

## J&E Workplan 2007: SEA infrastructure CASE STUDY

December 2007

**Introducing remark:** Please focus in particular on questions 14 to 17.

**1. Title of planning case:**

Operational Programme Transport for the Czech Republic 2007 – 2013 (OPT)

**2. Matter of case:**

The Operational Programme Transport for the Czech Republic 2007 – 2013 is a document that defines the framework for drawing money from European Structural Funds for purposes of transport infrastructure development in given priority axes between 2007 and 2013.

The Ministry of the Environment has granted a positive SEA statement for the OPT despite some very serious discrepancies in the document's text and the absence of evaluation of the projects' usefulness and comparison of different alternatives (these issues have not been addressed in any other concept document on transport infrastructure development either).

**3. Country:**

Czech Republic

**4. Location:**

The OPT will finance transport infrastructure projects throughout the Czech Republic.

**5. Geographic dimension: (local, regional, national, EU, international - (especially, is the plan (shall it be) part of Trans-European Transport Network?)**

The OPT has both a national and an international dimension. Some projects/development plans will form part of the Trans-European Transport Network (priority axes OPT 1, 2).

**6. Initiator of SEA/competent authority:**

Ministry of environment

**7. Participants involved:**

Ministry of Transport

The Road and Motorway Directorate of the Czech Republic (RSD CR)

European Commission

**8. Other interested parties and/or stakeholders:**

NGO's, municipalities, administrative bodies, who submitted their comments on SEA documents

**9. Background facts:**

**9.1. Account of facts** (short summary of the planning case)

The Operational Programme Transport for the Czech Republic 2007 – 2013 is a document that defines the framework for drawing money from European Structural Funds for purposes of transport infrastructure development in given priority axes (including construction and modernisation of the TEN-T network and related networks, the highway network and class I roads not included in TEN-T, construction and modernisation of regional railway networks) between 2007 and 2013. It is the biggest

operational programme for the Czech Republic in this programming period in terms of the size of funds (EUR 5.774 bln). At the same time, it is a highly controversial programme – four different versions have been proposed so far, the programme has yet to be approved by the European Commission and has drawn public criticism for some of its controversial parts (most vocal critics have been municipalities affected by the proposed projects and non-governmental organisations).

## **9.2. Description of the project and its main environmental impacts**

### **9.2.1. General description of the project**

*(kind of the plan, its main goal, basic proportions, land-use requirements, etc.)*

As already mentioned earlier, the OPT defines the framework for drawing money for purposes of transport infrastructure development between 2007 and 2013. It involves projects with total cost over EUR 50 mln. The document's appendices list 95 proposed projects divided into 7 priority axes:

1. Upgrading the TEN-T Railway Network
2. Construction and Upgrading of the Motorway and Road TEN-T Network
3. Upgrading Railway Networks outside of the TEN-T Network
4. Upgrading of Class I Roads outside of TEN-T
5. Upgrading and Development of the Prague Underground and Systems for the Management of Road Transport in the City of Prague
6. Support of Multimodal Freight Transport and Development of Inland Waterway Transport
7. OP Transport Technical Assistance

### **9.2.2. Description of the affected area**

- *general characteristics (scope, character of land, density and kind of settlement...)*
- *most important environmental characteristics, e.g. quality of air, water resources, protected areas, fauna, flora, important cultural sites... ; if possible, map of the area or sketch map of the project)*
- *overall evaluation of quality of environment in the affected area before realization of the project, extent of its "environmental burden"*

Not applicable since the OPT covers the whole territory of the Czech Republic and affects the territories of the neighbouring states as well.

### **9.2.3. Description of the main impacts of the project**

*according to the kind of the plan - mainly climate change, emissions, noise, nuisances, conflicts with special protection areas, changing characteristic of the landscape... )*

The OPT as well as the SEA procedure were presented in a very confusing way.

On one hand, it was declared by the Ministry of Transport that the OPT has a "strategic and general character" and the list of projects in the OPT Annex 1 was presented as an indicative one, which allegedly "makes it impossible to identify specific negative impacts on environment in specific localities." SEA documentation was therefore presented as a general description of traffic infrastructure (in the sense of "social phenomena") impacts on human health and environment. There was no description of

impacts of individual projects, which are listed in the indicative list and expected to be potentially financed from the EC budget.

On the other hand the Annex 3 of OPT with the map of planned highways was presented without variants and without an indication which alignments are decided in land-land use plan and supported by positive SEA and EIA statements and which are not.

The OPT was developed for the entire territory of the Czech Republic and as such is likely to influence the entire country. However, some projects included in the lists are rather controversial, lack transport and economic justification and may have potential serious negative consequences for the environment. In general, it is safe to say (and has been repeatedly mentioned by the public) that the OPT gives preference to road transport that has the worse impact on the environment.

- possible **cumulative effects with other projects**

The OPT itself includes many transport projects that should be evaluated together for their cumulative effects.

On the country-wide conceptual level, we may mention possible cumulative effects arising when combined with other conceptual projects such as the Spatial Development Policy, General Plan for the Traffic Infrastructure in the Czech Republic (GEPARDI), Transport Policy of the Czech Republic 2005-2013, Operational Programme Environment 2007-2013, State energy Policy, etc.

**9.3. Important interrelated aspects - transboundary impacts of the plan, relation to national and EU infrastructure (transport) development plans, EU funds etc.**

- *TEN-T?*

Yes

- *National transport programme*

Yes

- *EIB-funded?*

Some of the projects are supposed to be EIB-funded.

**10. Applicable articles of SEA Directive, relationship to EIA Directive, habitats and bird-Directives**

SEA Directive, in particular Art. 3.3, 5, 6, 7, 8, 9.

EIA Directive

It has been decided and confirmed during talks with the European Commission that projects financed from the OPT will go through due EIA in accordance with national regulations and the EIA Directive.

The environmental assessment procedures EIA (which logically follows after the SEA procedures) for some questionable projects included in the OPT are, however, already in progress or even finished (some of them, however, are awaiting Supreme Court decision), but in the respective processes no variants were taken into account or the variants were incorrectly treated (e.g. expressways R43, R55, R52, and for Europoint - Brno railway station).

Habitat Directive – art. 6.4

Bird Directive – art. 4.4

### **11. Applicable national laws:**

Act No. 100/2001 Coll. on evaluation of environmental impacts

Regulates projects' environmental impact assessment (EIA) and as of May 1, 2005, applies also to concept assessment including land use planning (SEA)

Act No. 114/1992 Coll. o ochraně přírody a krajiny

Regulates conditions for protection of areas, bird sanctuaries, other protected territories, endangered plant and animal species biotopes and sites of European importance (NATURA 2000).

Act No. 258/2000 Coll. o ochraně veřejného zdraví

Defines regulations on protection from noise.

### **12. Legal framework of SEA-proceeding:**

- *Position in legal system*
- *Administrative proceeding?*
- *particular planning proceeding?*
- *legal form of decision*
- *legal form of plan*
- *possibility to appeal against SEA decision and plan?*

Strategies, policies and land use documentation are to be (before its adoption) evaluated from the perspective of impacts on the environment by a method according to Act No. 100/2001 Coll., on evaluation of environmental impacts. The SEA procedure is a specific administrative procedure but the final decision – SEA statement – does not have a legal form of decision.

SEA statement is indispensable document for further decisions regarding concept approval/rejection. The relevant authority's decision must reflect requirements and conditions defined in the SEA statement or, if this does not happen, explain its reasons for not doing so. According to current interpretation as confirmed by court orders, the SEA statement is a preliminary and non-binding document to be used further procedures and is not subject to court review.

### **13. SEA/planning procedural history/timeline:**

- *information on formal proceeding (initiation of SEA, PP, decision etc)*
- *information on other relevant planning (political decision for the plan, start of internal planning, scheduled construction start)*
- *information on time between SEA and formal adoption of the plan*
- *information on scheduled timeframe between adoption of plan and (EIA)-permit proceeding and scheduled construction start*

On March 8, 2006, the Czech Ministry of Environment published a document outlining the idea that an Operational Programme Transport will be prepared. SEA procedure for this programme started thereby. The above mentioned outline document with a few pages served a basis for the scoping process and was made available for public to comment on.

The scoping process was concluded by a statement issued by the Ministry of Environment on April 11, 2006. In its point 13 this statement requested that possible impact of the OPT outside of the

borders of the Czech Republic should be identified. However, the Ministry of Environment did not give a chance to the neighbouring countries and citizens to enter into consultations with the Czech Republic.

The public hearing on SEA document was called for October 30, 2006 and it was announced that comments would be accepted until Friday November 10, 2006.

As a conclusion of the SEA process, the positive SEA statement on the OPT was issued by the Ministry of Environment as dated on 13 November 2006, i.e. Monday.

On 15 November 2006 the Ministry of Environment published this final statement. At the same date, on November 15, 2006, the OPT was approved by the Czech Government (Decision No. 1302/2006).

#### **14. Relationship to EIA**

*Please explain the relationship of EIA and SEA in the legal system and planning/project practice in particular with problems indicated in J&E Workplan 2006 on EIA/infrastructure*

The SEA process is regulated by a special part of Act No. 100/2001 Coll., on evaluation of environmental impacts. The basic relationship between the two procedures follows the logic of Art. 3 par. 2 of the SEA Directive. Concepts that define the framework for future approval of proposals listed in Appendix no. 1 to the EIA Act (i.e. Appendices I and II of the EIA Directive) are subject to SEA.

There are similar evaluation criteria, some identical procedural points and the relevant authority must issue a non-binding opinion before the concept is approved. SEA for land use plans is included in procedures necessary to approve these plans.

Unfortunately, SEA and EIA process are not sufficiently tied. On the one hand, SEA and EIA procedures in some cases repeatedly evaluate similar impacts while, on the other hand, an EIA statement was granted without a prior evaluation of the given concept (usually land use planning) and without a SEA procedure, which meant that alternatives were not considered in either of the processes.

Moreover, in case of large traffic infrastructure projects it is a common practice that the EIA processes are not in accordance with valid SEA positions. It is necessary that the feasible variants of corridors (alignments) were evaluated in the SEA process and then the EIA process will only evaluate the options of routes within the corridor.

In this concrete case of the SEA on the OPT the EIA procedures (which should logically follow after the SEA procedure) for some questionable projects included in the OPT are, however, already in progress or even “finished” (some of them are awaiting High Court decision), but in the respective processes no variants were taken into account or the variants were incorrectly treated (e.g. for expressways R43, R55, R52, and for Europoint - Brno railway station). The result was that alternatives were not considered in the OPT SEA or any other process.

The OPT should have been based on “General Plan for the Traffic Infrastructure in the Czech Republic” (GEPARDI), which should have been approved before the work on the OPT started. GEPARDI was initiated to cover all highways, express roads and the so called first class roads in the Czech Republic. Preparation of GEPARDI (as well as the SEA process on GEPARDI) had started well before the preparation of the OPT did, but GEPARDI has not been finished until now. SEA procedure on GEPARDI actually started in 2005 and the SEA scoping process was concluded by the Ministry of Environment explicitly demanding that variants should be evaluated in the SEA procedure.

## 15. Description of “significant effects” in environmental report (Article 5/1, Annex I (f))

- *How does the environmental report deal with “significant effects” as compared to other parts of the report (Does elaboration of “significant effects” have a high priority in environmental report)?*
- *Does the report and to what extent analyze the issues mentioned in Annex I f (biodiversity, climate, air, soil, interrelationships..)?*
- *Does and to what extent the environmental report cover with regard to significant effects*
  - *cumulative, secondary and synergetic effects?*
  - *short-term, long-term, permanent and temporary effects?*
  - *positive and negative effects related to environment?*

The SEA assessment for OPT does not include (at all or in sufficient scope) obligatory information concerning the significant environmental effects of implementing OPT.

The situation in the specific regions which shall be influenced by new priority transport projects is not described in the SEA documentation. The environmental characteristics of the areas, where the limits of tolerable burden (noise, air pollution) are already exceeded and where the conditions would even worsen by implementation of the OPT (e.g. Praha-Suchdol, Brno-Bystrc, Troubsko) are not taken into account.

The likely significant effects of implementation of OPT on the environment and human health are described only in a very generalized way, without taking into account the indirect and cumulative effects of more priority projects on individual (above all the currently overburdened) areas. The situation is similar concerning the protective measures.

As mentioned above, the OPT was presented as a document of a “strategic and general character”, which allegedly “makes it impossible to identify specific negative impacts on environment.” Simultaneously it includes concrete corridors of the planned infrastructure projects presented without variants. Also the SEA documentation is not clear in this regard as it creates an impression that particular corridors/alignments are in fact part of the SEA evaluation (though no real evaluation of any specific alignments is documented).

We must note here that – in our experience – once included in a strategic document (such as the OPT), a proposal is then presented by authorities as already approved and its being listed in such a document (that has went through the SEA process) is often used as an argument against any other real evaluation such as the EIA (and as a reason to reject any other possible alternative – see below).

The part of the SEA evaluation that focuses on a concept’s significant effects on the environment then merely states that priorities and areas of support proposed in the OPT are not, by their nature, specific measures or activities. Different environmental aspects were presented as “reference goals” of environment protection and the OPT SEA described the potential impact of the OPT priorities on these reference goals. As a result, the description of potential impacts is very vague and loose.

To sum up, we have to say that in the environmental report the elaboration of “significant effects” in the sense of the SEA Directive did not have priority.

## 16. Assessment of “reasonable alternatives” (Article 5/1, Annex I (h))

- *what kind of alternatives are covered, for example different locations, different means of transport (like railways, motorways, water-ways)*
- *Are respective alternatives analysed in a “reasonable” and serious way?*

- *Does and to what extent the report cover the significant effects of alternatives?*

As already mentioned earlier, the OPT is presented as a framework for financing specific projects. However, the document's text and appendices states specific corridors of each transport project and the Commission has repeatedly received the public's objections and complaints in this respect. Relevant state authorities have rejected the objections as ungrounded, arguing that it is merely an indicative list and that the projects and their alternatives will duly evaluated in the future (under SEA or EIA). Critics are thus referred to future evaluation despite the fact that some of the projects listed in the OPT have already went through impact assessment (or are currently going through it) but too often without any thought given to possible alternatives.

As for different means of transport, the OPT and its various priority axes include different means of transport (railway, road and water). The OPT fails to mention different combinations of these types of transport and, in its current version, gives preference to road transport.

### **17. Early and effective public participation (Article 6 and 7)**

- *How was the public informed on SEA?*

- *At what stage in planning procedure does PP take place?*

- *At what stage in SEA procedure does PP take place?*

- *Did the SEA provide for early and effective PP at a planning stage when all options are open (in theory and effectively)?*

- *Has the SEA provided for sufficient time frame and arrangements to guarantee fair and effective PP?*

- *Is the information provided for consultation sufficient to assess the plan?*

- *In case of transboundary SEA*

- *When and how was the public of the other country informed on SEA?*

- *What information was provided for consultations?*

- *Were SEA documents translated?*

The Czech Ministry of Environment published a document outlining the idea that the OPT will be prepared on March 8, 2006. This document with a few pages served a basis for the scoping process and was made available for public to comment on. No other information was made available.

The scoping process was concluded by a statement issued by the Ministry of Environment on April 11, 2006. In its point 13 this statement requested that possible impact of the OPT outside of the borders of the Czech Republic should be identified. However, the Ministry of Environment did not give a chance to the neighbouring countries and citizens to enter into consultations with the Czech Republic. (Contrary to this, Slovakia contacted officially the Czech Republic on the issue of the Slovak OPT.)

Some draft versions of the OPT were published by the Ministry of Transport, but not on their official webpage where according to the law officially announced documents have to be posted. The first incomplete version on the thematic webpages of the Ministry of Transport detected was only put on the ministerial website in April 14, 2006, i.e. after the comments from public for the scoping process were long received by the Ministry of Environment.

The public hearing on SEA document was called for October 30, 2006 and it was announced that comments would be accepted until Friday November 10, 2006.

As a conclusion of the SEA process, the positive SEA statement on the OPT was issued by the Ministry of Environment as dated on 13 November 2006, i.e. Monday. Thus there was in fact not a single working day between the deadline for comments and the date of issuing of the final SEA Statement.

On 15 November 2006, the Ministry of Environment published this final statement. At the same date, on November 15, 2006, the OPT was approved by the Czech Government. The document containing the answers to the objections of the public was published only on December 2006 on the web of the Ministry of Transport without showing who is the author of these answers.

To sum up, the public was not given an effective opportunity to express their opinion on the draft of the OPT and the accompanying environmental report before the adoption of the OPT. The comments on the draft (made within the SEA scoping process) were either not answered to or dismissed as “*comments on the OPT and not comments relevant to SEA*”. Comments and objections submitted by public were ignored during the preparation of the OPT and before its adoption; the objections submitted during the last stage of the SEA process were not answered before the day when Government approved the OPT and due to the timetable (see above) even could not be taken into account.

The fact that realization of OPT is likely to have significant effects on the environment in another member states (all neighbouring states to the Czech Republic) is evident as it contains the projects of traffic infrastructure connected to infrastructure of neighbouring states. It was proclaimed already in the scoping process, but ignored at the later stages of the SEA procedure. Contrary to art. 7 of the SEA Directive, no official announcement about preparation of OPT and related SEA procedure was made.

## **18. Consideration of SEA in planning decision (Article 8, Article 9)**

### **18.1. Information and form of decision**

- *In what form is the plan adopted?*
- *How was the public informed on the adoption and results of SEA?*

OPT was approved by the Czech Government in a legal form of decision (Decision No. 1302/2006).

The OPT is now subject to approval by the European Commission. More specifically, the Czech Republic’s OPT will be discussed by DG Regio. To this day, several meetings between representatives of the European Commission and the Czech Republic took place and the European Commission has voiced many objections (often based on comments and complaints from Czech NGO’s and representatives of towns affected by some of the projects) and the OPT had to be rewritten several times (which leads us to wonder whether SEAs granted to previous, different versions may be considered valid for the new, modified text).

Once the OPT is approved during the programming period, each of its projects must be approved by the OPT Steering Body and the European Commission.

For details on how the public is to be informed of SEA acceptance and results, see above.

### **18.2. Integration and consideration of SEA in decision**

- *Did (and to what extent) the published statement summarizing SEA (Article 9/1/b) explain how **environmental considerations** have been integrated into the plan, in particular how*
  - *the environmental report with regard to “significant effects” and*
  - *the opinions of the public were **taken into account** in accordance with Article 8?*
- *Was SEA taken into account effectively?*

The text of the OPT includes a very brief chapter on the application of the partnership principle and a wide support of and application of the principle was announced; however, the reality is very different (see above).

The text of the OPT also includes a chapter describing the main results of the SEA and concludes that transport always has negative impact on the environment and that it is necessary to search for solutions that might mitigate such impact.

We may conclude that the evaluation of environmental impact as well as the public's comments and objects were included in a very general and imprecise manner.

### **18.3. Reasoning for alternative chosen**

*- Did the decision statement clearly state the reasons for choosing the plan adopted, by the light of other reasonable alternatives dealt with?*

*- Is the reasoning understandable and clear with regard to environmental impacts?*

No alternative versions of the OPT were developed. It included transport plans that are to be financed from the OPT in the programming period. No alternative versions to these plans were presented (in the text or in the "indicative" list in an appendix) and the reader was merely referred to future assessment.

### **18.4. Arrangement of Monitoring**

*- Did the decision statement name the decided measures concerning monitoring of significant environmental effects in order to identify early stage unforeseen adverse effects in accordance with Article 10?*

Hodnocení SEA obsahuje krátkou kapitolu o stanovení monitorovacích ukazatelů vlivů OPT na životní prostředí. Obsahuje opět pouze obecné stanovení povinnosti sledovat vlivy realizace OPT na životní prostředí, jež má být navázáno na environmentální hodnocení projektů realizovaných v rámci OPT (připomínáme, že na některé projekty zařazené do OPT již proces hodnocení vlivů na životní prostředí proběhl nebo probíhá – viz výše).

### **18.5. Was there any other particular problem with regard to decision making?**

The submission of the OP Transport to the Czech Government was obviously anomalous. The draft of the Government decision on several Operational Programmes prepared for adoption on November 15, 2006, as submitted by the responsible ministry, i.e. Ministry for Regional Development, did not include the OPT as an OP to be approved. Once the SEA statement dated November 13, 2006 was issued (but posted on the Ministry of Environment web pages only on the same day as was the Government meeting, i.e. only on 15 November 2006), the text of the Government Decision No. 1302/2006 suddenly included the OPT as an approved OP. This indicates that the SEA conclusions, and possibly also the OPT itself, was not submitted to the other Ministries in time (may be not at all) following the established Government rules, which anticipate that in regular situations any documents for decision shall be submitted to all Ministries at least one week ahead of the Government meeting. This can mean that Ministries had no chance to review what happened with their objections as the evaluation of the objections was a part of the OPT submission for the government decision.

## **19. Remedies taken:**

*Is there a legal possibility to appeal against SEA decision?*

The ELS and seven other NGO's have filed a complaint to the European Commission for violation of Community law, precisely violation of the SEA Directive in the OPT SEA.

NGO's and representatives of towns that may be affected by OPT projects have repeatedly submitted their comments on the OPT negotiations to the Commission.

According to current interpretation as confirmed by court orders, the SEA is not subject to court review .

#### **20. Judicial procedural history/timeline (if relevant):**

There was no judicial procedure in this case.

#### **21. Outcome of the actions:**

The infringement unit of DG Environment informed us in its letter of 23 October 2007 about its decision not to register our OPT SEA complaint as a complaint. However, comments presented in our complaint as well as other objections received from NGO's and municipalities regarding different versions of the OPT were considered in the authorisation procedure of the OPT and have led the Commission to define some of its requirements as to additions and modifications to the OPT whose incorporation is a condition for OPT approval. Nevertheless, the latest OPT version that resulted from talks between the EC and Czech representatives is still unacceptable for us.

#### **22. Current status of planning case:**

A web site created by the Ministry of Transport for OPT presentation has recently posted yet another, fourth and reportedly final version of the OPT of October 11, 2007. The OPT is expected to be soon approved by the European Commission. As early as in July 2007, invitation was issued to submit the first projects for OPT funding.

#### **23. Follow-up actions planned and their timeline**

It is not possible, according to the Czech legislation, to challenge the OPT at court. If the content of the final OPT approved by the European Commission is not satisfactory, there is a possibility to submit a request for internal review according to Art. 10 of the Aarhus regulation No. 1367/2006.

#### **24. Conclusions:**

The development in this case can serve as a good example of the poor implementation of the SEA Directive so typical in the Czech Republic in general and even more so in relation to land use planning and approval of transport construction projects. The most serious flaws include

- insufficient evaluation of all effects of the project, especially indirect impacts and synergies
- failure to consider real alternative to the project
- failure to consider the public's comments and objections
- failure to respect conditions for international evaluation
- absence of a concept in transport infrastructure implementation schedule – the priority of different projects was not assessed based on their infrastructure importance, economic efficiency and environmental impacts (multi-criteria analysis) and projects are included in major concept documents (such as the OPT) based on the progress in their preparation rather than on legal readiness.

The case also illustrates the importance of sticking to the logical approval sequence of concepts necessary for implementation of project with serious environmental impact an actual approval of these projects, or the related SEA and EIA processes. A failure to keep the logic inevitably leads to a failure choose the project version with least negative environmental impact, especially when it comes to NATURA 2000 sites.

And finally, the case is a nice example of the typical arrogance and legal inaptitude of most state authorities and agencies involved. It stands as a warning that nothing but constant resistance by affected public on all levels may (but not necessarily) bring at least some hope of success (incorporating NGOs' and towns' comments in the Commission's requirements during OPT negotiations).

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