Danish report on the Danish implementation of the SEA Directive (2001/42) and the EIA Directive (85/337 with later amendments)

Part A – The SEA Directive

I. How is the SEA-directive (Directive 2001/42/EC) implemented in Denmark? What is the scope of its implementation?

The SEA Directive (2001/42) was formally implemented in Danish Law by the Parliament's adoption of Act no. 316 of 5 May 2004 on Environmental Assessment of Plans and programs (the SEA Act). In contrast to the Danish implementation of the EIA-directive (see below), the Danish implementation of the SEA Directive is horizontal. This means that the SEA Act covers all plans and programs on all the sectors required by art. 2(a) of the SEA-Directive (see the SEA Act section 1(3) – which is contrary to the vertical implementation of the EIA Directive (see below). Any plan or program which fall within the scope of art. 2(a) of the SEA Directive is subject to an environmental impact assessment procedure – or at least a screening procedure as required by art. 3 of the SEA Directive (see the SEA Act section 2 and 3).

The SEA Act was amended by the Parliamentary Act no 250 of 31 March 2009 on amending the SEA Act which was caused by an opening letter of the Commission which stated certain failures in the Danish implementation. By the amending Act in 2009 the objective of the Act was clarified. Moreover, the scope of the SEA procedure was expanded to include not only plans adopted by authorities in accordance with legislation but also other plans adopted by public authorities and also to include amendments to plans (which were not included in the first Danish implementation). The amending Act also include a new section 11a with the same wording as article 11 of the SEA Directive clarifying that the SEA-procedure cannot substitute the EIA-procedure under the EIA Directive. This does however not prevent that the SEA-procedure and the EIA procedure are carried out simultaneously (see below on EIA).

II. What types of public plans and programmes are subject to a strategic environmental assessment in accordance with the SEA-directive?

As it follows from the first answer, the SEA procedure must according to the Danish SEA Act be applied before the final adoption of any plan or program by public authorities. So formally there seems no deficit in the Danish implementation. However, in practice the SEA procedure has until now mainly been applied on physical planning under the Planning Act. Because the way the EIA-procedure is integrated in the Planning Act as formally an amendment to the Municipality Plan, the EIA-procedure itself is often cause to the SEA procedure. If the EIA-procedure ignore SEA obligation, the EIA will be invalid, which can be illustratedwith one rather spectacular case from 2008 published in the magazine for environmental case law (MAD 2008.1193 Nkn).

MAD. 2008.1193 NKN: The Major of Copenhagen and the majority of the City Council wanted to built 5.000 flats for young people at a very polluted industrial site named Kløverparken placed only few hundred metres from the fuel storage for the airport and Copenhagen with status as Seveso Plants. The owner of the site Kløverparken was a developer who want to

build houses on the site and the use of the site for houses was in accordance with the physical planning for the site. Since the site was heavy polluted, the developer ask for a clean-up the contaminated soil on site, which has a legal status as a landfill and require an IPPC-permit and an EIA procedure. Since the EIA procedure is formally a proposal for a plan under the Planning Act, the initiating of the EIA procedure was appealed to the Nature Appeal Body claiming a SEA-procedure was needed because of the intention of constructing houses close to Seveso Plants. The Nature Appeal Board agreed and annulled the Council's initiating of the EIA procedure under the Planning Act - and in the very end, the project of constructing houses on the site was cancelled.

Regarding plans falling outside the Planning Act, the SEA procedure is in practice almost ignored because lack of knowledge by local authorities and certain state agencies. Thus, despite the SEA Act requires environmental impact assessment (or at lest screening) regarding waste management plans, waste water plans, plans for drinking water supply, plans for energy supply and a number of other plans, the SEA-procedure are mainly not applied before plans are adopted in these sectors.

Moreover, comparing with the ECJ ruling in the united cases C-105/09 and C-110/09 Terre Wallone in which the ECJ concluded that action plans to implement the Nitrate Directive (91/676) must be subject to SEA procedure even if the plan is adopted by a legislative Act, it can be observed that the Danish plan to reduce nitrate pollution from agriculture is adopted by an administrative order issued without a prior SEA procedure.

III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?

The obligation to apply the SEA-procedure covers all public body: state agencies and local municipalities and regional councils. Thus, the authority competent to adopt the plan or program has under section 4 of the Act to ensure compliance with the SEA obligations. Before any plan or program is adopted, the competent public authority must at least make a screening if the draft plan has a major environmental impact and requires a SEA procedure. If the answer to this is positive, the public authority must ensure an environmental impact assessment of the plan is made and that the proposal for the plan together with the environmental impact assessment is subject to a public hearing.

IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?

As part of the public hearing of the draft plan and the environmental impact assessment of the plan, there is an obligation of the public authority under section 6(4) of the SEA Act to inform and ask other effected public authorities for their comment. Moreover, as part of the screening procedure, the competent must according to section 4(3) of the SEA Act ask other effected authorities on their opinion of whether a SEA procedure is needed. If the competent authority fails to make such request to other public authorities, the Nature Appeal Board has find the plan is invalid. Thus in MAD 2005.957 Nkn the Nature Appeal Board annulled a local plan because the Municipality Council has decided that the local plan procedure didn't need a SEA procedure without asking other effected public authorities.

V. What types of decision are resulting from a strategic environmental assessment proceedings?

The SEA-procedure implies that an environmental impact assessment report of the draft plan must be carried out before the public hearing of the draft plan according to section 6 of the SEA Act. The environmental report must comply with the requirements laid down in section 7 of the SEA Act which is almost identical with article 5 of the SEA Directive. When the environmental impact assessment report on the draft plan has been made a public hearing of the plan and the environmental report must be held in accordance with section 8 of the SEA Act (almost identical with article 6). The final adoption of the plan must according to section 9(1) of the SEA Act take into account the environmental report and the comments under the public hearing. Moreover, according to section 9(2) of the SEA Act, the competent authority has the obligation to explain how environmental consideration has been taken into account in the final plan. The final plan and the explaining report must according to section 10 of the SEA Act be made public. Finally the competent authority must according to section 11 of the SEA Act adopt a plan for surveillance of the environmental impact when the plan is carried out.

VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?

Public access to environmental information is ensured by the public hearing. In practice there will be a public announcement in newspaper that the competent authority has drafted a plan and an environmental impact assessment of the plan and what the drafted plan is about (for example a plan for a windmill farm, e new city area or a new industrial area). The announcement will inform the public that all detailed information of the drafted plan and the environmental impact assessment can be achieved by contacting the competent authority.

The access to enforce the right for the public concerned created by the SEA Directive was in the first SEA Act (no. 316 of 5 May 2004) rather limited and depend on whether their was access to administrative appeal under the legislation which found the basis for plan. After an opening letter from the Commission the SEA Act was amended by the Parliamentary Act no 250 of 31 March 2009 on amending the SEA Act which by section 16(2) of the SEA Act now provide access to administrative appeal to the Nature Appeal Body on missing SEA or failure in the Sea procedure for any plan adopted by public authorities, except for plans adopted as legislation by Parliament.

VII. Who is authorized to take part in a strategic environmental assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

According to section 8(3) of the SEA Act the public must have at least 8 weeks to comments on the drafted plan and the environmental impact assessment. The public is defined by section 1(3)(4) of the SEA Act which define the public as any physical or legal person who direct or indirect are effected

by the plan or program, and any organization or association which has the protection of the environment, the nature, the cultural heritage or the landscape as the objective provided the organization or association has at least 100 members.

VIII. To what extent are the SEA and EIA procedures were integrated in Danish Law? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give examples?

In accordance with article 11 of the SEA Directive, section 11a of the SEA Act states that an environmental impact assessment under the SEA Act doesn't substitute the Environmental Impact Assessment under the Planning Act which is part of the Danish implementation of the EIA Directive. As explained above (see question II) the way the EIA Directive has been implemented into Danish Law in fact implies that the EIA procedure in it self is often the cause to a SEA procedure. However, the Nature Appeal Board has accepted that the competent authority carries out the EIA Procedure and the SEA Procedure simultaneously for EIA projects, meaning that the environmental impact assessment report is in fact the same and that the public hearing under the two schemes is done at the same time. So the documentation of environmental impact of the plan and the project is in fact identical and the public hearing is also identical.

Part B – The EIA Directive

I. How is the EIA-directive implemented in Denmark? What is the scope of its implementation?

The Danish implementation of the EIA Directive has been a troublesome process where the EIA Directive only gradual has been implemented into Danish Law – and it is disputed whether the formal Danish implementation of the EIA Directive even in 2011 is fully in place. The implementation of the EIA Directive is vertical, meaning that the obligations under the EIA Directive are (more or less) integrated in a number of sector legislations. The complexity of the implementation makes it impossible to describe the Danish EIA legislation in few pages. For this reason only a brief survey of the Danish EIA implementation is presented in this paper.

The Danish EIA legislation can overall be divided between legislation related *to projects on land* and legislation related to *projects on the Sea.*

1.1 The land related Danish EIA implementation was until 2007 one regime covering all projects on land which establish a special procedure for amending municipality plans under the Planning Act before projects under in Annex I or II of the EIA Directive could be permitted. In 2007 the Livestock Act came into force establishing a special regime outside the Planning Act for livestock (pig, cattle, poultry, sheep, fox-farm and so on) with the intention to integrate EIA into the pollution-abatement legislation of livestock installation.

1.1.1 The EIA procedure under the Planning Act is governed by the Ministerial Statutory Order no. 1510 of 15 December 2010 on the assessment of the environmental impact of certain public and private projects under the Planning Act – the EIA Statutory Order.[1] The scope of the Danish EIA Statutory is defined by section 1 of the EIA Statutory Order which refers to the definition of 'projects' in the EIA Directive article 1 (although the EIA Statutory Order use the confusing term "constructions). According to section 3 of the EIA Statutory Order, the Statutory Order must be applied for all projects listed in Annex 1 and Annex 2 to the EIA Statutory Order which include the same activities as listed in Annex I and II of the EIA Directive with the exception of livestock installations and certain activities at Sea. According to section 2 of the EIA Statutory Order it is prohibited to establish any projects or change of projects listed in Annex 1 or 2 without a prior notice to the municipality and the initiating of the project or the change of project must according to section 2(4) wait until either the competent authority has informed the developer that the project doesn't require an EIA or procedure or until the EIA permit is granted. Section 4 of the Statutory Order exclude military projects and projects decided by legislation adopted by Parliament similar to the derogations in article 1(4) and 1(5) of the EIA Directive.

[1] In Danish named the VVM Statutory Order base don the Danish Acronyms Vurdering (Assessment) Virkning (Impact) and Miljøet (the Environment).

The EIA Statutory Order distinguish between Annex 1 projects were EIA procedure is mandatory (section 3(1) of the EIA Statutory Order) and Annex 2 project were an EIA Screening is required under section 3(2) in accordance with the criteria laid down in Annex 3 of the EIA Statutory Order (which is similar to Annex III of the EIA Directive). According to section 5 of the EIA Statutory Order the decision that EIA is required or that EIA isn't required must be published and is subject to appeal to the Nature Appeal Body. The assessment and information required by the EIA Statutory Order must according to section 7 of the Statutory Order meet the requirement under article 3 and article 5 of the EIA Directive.

1.1.2 Livestock installations: The establishment or modifications of livestock installations is governed by the Livestock Act which intends to integrate the EIA procedure into the IPPC-regime and other the pollution-abatement legislation of livestock. Regarding livestock falling within the IPPC regime, the Livestock Act require a public hearing of the requested project before a permit can be granted. The Act does however not require that the assessment of the environmental impact includes all information required under article 3 and article 5 of the EIA Directive. For livestock which are smaller than the threshold for IPPC Livestock the Livestock Act has established a regime under which a public hearing of the application for the permit isn't needed if the public authority conclude that the livestock will not cause negative impact on the environment. This means in practice that conditions for the permit to livestock replace the public hearing. It has by several scholars been argued that the implementation of the EIA Directive in the Livestock Act is not in accordance with the EIA Directive as this is interpreted by the ECJ.

1.2 Projects on the Sea Territory: Because the scope of the Planning Act is restricted to the land territory projects on the Sea Territory falls without the Planning Act. The Danish implementation of the EIA Directive for projects on the Sea territory vertical referring to a number of sector legislations on the Sea: the Port Act, the Coastal Protection Act, the Act on Protection of the Marine Environment, the Continental Shelf Act, the Undergrounds Act, the Raw Material Act, the Act on Renewable Energy, the Energy Supply Act – so each of these sector legislation has its own EIA regime. Projects on the Sea which falls outside these sector laws are for the EIA part covered by Statutory Order 809 of 22 May 2005 on EIA of certain projects on the Sea which is sort of residual legislation to ensure that Danish legislation requires EIA for all projects falling within the scope of the EIA Directive.

1.3 Confusing division of competences regarding EIA: The complexity created by the vertical implementation of the EIA Directive is confusing with overlapping competence and raise in it self obstacles for the Danish compliance with the EIA Directive which can be illustrated by two cases:

Enlargement of Esbjerg Port – MAD 1999.113 Nkn: Esbjerg Port is one of the biggest harbours in Denmark and is placed at the west coast of Jutland nearby the Waddenzee which is designated as one of the most import Special Bird Protection Areas. In 1996/97 the port requested the Minister of Transport for extension of the land area to enlarge the port with 50.000 m². Permit for the enlargement of the port was granted by the minister in 1997 without an EIA and without an assessment under the Habitat Directive article 6(3). After the 50.000 m² was filled up the port request the Municipality Council for a local plan to use the filled up area for port activities. The Municipal Council adopted a local plan which by local citizens was appealed to the Nature Appeal Body claiming that an EIA was required. The Nature Appeal Board rejected the claim arguing that the Nature Appeal Body has no competence regarding the decision of the minister and after the former sea area was filled up the decision of using the area to port activities didn't have any major environmental impact. It seems rather obvious that an EIA was required under the Directive. The case illustrates how the division of competence in this case escape EIA obligations by dividing the decision of the project into slices.

Expanding the dike (sea wall) at West Amager - MAD 2009.2111 Nkn, MAD 2009.2131 Nkn, MAD 2010.3115 Nkn: West Amager is established by reclamation work (diked in land) in 1939-1944 of marshland and is at Sea level. The area has for decades been an protected by a nature conservation order and a 14.1 hectar of the area is designated as Special Protected Bird and Natura 2000 site. Behind the nature area the new City "Ørestad" is established. To protect the area against flooding there is a 7 km. and 3.7 meter high dike. Referring to future raise of Sea level because of climate effect the local authorities asked the Minister of traffic for a permit to extend the dike's high from 3.7 meter to 5.9 meter. The extension of the dike will at the same time will help the local authorities to get rid of a surplus of soil from the digging to a new Metro in the Capital since the project will require about 700.000 cubic metre of soil. Permit under the Coastal protection Act was granted by the Minister of Traffic without an EIA, and later on the Local Nature Conservation Board granted a dispensation from the conservation order under the Nature protection Act. The dispensation was appealed by the Danish Ornithological Association arguing that the project will damage the bird habitat area, why the dispensation was in conflict with article 6(3) of the Habitat Directive and that the enormous size of the project could not been justified by climate impact for the next 200 years. In March 2009 (MAD 2009 2111 Nkn), the Nature Appeal Board rejected the claim and upheld the dispensation. Two month later the Municipality Council concluded that the project didn't need an EIA procedure. This decision was appealed by the Danish Ornithological Association. Normally such appeal has suspensive effect. However, in this case the Nature Appeal Body in august 2009 (MAD 2009.2131 Nkn) decided that the appeal didn't have suspensive effect, so while the case was pleading before the Nature Appeal Body the construction of the enlargement of the dike was started by the local authorities. After the construction was about half away, the Nature Appeal Body in October 2010 finally concluded the appeal of the EIA Screening with the conclusion that an EIA was needed and that further construction on the dike should stop until an EIA permit was granted.

II. What types of public and private projects are subject to an environmental impact assessment in accordance with EIA-directive?

From a formal perspective the Danish implementation of the EIA Directive include all the projects listed in Annex I and Annex II of the EIA Directive. However, in practice there are a lot of problem – see answer to question 1.

III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?

The criteria in Danish legislation to select when Annex II projects must be subject to an EIA are almost identical with the criteria laid down in article 4(2) and (3) and Annex III of the EIA Directive. The Danish EIA Statutory Order and a number of the vertical legislation for projects on Sea contain a copy text of Annex III of the EIA Directive.

However, in particular two problems can be identified in the Danish implementation. First, the Livestock Act doesn't include the criteria for selection of EIA projects required by article 4(2) and (3) and Annex III of the EIA Directive and many scholars find for this reason that the Livestock Act isn't in accordance with the EIA Directive – but until now, the concern has not been dealt with in any published cases. Second, as it can be illustrated with the Skodsborg Beach Park case (MAD 2008.1950 Ø / UfR 2009.509) which was concluded by the Eastern High Court - several scholars has disputed the Danish interpretation of Annex II(13) which states that EIA-screening is required for:

Any change or extension of projects listed in Annex I or Annex II, already authorized, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)

Skodsborg Beach Park case (MAD 2008.1950 Ø / UfR 2009.509): The municipality named Søllerød owns one km beach to Ôresund at Skodsborg. The beach has been used by bathers for more than a Century. In the 1990'ties the council of the municipality agreed to establish a Beach Park at the area. In 2004 the council the Minister of Transport for a permit under the Coastal protection Act for the construction needed for the Beach Park. A permit was granted by the Ministry without even an EIA Screening of the project. Protest was submitted by neighbours which raise a legal action at the lower court against the Minister of Transport and the municipality arguing that the permit was invalid since no EIA screening was made. The Ministry and the Municipality didn't dispute that no EIA Screening was needed but argued that the establishment of the Beach Park should be considered a modification under the EIA Directive Annex II(13) and since no significant environmental harm was demonstrated, EIA screening wasn't needed. This position if the Ministry was upheld first by the lower court and later by the Eastern High Court arguing that although the establishment of the Beach Park will substantial increase traffic this wasn't sufficient reason to criticize that the permit was granted without a prior EIA screening.

IV. What kind of authority (local, regional, central) is responsible for performing the duties arising from the EIA-directive?

The competent authority to ensure the EIA obligation depends on what sector legislation governs the project. Regarding land based projects the competent authority is mainly the Council of the Municipality with three exceptions. For windmills higher than 100 meter, the EIA Authority is the Ministry of the Environment (in practice the Environmental Protection Agency). For establishment or modifications of port and for projects effecting the coastal line the Ministry of Transport is the competent EIA authority. For projects at the Sea, the competent EIA authority is the Ministry which are responsible for issuing the permit for project under the relevant legislation (see answer to question 1).

V. When should an environmental impact assessment take place during the investment procedure?

The placement of the EIA in the timetable before issuing permits depend on the legislation governing the project. See answer to question 1.

VI. Does the decision resulting from an environmental impact assessment grant the final development consent?

After the latest Danish implementation (since 2007) of the EIA Directive, the EIA-permit is the final development consent regarding projects covered by the Planning Act. But as explained above on the project of extension of the West Amager Dike this doesn't fully apply when permits for projects can be issued by the Ministry of Transport.

VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?

Public access to environmental information is ensured by the public hearing. In practice there will be a public announcement in newspaper that there has been application for permit to a specific project (for example a new highway) and that an environmental impact assessment of the project has been made and that the application and the EIA can be achieved by contacting the competent authority.

VIII. Who is authorized to take part in an environmental impact assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, national)? What legal rights do participants of the proceedings have?

The parties entitle to take part in the EIA proceedings and the public hearing is the public concerned which is defined in accordance with the definition of the public concerned in article 1(1) of the EIA Directive. So the public concerned includes neighbours, NGOs and effected authorities. The right to participate gives the right of the public concerned to comment on the project as well as to comment on the environmental impact. There is no formal distinction related to the level of decision regarding public participation.

IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceeding and the judgement.

The access to justice of the public concerned follows different tracks depending on the legislation which is the basis for permit of the project. For projects falling within the Planning Act, any decision on EIA (or not making EIA) can be appealed to the Nature Appeal Body, and the decision of the Nature Appeal Body can be brought before the court. For projects at Sea, no such administrative appeal is possible, so for these project, the only access is to raise a case directly before a court. Until now the Danish Court have been very reluctant to overrull decisions of the EIA authority as illustrated by the Skodsborg Beach Park case mentioned above.

Some major national projects has been decided by a Parliamentary legislative Act and until now three of these projects have went to Court: the Öresund Bridge Case (MAD 1998.1227 H), the Öresund City case (MAD 2000.139 Ø) and latest on the Act establishing a Testcenter for Windmills which is still pleading.

The first case was regarding the establishment of the Öresund Bridge to Sweeden. In this case, the decision of the Act as well as the later public hearing was made before there was an environmental impact assessment of the project. During the pleading of the case before the Eastern High Court and the Supreme Court at least four different interpretation of the derogation clause in article 1(5) of the EIA Directive was taken by different judges. In 1998 (MAD 1998.1227 H), the Supreme Court finally concluded that the decision of the project was not in conflict with the EIA Directive based on an interpretation of the EIA Directive which according to several scholars differ from the ECJ interpretation of the same clause one year later in C-435/97 WWF v. Borzen.

X. What are the specific characteristics of the transboundary environmental impact assessment of certain public and private projects?

The transboundary environmental impact of project has not been enlightened by any cases until now. The question was raised in the Öresund Bridge Case but in this case the Supreme Court assumed that the environmental impact in Sweden was a Swedish matter which should not be dealt with by the Danish Court.