proceedings that the violation would inevitably cause illegality of the final act or make the afterwards evaluation of legality of the act impossible. It is possible that decision about not initiating SEA could be considered as such significant violation of rules.

The indicated Supreme Courts' decision is a unique interpretation guide especially for legal review of violation of procedural rules in environmental decision-making (the case in question was connected to EIA of an oil-shale mine) and hence it deserves to be highlighted here. The Supreme Court stated that environmental field is so specific that person who has standing should have larger opportunities to dispute the procedural acts separately from the final administrative act. When deciding about possibility of legal review, the court must take into account the significance of the procedural act and also significance of the alleged violation in fulfilment of the principal procedural requirements.

The Supreme Court stated that for correct decision-making in environmental matters, the administrative procedure has a decisive value in itself: "In most of such cases it is not possible to decide convincingly that despite of the deficiencies in administrative procedure, the final administrative act is lawful. It is only possible to presume lawfulness of the final adopted act, if the decision has been made in result of an administrative procedure that has been carried out according to law and principles of administrative procedure."

Therefore, on basis of the interpretation of the mentioned Supreme Court's decision, the procedural acts in environmental decision-making are exemption from the general prohibition to dispute

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[11] In letter of MoEAC to Estonian Council of Non-Governmental Environmental Organisations in June 2005

[12] Estonian Supreme Court's decision of 28th February 2007 in case 3-3-1-86-06,

procedural acts separately from final administrative act. However, the possibility to dispute the procedural acts depends on the nature of the rights connected to the alleged violation and the significance of the violation.

The possibilities for legal review may in practice be diminished by the fact that there is no legal obligation to inform public of approval to SEA report and the adoption of the final plan (except for spatial plans).

The final plan can be disputed by anyone who has standing (ie who's rights have been violated or who has a sufficient interest), except for spatial plans which can be disputed by anyone who thinks that "*a decision to adopt a plan is in conflict with an Act or other legislation or that his or her rights have been violated or freedoms restricted by the decision has the right to contest the decision in court within one month as of the day on which he or she became or should have become aware of the adoption of the plan*" (Section 26 (1) of the Planning Act). It has to be concluded that in legal review of spatial plans, there is *actio popularis.*

5. **What other problems occur with regard to SEA proceedings?**

Regarding big infrastructure projects, the main problem is lack of regulation for decision-making. There is no legal structure of decision-making that would involve strategic decisions as well as proper selection of locations etc. The Planning Act includes specific provisions for establishment (site selection) for projects with significant impacts, but the list of such projects is exhaustive and it does not include roads or railways. Moreover, the only requirement for decision-making of such projects is that the location shall be selected through comprehensive plan (which in rule covers only territory of one municipality). In practice, the political decisions about such projects are made by state government, but the formal decision falls to local government. This creates problems for public participation in early stage as well as assessment of environmental impacts already on strategic level.

For example, in order to establish the Fixed Link between Saaremaa and main land, government has initiated a plan (and SEA for this plan) which should consider different alternatives of such link (a bridge, a tunnel, continuing ship connection) – but there is no legal requirement for initiating or adopting such plan. Such plan has no legal status in current legislative system – it is not a development plan, spatial plan or any other plan that is required to be adopted by law.

Such paradox situation has been evaluated by Estonian courts in another case – case of South-Eastern regional landfill aka Laguja landfill. As well as the fixed link, this project was also of regional or even state-wide importance and in decision-making, both state and local authorities were involved. Estonian Supreme Court stated in this case[13] that although state authorities have acknowledged the establishment of the landfill as national plan, it is not possible to ascertain that such plan has been adopted by state authorities. Whereas selection of location for this landfill was decided in unofficial proceeding (on basis of an expert opinion), the Supreme court found that there is no legally correct decision about the location, so the Directive 2001/42/EC is not followed. Supreme Court also stated that it is necessary to develop a decision-making process for such national plans which would also enable to make decisions about location.

It could be argued, however, that according to the Estonian Constitution, the government has powers to execute the domestic and foreign policies of the state and according to Section 30 (3^1) of the Government of the Republic Act, the government may assign tasks to a government agency by an order and that therefore the government has right to assign task to Ministry of Economic Affairs

[13] Supreme Courts decision of 9 March 2005 in case No 3-3-1-88-04

and Communication to establish a plan for Fixed Link (or any other big infrastructure project). The formulation about this right seems, however, to be too vague in order to qualify as act that is "*required by legislative, regulatory or administrative procedures*" as foreseen in Art 2 a) of the SEA Directive.

6. What is particular positive with regard to SEA proceedings in your country?

Particularly positive is the fact, that in practice, the SEA reports are usually available in the internet (at least for the time of public display) (although there is no such requirement in EIA Act).

Also, notifications about public displays of SEA programme and report are obligatorily published at specific official website (see p 3 a i) which makes it easy for NGOs to monitor the significant SEA proceedings (though it is not effective way to inform general public). There is also specific requirement in EIA Act that environmental NGOs also have to be notified about public displays in SEA proceedings.

7. Conclusions

In main parts, the SEA Directive has been correctly transposed into Estonian national legislation.

The transposition is especially purposeful in regard to integration of SEA into planning process – SEA is ideally part of the planning process so that the conclusions on environmental impacts can be taken into account while preparing the plan. This approach has not been working very smoothly in practice because there is no one-to-one compatibility between SEA and planning process. We are of opinion that the two proceedings can be carried out in unified way, but the SEA and planning experts are on other opinion.

The essential problem with establishment of big infrastructure projects is lack of clear rules for decision-making on different hierarchical levels (government, county, local government). This brings along problems with assessing possible alternatives (alternatives can be different on different levels), which in turn brings along problems with public participation (in case public is involved in the process only on local level, it has no possibility to participate at the early stage where all options are open).

In practice there has been a tendency to use the official SEA and planning proceedings only to formulate decisions that have politically already been made. There have been attempts lately to change this practice at least apparently – for example, in Fixed Link project the government changed the whole planned decision-making process and initiated a governmental plan where all the alternative options should be considered. Also, new provisions about so-called "line-constructions" have been introduced lately to Planning Act for establishment of roads and railways through several municipalities – quality of implementation of these provisions is yet to be tested.