

Expert Opinion Report

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Requested by: Mawson Oy, Finland, represented by Castrén & Snellman Attorneys Ltd

Subject: Expert opinion on Finnish national measure potentially in breach of EU law

Introduction

This report contains expert opinion on questions related to the scope of application of the Directive 2001/42/EC on the environmental assessment of plans and programmes.

The case concerns exploration/mining activity in Northern Finland by Mawson Oy, a Finnish limited liability company, in the Western Lapland area of the Ylitornio and Rovaniemi municipalities of Northern Finland.

The issue is the preparation process of national decrees under the Finnish Nature Conservation Act (1096/1996, “Nature Conservation Act”) for the establishment of new nature reserves in the Western Lapland area in Northern Finland (the “Decrees”), and the absence of measures taken by the Ministry of Environment in Finland to carry out Environmental Assessment in preparation of the Decrees, thus potentially infringing EU law.

The EU law in question is Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the “SEA Directive”).

Mawson Oy considers that the Environmental Assessment should have been performed in connection with the preparation process for enacting the Decrees due to the following reasons:

1. The Decrees are plans and programmes meant in Article 2(a) of the SEA Directive;
2. The Decrees will likely have significant environmental effects meant in Article 3(1) of the SEA Directive; and
3. The Decrees set the framework for future development consent of projects.

The specific question raised by Mawson Oy in relation to the issue above described is the following: “Should the Decrees to be prepared by the Ministry of Environment be required to undertake an environmental assessment under the 2001/42/EC Directive, and would the omission of such an SEA constitute a breach of the Directive?”

Background

The **scope of application of the SEA Directive** is defined in Article 3 and include plans and programmes which are likely to have significant environmental effects and which:

- are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC (EIA Directive).
- in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC (the Habitats Directive)

Article 2 of the SEA Directive defines plans and programmes as those which are subject to preparation and/or adoption by an authority at national, regional or local level through a legislative procedure by Parliament or Government and which are required by legislative, regulatory or administrative provisions.

Article 5 of the SEA Directive identifies the need to prepare an environmental report whenever an environmental assessment is required under Article 3, in which the likely significant effects on the environment of implementing the plan or programme, and **reasonable alternatives**, are identified, described and evaluated. The information to be provided is referred to in Annex I and includes the need to consider likely significant effects on **material assets** (indent f), and the need to provide an outline of the reasons for selecting the areas [object of the “decrees”] in relation to reasonable alternatives (indent h).

In light of certain **Court of Justice of the EU (CJEU) case law**, and as presented in the Draft Discussion Paper on the Definition and scope of plans and programmes (EIA/SEA experts group Agenda item on 2001/42/EC Directive, Sofia, March 2018), in particular considering Case C-290/15 Patrice D’Oultremont and Others, Case C-473/14 Dimos Kropias Attikis, the trend is to consider that CJEU case-law:

- covers national measures that are in nature a national decree
- has extended the scope of the SEA Directive with the notion of plans and programmes covering also normative acts adopted by law or regulation provided that these contain provisions that establish conditions under which actual projects may be authorized in the future even downstream in a cascade planning.

This well established case law has been re-confirmed by two recent judgments, C-671/16 Inter-Environnement Bruxelles ASBL and Others and C-160/17 Raoul Thybaut and others, according to which even downstream – urban detailed level – plans, in cascade planning processes, have to undergo an SEA.

Considering the **Finnish legislative framework**, the Finnish Act and Decree on the Assessment of the Impacts of the Authorities Plans, Programmes and Policies on the Environment (respectively 200/2005 and 347/2005) includes nature conservation programmes and refers to negative and positive environmental effects on, among other things, exploitation of natural resources (namely in section 4(6) of the Decree), while Section 15 under the Finnish Nature Conservation Act (1096/1996) establishes that geological surveys and prospecting is permitted in a national park or strict nature reserve with permission from the authority or agency in charge of the site, provided that the conservation objectives of the site are not jeopardized.

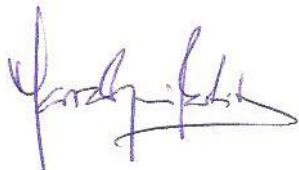
In addition, and according to the information provided, it appears that the areas subject to the application of the Decrees have been, at least in part, classified as **Natura 2000** sites, under Directive 92/43/EEC, and therefore Art. 3 second indent of Directive 2001/42/EC is applicable, while under the Finnish Nature Conservation Act (1096/1996) section 65 requires a Natura 2000 appropriate assessment.

Opinion

In response to the specific question raised by Mawson Oy, considering the points elaborated above, in particular:

- the extended scope of application of the Directive 2001/42/EC in the light of the existing case-law,
- the requirement of the same Directive on the need to provide information on likely significant effects on material assets and on reasonable alternatives,
- the Finnish legislative framework both on environmental assessment and on nature conservation,
- the partial existence of Natura 2000 sites, and
- the fact that the Decrees to be prepared will set conditions affecting mining activity, setting the framework for future development consent

I am of the opinion that the Decrees to be prepared by the Ministry of Environment should be required to undertake an environmental assessment procedure under the 2001/42/EC Directive. The omission of such an SEA constitutes a breach of the Directive.



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Lisbon, 2018.06.08

Maria Rosário Partidário is amongst the leading international experts on Strategic Environmental Assessment (SEA). She is university professor (Universidade de Lisboa, Instituto Superior Técnico, Portugal and University of Aalborg, Denmark) on strategic thinking for sustainability. She has a long track record on Strategic Environmental Assessment (SEA) as a researcher, author, trainer and consultant. Maria is the author of the methodology Strategic thinking for sustainability in SEA, having developed the Critical Decision Factors (CDF) strategic focus approach. She undertakes research and consultancy work in many countries in five continents, and has been involved in several European research projects, directly with selected Directorate Generals, as well as Interreg and Framework Programmes. She has been advisor to national governments, such as Portugal, Chile, Brazil, Iran, El Salvador, China and Vietnam, and international organizations such as the World Bank, UNEP and UNDP, also developing international cooperation through bi-lateral organizations in the Netherlands, Denmark, Germany, Sweden and Switzerland. She is a former President of the International Association for Impact Assessment (IAIA) and IAIA2015 Lifetime Achievement Award in recognition of significant contribution to SEA theory, education, and practice, with notable international influence. She is the current President of the Centre for Management Studies of Instituto Superior Técnico (CEG-IST) and Head of the Research Group on Strategic Approaches to Environment and Sustainability (SENSU). Furthermore she is the focal point of IAIA at the United Nations Economic Commission for Europe (UNECE) Espoo Convention, SEA Protocol and Working Group on EIA (since 2010).