

Questionnaire for the report of Denmark on the implementation of the Protocol on Strategic Environmental Assessment in the period 2016–2018

Information on the focal point for the Protocol

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Part one

Current legal and administrative framework for the implementation of the Protocol

In this part, please describe the legal, administrative and other measures taken in your country to implement the provisions of the Protocol. This part should describe the framework for your country's implementation, and not experience in the application of the Protocol.

Please note the following preconditions for the answers given below:

The preparation of the SEA-Directive was done within the scope of the later SEA Protocol, cf. European Parliament and Council Directive 2001/42/EC of 27 June 2001, recital 7. There are not – to our knowledge – any misconceptions in the transposition or interpretation of SEA-Protocol in the SEA-Directive and the rulings of the ECJ.

Given the fact that Denmark is a Member of the EU, Denmark is obliged to transpose the SEA-Directive. The transposition is adopted in the Environmental Assessment Act (EAA no. 1225 of 4 February 2018), which also transposes the EIA-Directives.

Article 3 General provisions

I.1. Please provide the main legislative, regulatory and other measures you have adopted in your country to implement the Protocol (art. 3, para. 1) (more than one option may apply):

- (a) Law on SEA (please indicate number/year/name): **Environmental Assessment Act (EAA no. 1225 of 4 February 2018)**
- (b) SEA provisions are transposed into another law(s) (please specify):
- (c) Regulation (please indicate number/year/name): **no. 121 of 4 February 2019 pursuant to EAA**
- (d) Administrative rule (please indicate number/year/name):
- (e) Other (please specify): **Guidance documents under revision**

Your comments:

Article 4 Field of application concerning plans and programmes

I.2. List the types of plans and programmes that require SEA in your legislation: **The SEA-Protocol article 1, para 5, and the SEA-Directive article 2, litra a), alike presuppose a generic concept of plans and programmes and any modification to plans and programmes, which operates on the basis of three formal criteria:**

- **Required by legislative, regulatory or administrative provisions,**
- **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, and**

- Sets the framework for future development consent of projects.

In addition, the concept of plans and programmes presupposes a substantial delimitation, which involves sectors and types of projects listed in annex I and II, cf. SEA-Protocol article 4, para 2, and the SEA-Directive article 3, para 2.

When drafting the new EEA in Denmark in 2016 the formal part of the SEA-Directive (and the SEA-Protocol) definition was transposed in § 2(1) (1) with an update on the terminology concerning administrative decisions was updated. The definition of plans and programs was placed under the heading ‘The scope of the Act’ to avoid duplication of the definition under the heading ‘Definitions’. Furthermore, a generic reference to ‘the framework of future construction permits’ was added to § 2(1) (1).

In order to ensure that the definition of plans and programs would be interpreted with the full legal value as the ECJ has laid down in several rulings a reference in the preparatory work was made to the C-473/14, paragraph 50, which reads:

‘Given the objective of Directive 2001/42, which consists in providing for a high level of protection of the environment, the provisions which delimit the directive’s scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly (judgment in *Inter-Environment Bruxelles and Others*, C-567/10, EU:C:2012:159, paragraph 37). Any exceptions to or limitations of those provisions must, consequently, be interpreted strictly.’

The substantial part of the concept in the SEA-Directive (and SEA-Protocol) was transposed in § 8(1) and § 8(2). The latter concerns screening.

In conclusion, the EEA neither exclude or nor narrow down the concept of plans and programs by listing specific plans and programmes. Anyway, it would be in conflict with the use of a generic definition in order to ensure that specific plans and programmes will undergo an environmental impact assessment. However, in the existing Guidance-document and the draft version of the amended guidance examples of plans and programmes, which may be a plan or a programme under the scope of the EEA such as local, regional and national plans and programmes and to certain extend draft legislation and ministerial orders.

I.3. Explain how you define whether a plan or programme “set the framework for future development consent” (art. 4, para. 2): The ECJ has in more recent rulings elaborated on the concept of setting the framework for future development consents, especially in terms of ministerial orders and acts passed by Parliament.

In accordance with these rulings the Danish interpretation is that

- It is a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (judgment of 27 October 2016, *D’Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 49 and the case-law cited),
- The concept of ‘a significant body of criteria and detailed rules’ must be construed qualitatively and not quantitatively. It is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive (judgment of 27 October 2016, *D’Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 48 and judgment of 7 June 2018, *Inter-Environment Bruxelles ASBL and Others*, C-671/16, EU:C:2018:403, paragraph 55), and
- It follows that, although such an instrument [decree, regulation, ministerial order etc.] does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of Article 2(a) and Article 3(2)(a) of the SEA Directive judgment of 7 June 2018, *Raoul Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 55).

I.4. Explain how the terms “plans and programmes ... which determine the use of small areas at local level” (art. 4, para. 4) are interpreted in your legislation:

The ECJ has more recently taken a position on the term the use of small areas at local level (identical wording in the SEA-Directive article 3, para 3) (judgment of 21 December 2016, Associazione Italia Nostra Onlus, C-444/15, EU:C:2016:978, paragraph 69-74):

‘69 As regards, the term ‘local level’, it must be pointed out that the expression ‘local level’ is also used in the first indent of Article 2(a) of Directive 2001/42. Under that provision, ‘plans and programmes’ means plans and programmes, including those co-financed by the European Union, as well as any modifications to them which are subject to preparation and/or adoption by an authority at national, regional or local level, or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.

70 Thus, as the Advocate General stated in point 56 of her Opinion, it is evident from the similarity of the terms used in the first indent of Article 2(a) and in Article 3(3) of Directive 2001/42, and from the broad logic of the directive that the expression ‘local level’ has the same meaning for both those provisions, that is to say, it refers to an administrative level within the Member State concerned.

71 Consequently, in order for a plan or programme to be qualified as a measure which determines the use of a small area ‘at local level’, for the purposes of Article 3(3) of Directive 2001/42, that plan or programme must be prepared and/or adopted by a local authority, as opposed to a regional or national authority.

72 As regards the term ‘small area’, the qualifier ‘small’, in accordance with its usual meaning in everyday language, refers to the size of the area. Thus, as the Advocate General stated in point 59 of her Opinion, that criterion of the size of the area may be understood only as referring to a purely quantitative factor, that is to say, the size of the area concerned by the plan or programme referred to in Article 3(3) of Directive 2001/42, irrespective of the effects on the environment.

73 In those circumstances, it must be held, that, through the use of the term ‘small areas at local level’, first, the EU legislature intended to take as a reference the territorial jurisdiction of the local authority which prepared and/or adopted the plan or programme concerned. Secondly, since the criterion of the use of ‘small areas’ must be met in addition to the criterion of determination at local level, the area concerned must be small in size relative to that territorial jurisdiction.

74 Having regard to the foregoing considerations, the answer to the second and third questions referred is that Article 3(3) of Directive 2001/42, read in conjunction with recital 10 of that directive, must be interpreted to the effect that the term ‘small areas at local level’ in paragraph 3 must be defined with reference to the size of the area concerned where the following conditions are fulfilled:

- The plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and
- that area inside the territorial jurisdiction of the local authority is small in size relative to that territorial jurisdiction.’

I.5. Explain how you identify in your legislation a “minor modification” to a plan or programme (art. 4, para. 4):

First of all – the use of ‘minor modification’ presupposes that the plan/programme meets the preconditions in the definition and has been assessed in accordance with the SEA-

regulation. Secondly, only the minor modification will be screened and depending on the result the modification may be subject to a SEA. The screening will be conducted on a case to case basis taking into account all the criteria in Annex II in the SEA-Protocol, which very similar to the Annex II in the SEA-Directive.

Article 5 Screening

I.6. How do you determine which other plans and programmes should be subject to a SEA as set out in article 4, paragraphs 3 and 4, in accordance with article 5, paragraph 1? Please specify:

- (a) On a case-by-case basis
- (b) By specifying types of plans and programmes
- (c) By using a combination of (a) and (b)
- (d) Other (please specify):

Your comments:

I.7. Do you provide opportunities for the public concerned to participate in screening and/or scoping of plans and programmes in your legislation (art. 5, para. 3, and art. 6, para. 3)?

No

Yes (please specify (more than one option may apply)):

- (a) By sending written comments to the competent authority
- (b) By sending written comments to the local municipality
- (c) By providing answers to a questionnaire
- (d) By taking part in a public hearing
- (e) By sending written comments to the consultants/SEA experts or persons preparing the plans and programmes
- (f) Other (please specify):

Your comments: The way the question is posed makes it difficult to answer in a Danish context. The screening/scoping of the draft plan/programme concerns not the plan/programme itself but the question of possible significant environmental impacts/the scope of the environmental impact assessment report. The extent to which the public may provide comments on the draft plan/programme is governed by the nature of the plan/programme but they are not excluded. For example a draft municipal or local plan will undergo a public hearing and the screening draft decision/the SEA-report is part of the drafted plan/programme.

Article 6 Scoping

I.8. How do you determine what is the relevant information to be included in the environmental report, in accordance with article 7, paragraph 2 (art. 6, para. 1)? The point of departure is the specific plan or programme and the draft guidance recommends the use of Appendix 4 in the EAA as a check list to ensure that all relevant information to the

specific plan or programme is covered. Appendix 4 is a transposition of the SEA-Directive (2001/42/EU) Annex 1, which describes the content of the SEA-report.

Article 7 Environmental report

I.9. How do you determine “reasonable alternatives” in the context of the environmental report (art. 7, para. 2)? Please specify:

- (a) On a case-by-case basis
- (b) As defined in the national legislation (please specify):
- (c) By using a combination of (a) and (b)
- (d) Other (please specify):

Your comments: **EAA § 12 transposes the SEA-Directive article 5, para 1. The scope of 'reasonable alternatives' is determined by looking at the objectives and the geographical scope of the plan/programme. The alternatives must be realistic in order to assess the possibility of reducing or avoiding the significant adverse environmental effects of the proposed plan or programme. For further guidance to the Danish interpretation please consult the EU-Commissions Guidance to Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment point 5.12-5.14.**

I.10. How do you ensure sufficient quality of the reports? Please specify:

- (a) The competent authority checks the information provided and ensures it includes all information required under annex IV as a minimum before making it available for comments
- (b) By using quality checklists
- (c) There are no specific procedures or mechanisms
- (d) Other (please specify):

Your comments: **Quite often will the authorities have external help (consultants) to ensure the quality of the report.**

Article 8 Public participation

I.11. How do you ensure the “timely public availability” of draft plans and programmes and the environmental report (art. 8, para. 2)? Please specify (more than one option may apply):

- (a) Through public notices
- (b) Through electronic media
- (c) Through other means (please specify):

Your comments:

I.12. How do you identify the public concerned (art. 8, para. 3)? Please specify (more than one option may apply):

- (a) Based on the geographical location of the plans and programmes

(b) Based on the environmental effects (significance, extent, accumulation, etc.) of the plans and programmes

(c) By making the information available to all members of the public and letting them identify themselves as the public concerned

(d) By other means (please specify):

Your comments: The concept of the public in the SEA-Directives art. 2, paragraph 2, litra d), and the definition is transposed in the EAA § 5, no.1. However, the concept of the public concerned serves two purposes: 1) who to consult when the environmental assessment procedure is conducted and 2) who are eligible to bring action before the Environment and Food Appeal Board or the Court. The EAA § 50, para 1, states 'location' and 'legal interest' as two of several selection criteria and thereby transposes the Aarhus Convention.

I.13. How can the public concerned express its opinion on the draft plans and programmes and the environmental report (art. 8, para. 4)? Please specify (more than one option may apply):

(a) By sending comments to the relevant authority/focal point

(b) By providing answers to a questionnaire

(c) Orally

(d) By taking part in a public hearing

(e) Other (please specify):

Your comments: Initially, it is only possible for the public to make comments during the periods when there is public consultation. However, it constitutes good administrative practice to take into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage.

I.14. Do you have a definition in your legislation of the term "within a reasonable time frame" (art. 8, para. 4)? Please specify:

(a) No, the time frame is determined by the number of days fixed for each commenting period

(b) No, it is defined case by case

(c) Yes (please provide the definition):

(d) Other (please specify):

Your comments: If a plan or a programme is required or drafted in accordance with national legislation e.g. municipal or a local plan, and the specific national legislation states time frames for consultation of authorities and the public, then the time frame will also be applicable to the SEA. In other cases the time frame will be determined case by case involving difficulty, geographical scope and objectives of the plan/programme.

Article 9

Consultation with environmental and health authorities

I.15. How are the environmental and health authorities identified (art. 9, para. 1):

- (a) On a case-by-case basis:
- (b) As defined in the national legislation:
- (c) Other (please specify)

Your comments: **The objectives of EAA cf. § 1, is to provide for a high level of protection of the environment and by conducting the SEA-procedure to assess the likely significant effects on the environment and the human health. The scope of competent environmental and health authorities is determined case by case, cf. EAA § 31.**

I.16. How are the arrangements for informing and consulting the environmental and health authorities determined (art. 9, para. 4):

- (a) On a case-by-case basis:
- (b) As defined in the national legislation:
- (c) Other (please specify)

Your comments: **The extent to which the authorities may provide comments on the draft plan/programme is governed by the nature of the plan/programme.**

I.17 Does your national legislation call for consultations with environmental and health authorities?

- (a) Yes
- (b) No

I.18. How can the environmental and health authorities express their opinion (art. 5, para. 2, art. 6, para. 2, and art. 9, para. 3):

- (a) By sending comments
- (b) By providing answers to a questionnaire
- (c) In a meeting
- (d) By other means (please specify)

Your comments: **Initially, it is only possible for the authorities to make comments during the periods when there is consultation. However, it constitutes good administrative practice to take into account unsolicited comments that might have been received from other sources, such as authorities, even though no formal consultation is required at the screening stage.**

Article 10

Transboundary consultations

I.19. As a Party of origin, when do you notify the affected Party (art. 10, para. 1)? Please specify:

- (a) During scoping
- (b) When the draft plan or programme and the environmental report have been prepared

(c) At other times (please specify):

Your comments: Possible affected countries are consulted whether they want to participate and whether they have comments on the plan, including the content of the environmental assessment. The notification, including appendices, is sent to potential affected countries no later than one week before the Danish public and the authorities concerned are heard. All contact with possible affected countries is always via the Danish Environmental Protection Agency, which is the Point of Contact.

I.20. As a Party of origin, what information do you include in the notification (art. 10, para. 2)? Please specify:

(a) The information required by article 10, paragraph 2

(b) The information required by article 10, paragraph 2, plus additional information (please specify):

Your comments:

I.21. As a Party of origin, does your legislation indicate a reasonable time frame for the transmission of comments from the affected Party (art. 10, para. 2)? Please specify:

(a) No

(b) Yes (please indicate how long):

Your comments: The EAA § 32 para 2, lays down a reasonable time frame for consultations. The specific reasonable time frame is calculated on the basis of e.g. the complexity of the case and the geographical scope.

I.22. If the affected Party has indicated that it wishes to enter into consultations, how do the Parties agree on detailed arrangements to ensure that the public concerned and the authorities in the affected Party are informed and given an opportunity to forward their opinion on the draft plan or programme and the environmental report within a reasonable time frame (art. 10, paras. 3 and 4)?

(a) Following those of the Party of origin

(b) Following those of the affected Party

(c) Other (please specify):

Your comments: In principle, the timetable laid down for the implementation of the environmental assessment of the Danish plan is complied with in relation to the rules for public participation included in Danish legislation. If the country concerned approaches other wishes, needs or concerns, it is discussed on a case-by-case basis so there is a good joint solution.

Article 11 Decision

I.23. When a plan or programme is adopted, explain how your country ensures, in accordance with article 11, paragraph 1, that due account is taken of:

(a) The conclusions of the environmental report

(b) Mitigation measures

(c) Comments received in accordance with articles 8 to 10

Your comments: In accordance with EAA § 13, para 1, the authority must include the environmental report, in the final approval or adoption of the plan or program, which is prepared in accordance with § 12, including environmental impacts, which, incidentally, are not handled in accordance with the environmental legislation, according to which the plan or program is provided, the results of any transboundary consultations pursuant to § 38 and statements by other authorities and the public pursuant to § 32.

In accordance with EAA § 13, para 2, The Authority must prepare a summary report 42 for,
1) how environmental considerations are integrated into the plan or program,
2) how the environmental report and the statements received during the public phase have been taken into account,
3) why the approved or adopted plan or program has been selected on the basis of the reasonable alternatives that have been dealt with, and
4) how the authority will monitor the significant environmental impacts of the plan or program.

I.24. How and when do you inform your own public and authorities (art. 11, para. 2)?

In accordance with EAA § 34, para 1, the Authority shall publish the final approved or adopted plan or the finally approved or adopted program, the environmental report and the summary statement pursuant to § 13, para 1, and forward them to the authorities concerned. The publication must include information on whether the decision can be appealed and the deadline for this.

I.25. How do you inform the public and authorities of the affected Party (art. 11, para.

- (a) By informing the point of contact
- (b) By informing the contact person of the ministry responsible for SEA, who then follows the national procedure and informs his/her own authorities and public
- (c) By informing all the authorities involved in the assessment and letting them inform their own public
- (d) Other (please specify):

Your comments: When a transboundary consultation has been conducted pursuant to EAA § 38, the authority shall in accordance with EAA § 34, para 2, send the approved or adopted plan or approved or adopted program annexed to the summary report to the Minister for the Environment and Food which shall ensure that these are transmitted to the States concerned.

I.26. How do you ensure that, when a plan or programme is adopted, the public, the authorities and the Parties consulted are informed and that the information mentioned in article 11, paragraph 2, is made available to them?

- (a) Pursuant to national legislation (please refer to specific provisions and provide citations in order to clarify the procedure followed):
- (b) Other (please specify):

Your comments: Please refer to the answer given to I.24 and I.25.

Article 12 Monitoring

I.27. Describe the legal requirements for monitoring the significant environmental, including health, effects of the implementation of the plans and programmes adopted under article 11 (art. 12, paras. 1 and 2): The monitoring concerns the implementation of the plan or program. Therefore, in some cases it may be more appropriate that the monitoring is carried out by the authority supervising the specific project,

etc. or overseeing the environmental condition of the environment and having the interventions possible by law.

Part two

Practical application during the period 2016–2018

In this part, please report on your country's practical experiences in applying the Protocol (and not your country's procedures, which were described in part one). The focus of this section should be on identifying good practices as well as difficulties encountered in applying the Protocol in practice. The goal is to enable Parties to share solutions. Please therefore provide appropriate examples highlighting application of the Protocol in your country and innovative approaches to improve its application.

II.1. Does your country object to the information on SEA procedures provided in this section being compiled and made available on the website of the Protocol? Please specify (indicate "yes" if you object):

(a) Yes

(b) No

Your comments: **This questionnaire is quite comprehensive, so it most certainly depends on the context – especially the way the information is compiled and the future use of the information.**

1. Consideration of health effects

II.2. Does your SEA documentation always include specific information on health effects? Please specify:

(a) Yes

(b) No, only when potential health effects are identified **X It also depends on the public and political awareness**

2. Domestic and transboundary implementation in the period 2016–2018

II.3. Does your SEA documentation always include specific information on potential transboundary environmental, including health, effects? Please specify:

(a) Yes

(b) No, only when potential transboundary effects are identified **X It also depends on the public and political awareness**

3. Cases during the period 2016–2018

II.4. Please provide the (approximate) number of transboundary SEA procedures initiated during the period 2013–2015 and list them, grouped by the sectors listed in article 4, paragraph 2: **There is no complete process overview for all SEA cases in Denmark, so it is not possible to answer this question in full. Instead, it can be stated that there are currently 1 ongoing SEA case with Denmark as Party of Origin.**

As an Affected Party, there are currently 12 SEA cases in Denmark.

4. Experience with the strategic impact assessment procedure in 2016–2018

II.5. Has your country experienced substantial difficulties in interpreting particular terms (or particular articles) in the Protocol?

- (a) No
- (b) Yes (please indicate which ones):

II.6. How does your country overcome the(se) problem(s), if any, for example by working with other Parties to find solutions? Please provide examples: **Denmark has a close and good dialogue with point of contact colleagues in our neighbouring countries. So in general, this means that, in respect of the individual country's cases, legislation, culture, etc., we talk together on a case-by-case basis about how it can best be handled.**

II.7. With regard your country's experience with domestic procedures, in response to each of the questions below, either provide one or two practical examples or describe your country's general experience. You might also include examples of lessons learned in order to help others. Please detail:

(a) Has your country carried out monitoring according to article 12 and, if so, for what kinds of plans or programmes (cite good practice cases or good practice elements (e.g., consultation or public participation), if available)? **The answer to this question presupposes the answers to question I.27 and II.4. There may be carried out monitoring in another context with different competent authorities, which does not undergo a systematic registration.**

(b) Would your country like to present a case to be published on the website of the Convention and its Protocol as a "case study fact sheet"?

- (i) No
- (ii) Yes (please indicate which ones):

II.8. With regard your country's experience with transboundary procedures, in response to each of the questions below, either provide one or two practical examples or describe your country's general experience. You might also include examples of lessons learned in order to help others. Please detail:

(a) What difficulties has your country experienced and what solutions has it found?

- (i) Translation and interpretation **Apart from translation, which may be quite time-consuming, Denmark has not experienced any problems.**
- (ii) Other issues **No comments**

(b) What does your country usually translate as a Party of origin? **Environmental assessment of the cross-border impacts and relevant annexes is translated into the language of the country concerned so that the public has the opportunity to get involved in the specific case. Following letters is usually in English as they are targeted to the authority.**

(c) As an affected Party, has your country ensured the participation of the public concerned and the authorities pursuant to article 10, paragraph 4?

(i) No

(ii) Yes (please indicate how): **Partly by publication on the Danish Environmental Protection Agency's website and partly by consulting the authorities concerned by email.**

(d) What has been your country's experience of the effectiveness of public participation? **There is generally more public interest in specific EIA cases than in SEA cases**

(e) Does your country have examples of organizing transboundary SEA procedures for joint cross-border plans and programmes?

(i) No

(ii) Yes (please describe):

(f) As an affected Party, how do you ensure that the public concerned and the authorities are informed and given an opportunity to forward their opinion on the draft plan or programme and the environmental report within a reasonable time frame (art. 10, para. 4)? **Refer to the answer in II 8 c**

5. Experience regarding guidance in 2016–2018

II.9. Are you aware of any use in your country of the online *Resource Manual to Support Application of the Protocol on Strategic Environmental Assessment* (ECE/MP.EIA/17)?¹:

(a) No:

(b) Part of it (Please specify):

(c) Yes (please describe your experience):

Your comments on how the Guidance might be improved or supplemented:

6. Awareness of the protocol

II.10. Does your country see a need to improve the application of the Protocol in your country?

(a) No:

(b) Yes Please describe how your country intends to improve application of the Protocol:

¹ Available from http://www.unece.org/env/eia/pubs/sea_manual.html.

7. Suggested improvements to the report

II.11. Please provide suggestions for how this report may be improved: **No comments**
