



# **Legal analysis on the conformity of the SEA Directive with the provisions stated under the Aarhus Convention and the Espoo Convention**

SEA

Legal Analysis

*Justice and Environment 2012*

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## **Legal Analysis**

### **Introduction**

There is little practical information on the implementation of the SEA Directive (although it was already adopted in 2001). Therefore application and effectiveness is not to be evaluated comprehensively. Given the lack of experience further analytical work is to be done – and an **analysis on the conformity of the SEA Directive with the Aarhus and Espoo Convention** has to be conducted.

**In the following study, the term “plan” will be used for both “plans and programmes”, since neither the SEA Protocol, nor the SEA Directive or the Aarhus Convention differentiate between those two.**

### **Table of Contents**

Executive Summary	3
1 General Remarks	4
2 Access to Information	8
3 Public Participation	8
4 Access to Justice	14
5 Summary of the proposed amendments	17
6 Sources	20

## Executive Summary

The EU is a party both to the Espoo and the Aarhus Convention and thus has to adhere to the standards laid out there for public participation and access to justice concerning environmental plans and programs. The presented study aims at pointing out the existing deficits in transposing these international obligations, which can be summarised as follows:

Whilst the definition of “plans and programmes” in the SEA Protocol and the SEA Directive are similar, the Aarhus Convention does not establish a definition of “plans”. In the light of consistent interpretation of the provisions, it is arguable that the SEA Directives, the SEA Protocols and the Aarhus Conventions definition of “plan” is similar. However, it is important to distinguish plans according to Art 7 from decisions according to Art 6 Aarhus Convention (which are subject to the EIA Directive 2011/92/EU).

Although the definition of “plans” is similar, there is a notable difference between plans “relating to the environment” as in Art 7 Aarhus Convention and plans “likely to have significant environmental effect” as in the Art 3 (1), (4) and (5) SEA Directive. The SEA Directive should thus include the wide approach of Art 7 Aarhus Convention. SEA should be provided for all plans “relating to the environment”, irrespective of their possible impact on the environment.

Further, the public participation provisions of the SEA Directive are very vague and do not provide for clear time-frames Members of the Public can rely on when participating in planning processes. However, given the different volume planning procedures might have we do not believe that solely setting a minimum time span for public participation in SEA procedures through the SEA Directive is the right approach, since this might lead to the Member States sticking to the minimum time span.

Another deficit of the SEA Directive concerns the implementation of access to justice concerning environmental plans. The Aarhus Convention demands review procedures concerning environmental plans, and as a minimum standards, standing in such procedures should be provided to environmental NGOs. Since the EU has exercised its powers concerning public participation for environmental plans, we believe that it would be appropriate to provide for access to justice provisions in the SEA Directive.

We welcome the process to revise the SEA Directive initiated by the European Commission and hope that the study we provided will be used as guidance for drafting a new SEA Directive. In order to ensure compliance with the Aarhus Convention and thus avoid international responsibility for non-compliance with an international treaty, it is mandatory to adhere to the case-law of the ACCC. By taking the case-law of the ACCC seriously when revising the SEA Directive, the EU has a chance to – next to fulfilling an international obligation – once again function as a role-model for non-EU-countries within in the UN-ECE region when it comes to public participation and access to justice standards.

## 1. General Remarks

### 1.1. Competences of the EU

The EU can only act within the limits of powers assigned to it by the Member States in the Treaties.<sup>1</sup> As a first step, it is thus necessary to analyse the Unions competences. The Directive discussed below is based on the environmental competence of the EU.

According to Art 4 (2) e TFEU and Art 191 TFEU, the EU shares its competence in the field of environment with the Member States. This means that the Member States can exercise their competence to the extent that EU has not (yet) done that.<sup>2</sup> The environmental competence of the EU stretches to all areas mentioned in Art 191 TFEU, including preserving, protecting and improving the quality of the environment. The EU can conclude international environmental agreements.

When exercising its (shared) competences, the EU is bound by the principles of subsidiarity and proportionality. This means that the EU shall only act insofar as the objective of the proposed action cannot be sufficiently achieved by the Member States and will be better achieved at the EU level (Art 5 (3) TEU, subsidiarity). Also, the actions of the EU must not exceed what is necessary to achieve the objectives of the actions (Art 5 (4) TEU, proportionality). This second principle applies to the choice of action as well as to its content.

As stated above, the EU shares the competence in the field of environment with its Member States. As far as the EU has exercised its powers, it is also responsible for the implementation of international treaties. The Aarhus Convention Compliance Committee (ACCC), which is competent to decide on the correct implementation of the Aarhus Convention by the Parties to the Convention<sup>3</sup> found that, concerning obligations arising from the Aarhus Convention<sup>4</sup> *“most Member States seem to rely on Community law when drafting their national legislation aiming to implement international obligations stemming from a treaty to which the Community is also a Party”*.<sup>5</sup> The same holds true for the Espoo Convention and its SEA Protocol. It is thus the responsibility of the EU to properly monitor the implementation of the legislation transposing the Conventions.<sup>6</sup>

We thus recommend that the EU, in general, should minimize the margin of appreciation the Member States have when implementing the SEA Directive in order to ensure that strict and proper monitoring (through the European Commission) is possible and feasible. This would also ensure a minimal distortion of competition between the Member States. In the light of the obligations arising from the Espoo Convention and the Aarhus Convention and the

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<sup>1</sup> Principle of conferral, Art 5 (2) TEU.

<sup>2</sup> Art 2 (2) TFEU.

<sup>3</sup> See also below at 0.

<sup>4</sup> Which is a mixed agreement, meaning that the EU and all its Member States are Parties to the Convention, see also below at 0.

<sup>5</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 49.

<sup>6</sup> Regarding the Aarhus Convention see explicitly Procedure ACCC/C/2010/54 (EU) Findings of 29.06.2012 (official version not yet published), para 77 and 84.

decision in the procedure ACCC/C/2010/54/EU, this would also comply with the principles of proportionality and subsidiarity: There are various pending compliance procedures against EU Member States concerning the correct implementation of secondary EU legislation in the light of the Aarhus Convention. It is not unlikely that, in a case of found non-compliance, the EU will be held responsible for not providing clear secondary legislation implementing the Aarhus Convention and/or for not properly monitoring the implementation of the Aarhus-relevant secondary legislation, such as the SEA Directive.

## 1.2. The Aarhus Convention within the EU legal order

The Aarhus Convention is binding for the EU since May 2005.<sup>7</sup> Next to the EU, all Member States are Parties to the Convention.<sup>8</sup> According to Art 216 (2) TFEU, international agreements concluded by the EU are binding on its institutions and its Member States.<sup>9</sup> According to the case-law of the ECJ, the provisions of a treaty signed by the EU form an integral part of the EU legal order.<sup>10</sup>

International agreements signed by the EU rank above the internal (secondary) legislation. Thus, Directives and Regulations must be interpreted in consistency with the obligations resulting from the Aarhus-Convention. This also applies to national legislation implementing the European secondary acts.<sup>11</sup> While the Commission often relies on this duty to interpret European legislation in consistency with the Aarhus-Convention when confronted with claims of non-compliance,<sup>12</sup> the Aarhus Convention Compliance Committee explicitly elaborated on this point as follows:

*“The Committee notes the point made by the Party concerned ... that under European Community law, an international agreement concluded by the Community is binding on the Community institutions and the Member States, and takes precedence over legal acts adopted by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement. In this context, the Committee wishes to stress that the fact that an international agreement may be given a superior rank to directives and other secondary legislation in European Community law should not be taken as an excuse for not transposing the Convention through a clear, transparent and consistent framework into European Community law (cf. article 3, paragraph 1, of the Convention).”<sup>13</sup>*

Under certain circumstances, provisions of the Aarhus-Convention may be directly applicable, meaning that Courts and state authorities can base their decisions directly on

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<sup>7</sup> Council Decision 2005/370/EC of 17.02.2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 124 17.05.2005, p. 1 in connection with Art 17 Aarhus Convention.

<sup>8</sup> Ireland ratified the Convention on 20.06.2012.

<sup>9</sup> Hence, Ireland is also bound by the Convention through EU law.

<sup>10</sup> ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 30.

<sup>11</sup> ECJ 08.03.2011, C-240/09 (Lesoochránárske zoskupenie VLK) para 50.

<sup>12</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 23.

<sup>13</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 58.

those provisions (also: direct effect). As far as provisions of the Aarhus-Convention also grant individual rights, individuals may directly enforce those provisions before national Courts and state authorities. To decide whether certain provisions of the Convention have those attributes lies within the jurisdiction of the ECJ, and may not be decided solely by the national Courts of the Member States.<sup>14</sup>

According to the ECJ, a provision is directly applicable, “*when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure*”<sup>15</sup>. Whilst direct applicability may be a possible solution to deficits in implementing the relevant international Conventions, it most certainly does not meet the ACCCs standard of transposing the Aarhus Convention “*through a clear, transparent and consistent framework*”. Thus, the following analysis tries to identify the deficits of the secondary legislation implementing the Aarhus Convention on European level, particularly the SEA Directive.

Upon approving the Convention, the EU declared that the legal instruments in force did not fully cover the implementation of the obligations arising from Art 9 (3) Aarhus-Convention. This is especially problematic concerning plans and programmes, as shown below.

### **1.3. Aarhus Convention Compliance Committees Decisions within the EU legal order**

In order to properly identify possible deficits of EU law transposing the Aarhus Convention, one has to take into account the Case Law of the Aarhus Convention Compliance Committee (ACCC). The case law of the ACCC has the same legal status in the EU legal order as the Convention itself and thus must be observed when implementing the Aarhus Convention:<sup>16</sup>

According to the case law of the ECJ, a provision of an international treaty is directly applicable “*when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure*”<sup>17</sup>. The same test applies to decisions of an institution established by an international treaty,<sup>18</sup> such as the ACCC.<sup>19</sup> The “findings and recommendations” of the ACCC, however, very often contain clear and precise obligations and/or criteria to be met by the Parties. Provisions of EU law thus can be directly tested on their consistency with the case-law of the ACCC and, if they contravene the obligations set out by the ACCC, they can be annulled by the ECJ (or are, at least, not applicable, since the principle of supremacy of EU law<sup>20</sup> also applies to the – in relation to the SEA Directive higher-ranking – Aarhus Convention).

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<sup>14</sup> ECJ 08.03.2011, C-240/09 (Lesoochranárske zoskupenie VLK) para 43.

<sup>15</sup> ECJ 08.03.2011, C-240/09 (Lesoochranárske zoskupenie VLK) para 44.

<sup>16</sup> See *Alge T*, RdU 2011, p. 140.

<sup>17</sup> E.g. ECJ 08.03.2011, C-240/09 (Lesoochranárske zoskupenie VLK) para 44.

<sup>18</sup> E.g. ECJ 20.09.1190, C-192/89 (Sevince) para 14, 15; ECJ 08.05.2003, C-171/01 (Wählergruppe Gemeinsam) para 54, 55.

<sup>19</sup> See *Alge T*, RdU 2011, p. 140.

<sup>20</sup> To the concept of supremacy see for example Craig/de Búrca, p. 256 seq.

Furthermore, the case-law of the ACCC and the adoption of its decision by the Meeting of the Parties provides for relevant legal custom under international law,<sup>21</sup> specifying the broad provisions of the Aarhus Convention. Also, as successive legal custom, the case-law has the potential to derogate the provisions of the Aarhus Convention.<sup>22</sup>

The EU is thus obligated to follow the obligations and criteria laid out in the case-law of the ACCC; this holds true from the perspective of EU law itself as well as from an international legal perspective.

#### **1.4. The Espoo Convention and the SEA Protocol within the EU legal order**

The EU is also party to the UN-ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (SEA Protocol).<sup>23</sup> The SEA Protocol entered into force on 11.07.2010 according to Art 24 (1) SEA Protocol. Whilst the Espoo Convention itself is mainly applicable to activities with probable transboundary effects, the SEA Protocol also applies to plans and programmes that may not have transboundary effects. The SEA Protocol was drafted after the enactment of the SEA Directive in 2001 and is based on this Directive, thus some provisions of the Protocol are very similar to the Directive. In its Art 15, the SEA Protocol states that *“the relevant provisions of this Protocol shall apply without prejudice to the UNECE Conventions on Environmental Impact Assessment in a Transboundary Context and on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters”*. Thus, whenever a plan or programme falls under the SEA Protocol and the Aarhus Convention, the standards of both international treaties must be met in order to comply with the EUs international obligations.

The Espoo Convention, including the SEA Protocol, and the Aarhus Convention should not be seen as single, stand-alone international treaties, but as a system of (mostly procedural) guarantees aiming at a high level of environmental protection.<sup>24</sup> This holds especially true for the SEA Protocol and its connection to the Aarhus Convention, as shown by Para 5 of the Preamble and Art 15 SEA Protocol. This implies that terms used in both treaties should be interpreted consistently. Since the Espoo Convention does not have a Compliance Mechanism comparable to the Aarhus Conventions ACCC,<sup>25</sup> there is a lack of international case-law clarifying and specifying the meaning of the broad provisions of the Espoo Convention and the SEA Protocol. This, and the fact that the SEA Protocol was drafted after the Aarhus Convention, speaks for interpreting provisions and terms of the SEA Protocol in

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<sup>21</sup> See *Alge T*, RdU 2011, p. 141.

<sup>22</sup> See *Alge T*, RdU 2011, p. 141.

<sup>23</sup> Council Decision 2008/871/EC of 20.10.2008 on the approval, on behalf of the European Community, of the Protocol on Strategic Environmental Assessment to the 1991 UN/ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context, OJL 308 of 19.11.2008, p. 33.

<sup>24</sup> *Ebbesson*, RECIEL 2011, 248, 250.

<sup>25</sup> The Espoo Conventions Implementation Committee does not have as far reaching competences as the Aarhus Conventions Compliance Committee. One of the main differences between the two bodies is that the Espoo Conventions Implementation Committee does not (yet) have the possibility to act upon submissions of individuals. This can be explained with the main content of the Espoo Convention itself, which is to provide for Consultation between States (and not individuals) when projects with possible transboundary environmental impacts are consented. Consequently, the Espoo Conventions Implementation Committee has not (yet) decided on as many cases as the ACCC.

the light of the ACCCs case-law, as far as it is relevant. Of course, the case-law may not have the same effects as it has for the interpretation of the Aarhus Convention, for it cannot be come legally binding upon approval of the Meeting of the Parties, but it still can offer much-needed guidance for the interpretation and application of the SEA Protocol.

## 2. Access to Information

The provisions of the Aarhus Convention concerning Access to Information have been transposed into EU law by the Environmental Information Directive.<sup>26</sup> These provisions are therefore not subject of this analysis.

## 3. Public Participation

### 3.1. Scope of Application

#### 3.1.1. "Plans and Programmes"

#### Article 2 SEA Protocol

*5. Plans and programmes" means plans and programmes and any modifications to them that are:*  
*(a) Required by legislative, regulatory or administrative provisions; and*  
*(b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government.*

The definition in the SEA Directive is very similar to the SEA Protocols definition. Art 2 (a) SEA Directive only specifies that authorities that prepare and/or adopt the plans might be situated at national, regional or local level. The SEA Directives concept of "authority" is a wide one, including private companies that carry out public duties or public tasks.<sup>27</sup>

The Aarhus Convention, on the other hand, does not define what plans are. "Plans and programmes" according to Art 7 Aarhus Convention are situated between decisions pursuant to Art 6<sup>28</sup> and "executive regulations and/or generally applicable legally binding normative instruments" according to Art 8 Aarhus Convention.

When determining whether an act falls under Art 7 AC, one may not take a strict formal approach; rather this "*must be determined on a contextual basis, taking into account the legal effects of each decision. Moreover, as stated by the Committee in previous findings, when it determines how to categorize the relevant decisions under the Convention, their labels in the domestic law of the Party concerned are not decisive (cf. the findings concerning Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 29)*".<sup>29</sup> Also, "*the fact that the document is*

<sup>26</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28.01.2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.02.2003, p. 26.

<sup>27</sup> EC SEA Directive Guide p. 5.

<sup>28</sup> To that extent see Justice and Environment: Legal analysis on the conformity of the EIA Directive with the provisions stated under the Aarhus Convention. July 2012.

<sup>29</sup> ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008, ECE/MP.PP/2008/5/Add.6 para 57.

*entitled “Planning Agreement” does not necessarily mean that it is a plan; rather, it is necessary to consider the substance of the document”.*<sup>30</sup>

This is especially important in cases where more than just one planning act is relevant (tiered or consecutive planning). In these cases, the legal effects each act has by itself as well as its effects in conjunction with other acts must be taken into account.<sup>31</sup>

Other factors relevant for the qualification as a plan according to Art 7 Aarhus Convention are the level of generality of the act in question, and whether further permits are necessary before a specific project can be realised. A crucial question in this context is whether a certain act can (still) be classified as a “plan” according to Art 7 Aarhus Convention or already amounts to a decision falling under Art 6 Aarhus Convention. A main factor for this determination is whether the act in question confers rights, i.e. to undertake certain activities, to individuals. The ACCC found that *“the Convention does not establish a precise boundary between article 6–type decisions and article 7–type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that, in addition to containing article 7–type decisions, some of the decrees do contain decisions on specific activities.”*<sup>32</sup> In another case, it held that *“the government decrees ... deal with the designation of land for a particular type of commercial activity. Typically, this would be considered as a type of decision falling within the scope of article 7 of the Convention. However, some of the decrees specify not only the general type of activity (e.g. manufacturing, agriculture) that may be carried out in the designated areas but also the specific activity (e.g. watch-making factory, construction of a diplomatic complex) and even the names of the companies or enterprises that would undertake these activities. These elements are more characteristic of a type of decision falling within the scope of article 6 of the Convention”.*<sup>33</sup> Whenever a “plan” confers development or construction consent to a specific applicant, this act can no longer be qualified as a plan according to Art 7 Aarhus Convention but rather as a decision according to Art 6 Aarhus Convention, with the consequence that more stringent public participation and access to justice provisions apply.<sup>34</sup>

On the other hand, whenever a plan becomes “a generally applicable legally binding normative instrument”, it falls under Art 8 Aarhus Convention, with the consequence that – according to the Aarhus Convention – less stringent public participation standards apply. The ACCC has, in its case-law, not elaborated on the boundaries between Art 7 and Art 8 Aarhus Convention. However, the case-law of the ACCC shows that Art 7 “decisions”, meaning plans, can also be legally binding acts. Also, the ACCC relied on the SEA Directives definition for

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<sup>30</sup> ACCC/C/2008/27 (United Kingdom) Findings and recommendations of 24.09.2010, ECE/MP.PP/C.1/2010/6/Add.2 para 41.

<sup>31</sup> ACCC/C/2008/26 (Austria) Findings and Recommendations of 25.09.2009, ECE/MP.PP/C.1/2009/6/Add.1 para 50.

<sup>32</sup> ACCC/C/2004/8 (Armenia) Findings and recommendations of 10.05.2006, ECE/MP.PP/2006/2/Add.1 para 28.

<sup>33</sup> ACCC/C/2005/12 (Albania) Findings and recommendations of 31.07.2007, ECE/MP.PP/C.1/2007/4/Add.1 para 23.

<sup>34</sup> To that extent Justice and Environment: Legal analysis on the conformity of the EIA Directive with the provisions stated under the Aarhus Convention. July 2012.

[http://justiceandenvironment.org/files/file/2012/EIA%20analysis%202012\(2\).pdf](http://justiceandenvironment.org/files/file/2012/EIA%20analysis%202012(2).pdf)

plans and programmes when defining “plans”.<sup>35</sup> It follows that – opposed to the first reading of the Art 8 – plans according to Art 7 can, to a certain amount, also have general applicability and be in legally binding, as i.e. zoning plans are.<sup>36</sup> Other typical acts falling under Art 7 Aarhus Convention are waste-management or water management plans (that may or may not have legally binding effects).

One can thus conclude as follows: Whilst the definition of “plans and programmes” in the SEA Protocol and the SEA Directive are similar, the Aarhus Convention does not establish a definition of “plans”. In order to establish consistency between the different systems, the ACCC relied on the SEA Directives definition of plans. It is thus arguable that the SEA Directives, the SEA Protocols and the Aarhus Conventions definition of “plan” is similar. Still, it is important to distinguish plans according to Art 7 from decisions according to Art 6 Aarhus Convention.

**3.1.2. Mandatory public participation**

Art 4 SEA Protocol	Art 7 Aarhus Convention
<p>1. Each Party shall ensure that a strategic environmental assessment is carried out for plans and programmes referred to in paragraphs 2, 3 and 4 which are likely to have significant environmental, including health, effects.</p> <p>2. A strategic environmental assessment shall be carried out for plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use, and which set the framework for future development consent for projects listed in annex I and any other project listed in annex II that requires an environmental impact assessment under national legislation.</p>	<p>Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment (...).</p>

According to the SEA Protocol, public participation is a mandatory part of Strategic Environmental Assessment (Art 2 (6) SEA Protocol). Consequently, the SEA Protocol provides for mandatory public participation only if an SEA is necessary. According to Art 4 (2) SEA Protocol, this is the case for plans in certain areas such as agriculture or forestry setting the framework for future development consent for projects listed in Annexes 1 and 2 SEA Protocol. This obligation has been fully transposed by Art 3 (1) and (2) SEA Directive (after which the SEA Protocol was drafted).

<sup>35</sup> ACCC/C/2005/12 (Albania) Findings and recommendations of 31.07.2007, ECE/MP.PP/C.1/2007/4/Add.1 para 68.

<sup>36</sup> ACCC/C/2005/12 (Albania) Findings and recommendations of 31.07.2007, ECE/MP.PP/C.1/2007/4/Add.1 para 68; ACCC/C/2004/8 (Armenia) Findings and recommendations of 10.05.2006, ECE/MP.PP/2006/2/Add.1 para 24.

The Aarhus Conventions approach, however, is much wider. Art 7 Aarhus Convention only states that public participation should be provided for during the preparation of plans relating to the environment. Whilst Art 3 (4) SEA Directive obliges the Member States to determine whether plans not falling under Art 3 (2) SEA Directive should undergo SEA, this is – according to the SEA Directive – only the case for plans setting “the framework for future development consent of projects” and “are likely to have significant environmental effects”.<sup>37</sup> Art 7 Aarhus Convention does – opposed to Art 6 Aarhus Convention – not follow a project-based approach. It is thinkable that plans that are (yet) too general to be considered a framework for future projects fall under Art 7 Aarhus Convention. These plans are not included in the SEA Directive. Also, there is a difference between plans “relating to the environment” as in Art 7 Aarhus Convention and plans “likely to have significant environmental effect” as in the Art 3 (4) and (5) SEA Directive. It is clear that one cannot simply transfer vague provision of the Aarhus Convention into the SEA Directive. However, the objective of wide public participation should be kept in mind and thus also be visible in the SEA Directive. The ACCC has already expressed doubts as to whether the plans included in the SEA Directive include all plans according to Art 7 Aarhus Convention: In a compliance procedure against Lithuania, an EU Member State, it held that it was “*under the impression that although the current legislation seems to be in line with article 7, it relates only to plans and programmes that are subject to strategic environmental assessment (SEA) and that there is no evidence of the public participation requirements covering other plans and programmes relating to the environment*”.<sup>38</sup> The SEA Directive should thus include the wide approach of Art 7 Aarhus Convention.

We thus propose the following new wording of the SEA Directive:

Article 3 SEA Directive

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes **relating to the environment** referred to in paragraphs 2 to 4.

(...)

4. Member States shall determine whether plans and programmes **related to the environment**, other than those referred to in paragraph 2, **should undergo Strategic Environmental Assessment according to this Directive**.

<sup>37</sup> See EC SEA Directive Guide p. 11, 14.

<sup>38</sup> ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008, ECE/MP.PP/2008/5/Add.6 para 86.

## 3.2. Manner of Public Participation

### 3.2.1. Reasonable time-frames

Article 8 SEA Protocol	Art 6 Aarhus Convention
<p>4. Each Party shall ensure that the public referred to in paragraph 3 has the opportunity to express its opinion on the draft plan or programme and the environmental report within a reasonable time frame.</p>	<p>3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.</p>

The obligation to establish reasonable time-frames for public participation is transposed by Art 6 (2) SEA Directive, stating that “*the public ... shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan*”. Whilst “*a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention*”<sup>39</sup> it does not in all cases establish the clear, transparent and consistent framework required by Art 3 (1) Aarhus Convention. In its case-law, the ACCC has specified the term “*reasonable time-frames*”.<sup>40</sup> Most importantly, the ACCC held that the definition of reasonable time-frames varies, depending on the size and complexity of the plan.<sup>41</sup> Given the different volume planning procedures might have we do not believe that **solely** setting a minimum time span for public participation in SEA procedures through the SEA Directive is the right approach, since this might lead to the Member States sticking to the minimum time span.

### 3.2.2. Early, timely and effective public participation

Article 8 SEA Protocol	Art 6 Aarhus Convention
<p>1. Each Party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.</p>	<p>4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.</p>

Art 6 (2) and Art 4 (1) SEA Directive prescribe that public participation should take place “*before the adoption of the plan ... or its submission to the legislative procedure*”. While this certainly is a precondition for effective and timely public participation, it does not

<sup>39</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 50.

<sup>40</sup> Procedure ACCC/C/2004/4 (Hungary) Findings and recommendations of 18.02.2005 ECE/MP.PP/C.1/2005/2/Add.4 para 12; Procedure ACCC/C/2007/22 (France) Findings and recommendations of 03.07.2009 ECE/MP.PP/C.1/2009/4/Add.1 para 44; Procedure ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70 and Procedure ACCC/C/2008/24 (Spain) Findings and recommendations of 08.02.2011, ECE/MP.PP/C.1/2009/8/Add.1 para 92.

<sup>41</sup> Procedure ACCC/C/2006/16 (Lithuania) Findings and recommendations of 07.03.2008 ECE/MP.PP/2008/5/Add.6, para 69 and 70.

necessarily mean that public participation takes place when all options are open, as required by both the SEA Protocol and Art 6 Aarhus Convention: *“Political and commercial pressures may effectively foreclose certain technical options”*<sup>42</sup>, even if the plan has not yet been adopted. This should be considered in the SEA Directive.

The requirement of early, timely and effective participation is of special importance with consecutive planning. Art 4 (3) SEA Directive obliges Member States to take into account planning hierarchies and try to avoid duplications of assessment. Whilst SEA should always be efficient, the SEA Directive should acknowledge that considerations of efficiency should not override the objectives of the Aarhus Convention and the SEA Protocol: *“The requirement for ‘early public participation, when all options are open’ should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, according to the particular needs of a given country and the subject matter of the decision-making, Parties have a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention ... within each and every such procedure, where public participation is required, it should be provided early in the procedure when all options are open and effective public participation can take place.”*<sup>43</sup> We thus propose the following new wording of the SEA Directive:

Article 4 SEA Directive

3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3). **This shall not contravene the objective of early, timely and effective public participation when all options are open according to Art 6.**

Article 6 SEA Directive

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity **when all options are open and** within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. **As a minimum, the public should be given 60 days to participate in the preparation of the plan or programme. When setting the time-frames, Member States shall take into account the complexity of the planning procedure and the objective of effective public participation.**

<sup>42</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 54.

<sup>43</sup> ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008, ECE/MP.PP/2008/5/Add.10 para 51.

### 3.2.3. Outcome of public participation

Article 8 SEA Protocol	Art 6 Aarhus Convention
<i>1. Each Party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes.</i>	<i>8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.</i>

Art 8 SEA Directive states that the results of the public participation procedure “shall be taken into account”. Whilst Art 8 SEA Directive could be interpreted in consistency with the Aarhus Convention, “a similar formulation in the Directives as in the Convention could probably help to ensure adequate implementation of the Convention”.<sup>44</sup> We would welcome a stronger wording in the Directive. We thus propose the following new wording of the SEA Directive:

Article 8 SEA Directive
The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into <b>due</b> account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

## 4. Access to Justice

### 4.1. Art 9 (3) Aarhus Convention

Article 9 Aarhus Convention
<i>3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.</i>

The SEA Directive does not provide for access to justice concerning plans relating to the environment. Those plans, however, must be reviewable according to Art 9 (3) Aarhus Convention: Concerning land zoning plans falling under Art 7, the ACCC held that “it is therefore the Committee’s opinion that the communicants, in accordance with article 9, paragraph 3, should have had access to a review procedure to challenge the decisions, which deal with such subject matter and which they believed to contradict their national law relating to the environment”.<sup>45</sup> It further stated that “national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the

<sup>44</sup> Procedure ACCC/C/2006/17 (EC) Findings and recommendations of 02.05.2008. ECE/MP.PP/2008/5/Add.10 para 50.

<sup>45</sup> ACCC/C/2004/8 (Armenia) Findings and recommendations of 10.05.2006, ECE/MP.PP/2006/2/Add.1 para 36.

*protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions.”<sup>46</sup>*

In two recent judgments, the EUs General Court found that *“as regards the terms in which Article 9 (3) of the Aarhus Convention is framed, it should be noted that, under those terms, the Parties to that Convention retain a certain measure of discretion with regard to the definition of the persons who have a right of recourse to administrative or judicial procedures and as to the nature of the procedures (whether administrative or judicial). Under Article 9(3) of the Aarhus Convention, only ‘where they meet the criteria, if any, laid down in [the] national law, [may] members of the public have access to administrative or judicial procedures’. However, the terms of Article 9(3) of the Aarhus Convention do not offer the same discretion as regards the definition of the ‘acts’ which are open to challenge. Accordingly, there is no reason to construe the concept of ‘acts’ in Article 9(3) of the Aarhus Convention as covering only acts of individual scope”*.<sup>47</sup>

It is thus clear that the ACCC and the General Court agree insofar, as plans (acts of general scope) must be reviewable under Art 9 (3) Aarhus Convention. Since the Parties to the Convention have a wide discretion as to who can challenge acts under Art 9 (3), we propose – as a minimum standard – that the SEA Directives provides for obligatory review procedures environmental NGOs can access.

#### **4.2. Art 9 (4) Aarhus Convention**

##### **Article 9 Aarhus Convention**

*4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.*

In order to properly transpose Art 9 (4) Aarhus Convention, the SEA Directive should establish a review procedure including effective remedies, that is fair, equitable, timely and not prohibitively expensive. Since planning procedures do not end with any project development consent, the need for standardised time-frames and injunctive relief is not as urgent as in review procedures pursuant to the EIA Directive. Still, there should be a minimum time-span awarded to the public concerned to raise objections against a plan and start review proceedings before a court or another independent body. We thus propose the following new wording of the SEA Directive:

<sup>46</sup> ACCC/C/2004/8 (Armenia) Findings and recommendations of 10.05.2006, ECE/MP.PP/2006/2/Add.1, Para 38.

<sup>47</sup> GC 14.06.2012, T-396/09 para 66; see also GC 14.06.2012, T-338/08.

#### **Article 9a SEA Directive**

- 1. Member States shall ensure that non-governmental organisations meeting the conditions laid out in the national legal systems within at least 40 days after the plan or programme has been adopted have access to an effective review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of the plan or programme.**
- 2. Member States shall establish procedures to challenge plans or programmes before a court or another independent body that are open to other members of the public according to Article 2 (d) of this Directive.**

## 5. Summary of the proposed amendments

Text of the SEA Directive 2001/42/EC	Proposed Amendments	Reasoning
<p>Article 3</p> <p>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.</p> <p>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.</p>	<p>Article 3</p> <p>1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes <b><i>relating to the environment</i></b> referred to in paragraphs 2 to 4.</p> <p>4. Member States shall determine whether plans and programmes <b><i>related to the environment</i></b>, other than those referred to in paragraph 2, <b><i>should be made subject to Strategic Environmental Assessment according to this Directive.</i></b></p>	<p><b>The Aarhus Conventions definition of plans is wider than those of the SEA Protocol and the SEA Directive, including not only plans with significant environmental impacts, but all plans “relating to the environment”.</b></p>
<p>Article 4</p> <p>3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3).</p>	<p>Article 4</p> <p>3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3). <b><i>This shall not contravene the objective of early, timely and effective public participation when all option are open according to Art 6.</i></b></p>	<p><b>In order to be effective, public participation must take place at a time when all options are open. This is especially important in cases of consecutive planning.</b></p>
<p>Article 6</p> <p>2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to</p>	<p>Article 6</p> <p>2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity <b><i>when all option are open and</i></b> within</p>	<p><b>In order to be effective, public participation must take place at a time when all options are open.</b></p>

<p>express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.</p>	<p>appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.  <i>As a minimum, the public should be given 60 days to participate in the preparation of the plan or programme. When setting the time-frames, Member States shall take into account the complexity of the planning procedure and the objective of effective public participation.</i></p>	<p><b>Minimum time-frames for public participation leave the Member States room to set longer time-frames whenever the complexity of a plan demands it.</b></p>
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<p>Article 8 – Decision making  The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.</p>	<p>Article 8 – Decision Making  The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into <b>due</b> account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.</p>	<p><b>It is important that the outcome of public participation procedures has influence on the final plan.</b></p>
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<p>Currently no equivalent provision in the SEA Directive</p>	<p><b>Article 9a SEA Directive</b>  <b>1. Member States shall ensure that non-governmental organisations meeting the conditions laid out in the national legal systems within at least 40 days after the plan or programme has been adopted have access to an effective review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of the plan or programme.</b>  <b>2. Member States shall establish procedures to challenge</b></p>	<p>The Aarhus Convention demands review procedures concerning environmental plans. As a minimum standard, environmental NGOs should be granted access to those procedures. Minimum time-frames for the initiation of review</p>
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*plans or programmes before a court or another independent body that are open to other members of the public according to Article 2 (d) of this Directive.* proceedings help to further the effectiveness of the SEA Directive and prevent Member States from setting too short time-frames.

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