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# Public Participation at the early stage of drawing up the Common Agricultural Policy National Strategic Plans

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## I. Memo for NGOs

Common Agricultural Policy (CAP) Strategic Plans are national plans that Member States must prepare according to the Proposal from the European Commission for a Regulation on the Common Agricultural Policy post-2020 (CAP SP Proposal). While negotiations on the CAP reform are still ongoing, the European Commission has urged Member States to begin preparing their CAP Strategic Plans, which several Member States have started to do.

**Civil society organisations have an important role to play in the preparation of national CAP Strategic Plans (SPs), but only if they are granted the opportunity to meaningfully participate in the preparation process of the SPs.**

The CAP SP Proposal includes requirements for public participation in the preparation of CAP Strategic Plans, but as this legislation has not been adopted and come into force yet, these requirements are not yet legally binding. However, that does not mean Member States can prepare their plans without involving civil society until the CAP SP Regulation becomes law.

The Strategic Environmental Assessment (SEA) Directive establishes certain requirements for public participation in policymaking. Based on a thorough legal analysis detailed at the bottom of this memo, ClientEarth concludes that the SEA Directive is applicable in the preparation of CAP SPs. This means that **Member States are legally required to apply the entire SEA process to their CAP SPs preparation: scoping, public consultation, and reporting.** In other words, when drafting their CAP SPs Member States have to respect the rules for public consultation established in the SEA Directive, covering all environmental impacts of the CAP SPs.

*NB: In what follows, when we refer to Member States' obligation to 'do an SEA', we are not referring to a separate document which must be prepared, we are talking about the **SEA process**, i.e. about the procedural requirements (scoping, consultation, reporting) under the SEA Directive. This should not be confused with the ex-ante evaluation which MS are obliged to do under the CAP SP Regulation, which is a document done by the Ministry or a consultancy following a scientific methodology and covering all nine objectives of the CAP, from environment to food safety, employment, administrative capacity to monitor the progresses of the plan etc.*

Having received evidence that some Member States are not adequately involving civil society in their CAP SP preparation, ClientEarth and the EEB have prepared this Memo to clarify the requirements placed on Member States and the rights of civil society organisations to be involved.

Two main problematic scenarios are foreseen:

- i. **First scenario: your country has started preparing its CAP Strategic Plan, including engaging with stakeholders, but the public participation process is not meaningful.**

Below, you will find the main procedural aspects that, under the SEA Directive, make a public consultation meaningful, therefore compliant with EU law. While national legislation implementing the SEA Directive will differ from one Member State to the other, applying the SEA Directive to the preparation of the CAP SPs means that:

- **The public must be given an early and effective opportunity**, within appropriate time frames, **to express their opinion on the draft CAP SPs** and the accompanying

environmental report (required by the SEA Directive) before the adoption of the plan or its submission to the legislative procedure.

- **The opinions expressed by stakeholders during consultations must be taken into account during the preparation of the plans**, and prior to their adoption. This means that Member States can either integrate those opinions in the CAP SP or justify the reasons for not incorporating them. Member States have an obligation to report the way in which the decision-making process has been carried out.
- **Member States should make the plans available to the designated authorities and the public once adopted**, as well as a statement summarising, among others the reasons for choosing the adopted plan over other reasonable alternatives.

For the SEA consultation to be meaningful, ENGOs should be involved in the early stages of the SEA process and they should have enough time to provide inputs prior to the submission of the first Strategic Plan draft. What “enough time” means in practice will vary from one Member State to the other, depending on national legislation transposing the SEA Directive. However, the period for consultation should be sufficient to allow ENGOs an effective opportunity to express their opinions both on the draft CAP SP and on the SEA environmental report. Since this time span is not a legal obligation, a reasonable one is normally between 6 and 8 weeks.

ii. **Second scenario: your country has started drawing up its CAP SP but no public participation process has been put in place, in other words, your country is not applying the SEA Directive.**

The SEA Directive applies to plans that fulfil four conditions. This memo provides you with strong legal arguments to demonstrate that the CAP Strategic Plans fulfil all four conditions, making it mandatory for Member States to follow the SEA process, including consulting ENGOs. The four conditions can be found under Articles 2 and 3 of the SEA Directive and determine in what situations a public participation process must be carried out. In the following, we demonstrate that the CAP Strategic Plans tick the boxes for all four conditions:

1. For the SEA directive to be applicable, the plan under scrutiny must be prepared or adopted by an authority of a Member State

According to the CAP SP Proposal, in each Member State, a body responsible for drawing up the Strategic Plan will be identified. This responsible body will also have the obligation to involve the competent national authorities for the environmental and climate aspects of the plan<sup>1</sup>. Hence, **by requiring that public bodies will be responsible for preparing CAP SPs, one can reasonably consider that the first condition of the SEA Directive is satisfied.**

2. The plan as identified under the above-mentioned condition must be *required by legislative, regulatory or administrative provisions.*

In light of the case-law of the European Court of Justice, the verb “required” should be broadly understood<sup>2</sup>. **Since the obligation for Member States to draw up CAP SPs derives from**

<sup>1</sup> Article 94(2), CAP SP Regulation Proposal.

<sup>2</sup> Please, refer to footnote n.17.

the CAP SP Proposal<sup>3</sup>, CAP SPs must be regarded as ‘plans required by legislative provisions’ in the meaning of the directive. Even if the CAP SP Proposal is not yet in force, national authorities are preparing the SPs to fulfil that prospective legal obligation, rather than entirely on a voluntary basis.

3. An environmental assessment has to be carried out for certain types of plans and programmes

Among the list of activities and economic sectors that the SEA Directive mentions as relevant for its applicability, **agriculture is expressly included. There is therefore no doubt that this condition is fulfilled.**

4. A plan, likely to have a significant effect on the environment, must:

- a) set the framework for future development consent of projects;
- b) [the mentioned projects should be those] listed in Annexes I and II to Directive 85/337/EEC<sup>4</sup>.

Regarding *point a*), by establishing in the CAP SPs an intervention strategy, Strategic Plans will determine the contributions to the CAP specific objectives expected from farmers, both under Pillar 1 and Pillar 2. CAP SPs will be the tool to steer national agricultural practices toward a certain direction. Although Member States will need to justify their choice of interventions to the European Commission, they **will have the choice to determine the details of each intervention**. In light of this, **Member States will therefore set “the framework for future development consent of projects”**.

Regarding *point b*), reference should be made to Annexes I and II of the Environmental Impact Assessment (EIA) Directive. Agricultural projects that fall under the scope of the EIA Directive are listed in Annex II<sup>5</sup>, where Paragraph 1 identifies *projects for the restructuring of rural land holdings, projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, water management projects for agriculture, including irrigation and land drainage projects and intensive livestock installations<sup>6</sup>, all of which should be regulated under CAP SPs<sup>7</sup>*. Therefore, **CAP SPs fulfil the last part of the fourth condition.**

<sup>3</sup> Article 91(1), CAP SP Regulation Proposal.

<sup>4</sup> Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (‘EIA Directive’). The EIA Directive has been amended in 2011 by Directive 2011/92/EU, which was further amended by Directive 2014/52/EU. As was the case under Directive 85/337/EEC, Directive 2011/92/EU as amended by Directive 2014/52/EU, provides that, where a public or private project is likely to have significant environmental effects, an environmental impact assessment (‘EIA’) should be conducted by the competent authorities in the Member State. Annexes I and II to both the former and the new EIA Directives list the projects falling under their scope of application (see also Article 4 Directive 85/337/EEC and Article 4 Directive 2011/92/EU).

<sup>5</sup> Projects listed in Annex I, Point 17, EIA Directive, namely *Installations for the intensive rearing of poultry or pigs with more than: (a) 85 000 places for broilers, 60 000 places for hens; (b) 3 000 places for production pigs (over 30 kg); or (c) 900 places for sows*, might be considered as agricultural projects as well.

<sup>6</sup> Those not included in Annex I, point 17, EIA Directive.

<sup>7</sup> The exact definition of each of the categories listed in Annex II, EIA Directive, differs from one Member State to another. However, it might be helpful to refer to the EU Commission’s document “Interpretation of definitions of project categories of annex I and II of the EIA Directive”, providing a first guidance on this matter. Available at: [https://ec.europa.eu/environment/eia/pdf/cover\\_2015\\_en.pdf](https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf) (last access 26th May 2020).

Satisfying these four conditions means that the SEA Directive applies to the drafting phase of the SPs and therefore Member States have an obligation to consult with ENGOs.

**If you are aware of gaps in the public participation process in your country, this document should provide you with the legal arguments to request a proper process to your national authorities.**

In the Annex below, you will find an in-depth legal analysis of the issues described above.

## II. Annex – Legal Analysis

### Introduction

Public participation is key to better manage natural resources and meet the needs of local communities. Local concerns and values can be raised in the process, enhancing democratic legitimacy of environmental decisions as well as facilitating smoother implementation and enforcement afterwards. For these reasons, it is important that a broad range of stakeholders, from farmers to civil society groups, are involved during the preparation of CAP Strategic Plans (CAP SPs).

CAP Strategic Plans are national plans to be prepared by Member States following the Proposal from the European Commission for a Regulation on the Common Agricultural Policy (CAP) post-2020. They constitute the main element of novelty in the governance structure of the new CAP, key to the so-called New Delivery Model, namely a system intended to shift the current compliance-based governance to a performance-based one. Through the CAP SPs, Member States present an intervention strategy that, tailored to domestic specific needs, is supposed to achieve the EU specific objectives<sup>8</sup> for the agricultural sector<sup>9</sup>. Since the New Delivery Model offers Member States a high degree of discretion, if the CAP SPs are not ambitious enough in terms of, among others, climate change mitigation, biodiversity loss and ecosystems conservation, the result will likely be another policy failure, unable to support the transition towards an environmentally positive farming model. Civil society organisations have an important role to play: they can positively contribute to strengthen the environmental ambition of the CAP SPs but only if they are granted the opportunity to participate in the preparation process.

Although the new CAP was supposed to cover the period from 1 January 2021 to 31 December 2027, the adoption of the Regulation by the co-legislators is facing lengthy delays. While negotiations are still ongoing, the European Commission has urged Member States to begin preparing their CAP SPs, which several Member States have started to do. However, in the absence of a legally binding CAP SP

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<sup>8</sup> Article 91, CAP SP Regulation Proposal.

<sup>9</sup> Pursuant to Article 91, CAP SP Regulation Proposal, the SPs implement the Union's support under both Pillar 1 and Pillar 2. Under Article 95, CAP SP Regulation Proposal, an assessment of needs, an intervention strategy, a description of the governance and coordination system - followed by Annexes covering, *inter alia*, the ex-ante evaluation, the strategic environmental assessment (SEA), the SWOT analysis, the consultation of partners. Each Member State submits to the European Commission a proposal for the SPs and the Commission is responsible for assessing and, eventually, approving the plan, following a procedure described in Article 106, CAP SP Regulation Proposal.

Regulation, that details the procedures to be followed in terms of public participation, some Member States have not activated the proper mechanisms for the engagement of interested stakeholders.

## **Can Member States neglect the rules on public participation, in the absence of a CAP SP Regulation?**

The present document addresses this issue by arguing that, even in the absence of a legally binding CAP SP Regulation, Member States that have started to draft their CAP SPs cannot overlook their obligations on public participation. Public participation is an essential requirement established by the Strategic Environmental Assessment Directive (SEA Directive), which applies to CAP SPs, as the analysis below will show.

This legal analysis first introduces the SEA Directive, its scope and main requirements in terms of participation. Secondly, it provides some background information on the CAP SP Proposal. The legal reasoning behind the applicability of the SEA Directive to CAP SPs is then explained, and the related obligations for Member States drafting their national plans, pointed out. This analysis concludes with some practical recommendations for ENGOs.

### **1. What is the Strategic Environmental Assessment Directive?**

The Strategic Environmental Assessment Directive<sup>10</sup> entered into force in 2001 and applies to a broad range of public plans and programmes that are likely to have significant effects on the environment. When a set of conditions for its application are satisfied, the SEA Directive establishes the obligation to carry out a strategic environmental assessment to address the environmental impacts of a plan/programme during its preparation, and prior to its adoption, by the competent authority<sup>11</sup>. Such an environmental assessment requires, among others, conducting an inclusive public participation process<sup>12</sup>.

Two provisions in the SEA Directive, *i.e.* Article 2(a) and Article 3, Paragraphs 1 and 2(a), need to be combined to identify its scope. In particular:

- i. Article 2(a) establishes that, in order to apply the SEA Directive, plans and programmes:
  - a. must have been prepared and/or adopted by an authority at national, regional or local level or prepared by an authority for adoption, through a legislative procedure, by a parliament or government; and
  - b. must be required by legislative, regulatory or administrative provisions.
- ii. Article 3, Paragraph 1, specifies that the Directive should apply exclusively to plans and programmes that are likely to have significant environmental effects. However, this first requirement is not sufficient to conclude on the applicability of the SEA Directive as, among the plans/programmes that might affect the environment, only those that satisfy two additional conditions fall under the scope of the Directive. Article 3, Paragraph 2(a) establishes that the obligation to undergo a strategic environmental assessment is for plans/programmes:

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<sup>10</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, L 197/30. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0042&from=EN> (last access 26<sup>th</sup> May 2020)

<sup>11</sup> Article 1, Article 2(a), Article 4, and Recital 4, SEA Directive.

<sup>12</sup> Articles 6 to 9, SEA Directive.

- a. prepared for certain sectors and economic activities – among which agriculture; and
- b. that *set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC*<sup>13</sup> (EIA Directive).

The combination of these two provisions – Article 2(a) and Article 3(2) - give rise to **four conditions**<sup>14</sup>:

- I. Preparation or adoption of the plan or programme by an authority of a Member State;
- II. Plans or programmes required by legislative, regulatory or administrative provisions;
- III. Plan or programme concerning an activity or economic sector covered by the SEA Directive;
- IV. Plan or programme that set a reference framework for consent for projects covered by the EIA Directive.

**By applying each of these conditions, it is possible to verify whether a plan or programme falls under the scope of the SEA Directive.**

- I. With regard to the first condition, the SEA Directive defines ‘plans and programmes’ as *plans and programmes, including those co-financed by the European Community, 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.*
- II. The plans and programmes as identified under the first condition must be *required by legislative, regulatory or administrative provisions*<sup>15</sup>. This condition should be interpreted broadly, as confirmed by the case-law of the Court of Justice of the European Union (CJEU). According to the CJEU, *excluding from the scope of the SEA Directive those plans and programmes whose adoption is not compulsory would compromise the practical effect of that directive, having regard to its objective, which consists in providing for a high level of protection of the environment*<sup>16</sup>.

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<sup>13</sup>Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (‘EIA Directive’). The EIA Directive has been amended in 2011 by Directive 2011/92/EU, which was further amended by Directive 2014/52/EU. As was the case under Directive 85/337/EEC, Directive 2011/92/EU as amended by Directive 2014/52/EU, provides that, where a public or private project is likely to have significant environmental effects, an environmental impact assessment (‘EIA’) should be conducted by the competent authorities in the Member State. Annexes I and II to both the former and the new EIA Directives list the projects falling under their scope of application (see also Article 4 Directive 85/337/EEC and Article 4 Directive 2011/92/EU).

<sup>14</sup> Opinion of Advocate General Campos Sánchez-Bordona delivered on 3 March 2020, Case C-24/19, Paragraph 41. Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=224002&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6897125> (last access 26<sup>th</sup> May 2020). The judgement is available at the following link: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=227726&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=14412395> (last access 25<sup>th</sup> August 2020).

<sup>15</sup> Article 2(a), SEA Directive.

<sup>16</sup> Judgment of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, Paragraph 38. See also AG Opinion in case C-24/19, Paragraphs 66 and 67 : *A broad interpretation of the term ‘required’ better enables the inclusion in the scope of the SEA Directive of plans and programmes whose adoption and preparation, under national legislation, cannot easily be classified as one or the other of compulsory or optional, because it covers multiple situations falling between the two extremes. The wide-ranging practices of Member States in relation to the adoption of such plans and programmes calls for a broad interpretation of the word ‘required’ [...].* Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=224002&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6897125> (last access 29<sup>th</sup> May 2020).



- III. The third condition relates to the specific object of those plans or programmes that are likely to have a significant impact on the environment. Under Article 3(2)(a) SEA Directive, an environmental assessment has to be carried out for plans and programmes *which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use*<sup>17</sup>.
- IV. Two additional requirements are laid down in Article 3(2)(a). A plan or programme, likely to have a significant effect on the environment, must:
  - a) *set the framework for future development consent of projects;*
  - b) *[the mentioned projects should be those] listed in Annexes I and II to Directive 85/337/EEC*<sup>18</sup>.

The obscure wording of *point a)* can be clarified thanks to the case-law. Following the interpretation of the CJEU, such plans or programmes are *any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, 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*<sup>19</sup>.

Finally, Article 3(8) establishes exceptions to the application of the SEA Directive. Accordingly, the SEA Directive does not apply to *plans and programmes the sole purpose of which is to serve national defence or civil emergency and financial or budget plans and programmes*.

The described conditions constitute a “test” to verify whether the SEA Directive applies to specific plans and programmes. Under Question 4 below, we apply this test to the CAP SP Regulation Proposal, and conclude that CAP SPs fall under the scope of the SEA Directive.

## **2. What are participation requirements under the Strategic Environmental Assessment Directive?**

When all the conditions scrutinised above are met, specific rules on public participation, as required by the SEA Directive, must apply. Consultations form an intrinsic part of any environmental assessment under the SEA Directive. This is made clear in Article 2, SEA Directive, where ‘environmental assessment’ is defined as *the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9 [describing the procedure]*<sup>20</sup>.

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<sup>17</sup> Alternatively, under Article 3(2)(b), SEA Directive, plans and programmes can be those *which, 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*

<sup>18</sup> Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (‘EIA Directive’). The EIA Directive has been amended in 2011 by Directive 2011/92/EU, which was further amended by Directive 2014/52/EU. As was the case under Directive 85/337/EEC, Directive 2011/92/EU as amended by Directive 2014/52/EU, provides that, where a public or private project is likely to have significant environmental effects, an environmental impact assessment (‘EIA’) should be conducted by the competent authorities in the Member State. Annexes I and II to both the former and the new EIA Directives list the projects falling under their scope of application (see also Article 4 Directive 85/337/EEC and Article 4 Directive 2011/92/EU).

<sup>19</sup> Judgment of 27 October 2016, *D’Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 49. See also: Judgments of 8 May 2019, *Verdi Ambiente e Società (VAS) – Aps Onlus e.a.*, C-305/18, EU:C:2019:384, paragraph 50; of 7 June 2018, *Inter-Environnement Bruxelles and Others*, C-671/16, EU:C:2018:403, paragraph 53; and of 7 June 2018, *Thybaut and Others*, C-160/17, EU:C:2018:401, paragraph 54.

<sup>20</sup> Article 2(b), SEA Directive.

Four stages can be drawn from Article 6, SEA Directive, governing the consultations process:

- i. the designation by a Member State of the competent authorities;
- ii. the identification by a Member States of the public to be consulted;
- iii. the information to be made available to stakeholders before consultations;
- iv. the actual consultation of stakeholders.

Article 6, SEA Directive, establishes that Member State *shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans*<sup>21</sup>.

Member States shall also *identify the public (...), including the public affected or likely to be affected by, or having an interest in, the decision-making subject to [the SEA] Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned*<sup>22</sup>.

Pursuant to the same Article, two documents have to be made available to the identified relevant authorities and public before the consultation takes place, namely the draft plan or programme and an environmental report<sup>23</sup>. Article 5, SEA Directive, requires Member States to produce an environmental report *in which the likely significant effects on the environment of implementing the plan (...), and reasonable alternatives taking into account the objectives and the geographical scope of the plan (...), are identified, described and evaluated*<sup>24</sup>.

The designated authorities and identified **public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure**<sup>25</sup>.

It is for Member States to determine how the information and consultation processes will take place in practice<sup>26</sup>. Nevertheless, in order to contribute to more transparent decision-making<sup>27</sup> and to address the environmental effects of a plan or programme<sup>28</sup>, it is imperative that consultations – and the environmental assessment as a whole – be conducted according to an appropriate timeline<sup>29</sup>.

Another important element of public participation is enshrined in Article 8, SEA Directive, which establishes that the environmental report and **opinions expressed** by stakeholders during consultations **shall be taken into account during the preparation of the plans or programmes**, and prior to their adoption<sup>30</sup>.

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<sup>21</sup> Article 6(3), SEA Directive.

<sup>22</sup> Article 6(4), SEA Directive.

<sup>23</sup> Article 6(1), SEA Directive.

<sup>24</sup> The full list of information to be provided can be found in Annex I, SEA Directive.

<sup>25</sup> Article 6(2), SEA Directive.

<sup>26</sup> Article 6(5), SEA Directive; See also Article 7, SEA Directive, on Transboundary consultations.

<sup>27</sup> Recital 15, SEA Directive.

<sup>28</sup> Article 1, SEA Directive.

<sup>29</sup> Article 4, Article 6(2), and Recital 4 SEA Directive.

<sup>30</sup> Article 8, SEA Directive also provides that, where Member States have entered in transboundary consultations, pursuant to Article 7, SEA Directive, the results of such transboundary consultations shall likewise be taken into account during the preparation of the plans, and prior to their adoption.

Finally, Article 9, SEA Directive, imposes on Member States a duty of information following the adoption of the plans or programmes. In particular, **Member States should make available to the designated authorities and the public the plans or programmes as adopted, as well as a statement summarising, among others, how the requirements of Article 8 have been met, and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with<sup>31</sup>.**

Overall, Article 12, SEA Directive, specifies that *Member States shall ensure that environmental reports are of a sufficient quality to meet the requirements of the SEA Directive and shall communicate to the Commission any measures they take concerning the quality of these reports<sup>32</sup>.*

### **3. What is the status of the CAP Strategic Plans Regulation and how does it influence the development of the CAP Strategic Plans at national level?**

The CAP SP Proposal has not been adopted yet. This means that, when discussing SPs, reference can only be made to the Proposal from the European Commission, published in June 2018. While almost two years have passed since the publication of this Proposal, the two co-legislators still seem far from aligning their positions.

This not only creates long delays, but also great uncertainty around the process that Member States are required to follow to develop their national plans. While the European Commission has urged Member States to begin drafting their Strategic Plans<sup>33</sup>, the legal obligation for Member States to prepare and submit a draft SP does not exist yet.

The absence of a legally binding CAP SP Regulation governing the preparation of these plans is having negative consequences on participatory democracy in several Member States, where SPs are already being prepared. In fact, the provision of the CAP SP Proposal dedicated to public participation, *i.e.* Article 94 on “procedural requirements” during the preparation of the SPs, is not yet in force.

### **4. Is the SEA Directive applicable to CAP SPs<sup>34</sup>?**

It would be erroneous to consider that, as long as the new Regulation is not into force, Member States enjoy full discretion on how (and even if) a public participation process should be carried out during the preparation of their CAP SPs.

As showed in the answer to Question 1, a “test” based on four conditions helps to understand whether the CAP SPs fall under the scope of the SEA Directive. Based on this test, we have identified strong arguments to consider that Member States are required to set a public consultation process during the preparation of their CAP SPs pursuant to the SEA Directive.

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<sup>31</sup> Article 9(1)(a) and (b), SEA Directive.

<sup>32</sup> Article 12(2), SEA Directive.

<sup>33</sup> <https://www.arc2020.eu/how-transparent-and-inclusive-is-the-design-process-of-the-national-cap-strategic-plans/>

<sup>34</sup> This paragraph aims exclusively at illustrating the common arguments for the applicability of the SEA Directive to CAP SPs; it is beyond its scope to provide a country-by-country in-depth analysis of the national implementing legal framework.

Below, we show how the CAP SP Proposal satisfies these four conditions, leading to the conclusion that the SEA Directive applies to CAP SPs. We then draw out the implications for the participatory process during the preparation of the SPs.

I. Preparation or adoption of the plans or programmes by an authority of a Member State

Pursuant to Article 91, CAP SP Proposal, in each Member State a body responsible for drawing up the Strategic Plan will be identified. The responsible body will also have the obligation to involve the competent national authorities for the environment and climate aspects of the plan<sup>35</sup>. Hence, **by requiring that public bodies will be responsible for preparing CAP SPs, one can reasonably consider that the first condition is satisfied.**

II. The plans and programmes as identified under the above-mentioned condition must be *required* by legislative, regulatory or administrative provisions.

In light of the case-law of the Court of Justice of the European Union, the verb “required” should be broadly understood<sup>36</sup>. **Since the obligation for Member States to draw up CAP SPs derives from the Commission Proposal<sup>37</sup>, CAP SPs shall be regarded as ‘plans required by legislative provisions’ in the meaning of the directive.** Even if the CAP SP Proposal is not yet in force, national authorities are preparing the SPs to fulfil that prospective legal obligation, rather than entirely on a voluntary basis.

III. An environmental assessment has to be carried out for certain types of plans and programmes

Among the list of activities and economic sectors that the SEA Directive mentions as relevant for its applicability, **agriculture is expressly included<sup>38</sup>. There is therefore no doubt that this condition is fulfilled.**

IV. A plan or programme, likely to have a significant effect on the environment, must:

- a) set the framework for future development consent of projects;
- b) [the mentioned projects should be those] listed in Annexes I and II to Directive 85/337/EEC<sup>39</sup>.

By establishing in the CAP SPs an intervention strategy, including the set of criteria and rules with which farmers must comply in order to benefit from Union support, CAP SPs will determine the contributions to the CAP specific objectives expected from farmers, both under Pillar 1 and Pillar 2. Although **Member States** will need to justify their choice of interventions to the European Commission, they **will have the choice to determine the details of each intervention.** In light of this, **Member States will therefore set “the framework for future development consent of projects”.**

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<sup>35</sup> Article 94, Paragraph 2, CAP SP Regulation Proposal.

<sup>36</sup> Please, refer to footnote n. 9 above.

<sup>37</sup> Article 91(1) CAP SP Regulation Proposal.

<sup>38</sup> Article 3(2)(a) SEA Directive.

<sup>39</sup> Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (‘EIA Directive’). The EIA Directive has been amended in 2011 by Directive 2011/92/EU, which was further amended by Directive 2014/52/EU. As was the case under Directive 85/337/EEC, Directive 2011/92/EU as amended by Directive 2014/52/EU provides that, where a public or private project is likely to have significant environmental effects, an environmental impact assessment (‘EIA’) should be conducted by the competent authorities in the Member State. Annexes I and II to both the former and the new EIA Directives list the projects falling under their scope of application (see also Article 4 Directive 85/337/EEC and Article 4 Directive 2011/92/EU).

Regarding *point b*), reference should be made to Annexes I and II of the Environmental Impact Assessment (EIA) Directive. Agricultural projects that fall under the scope of the EIA Directive are listed in Annex II<sup>40</sup>, where Paragraph 1 identifies *projects for the restructuring of rural land holdings, projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, water management projects for agriculture, including irrigation and land drainage projects and intensive livestock installations*<sup>41</sup>, **all of which should be regulated under CAP SPs**<sup>42</sup>. Therefore, **this fourth two-fold condition can be deemed satisfied by CAP SPs.**

Finally, it is essential to take into consideration Article 3(8), which establishes *financial or budget plans and programmes* as exceptions to the application of the SEA Directive. In addition to determining the allocation of EU agriculture financial support<sup>43</sup>, the CAP SPs will fulfil other significant functions and should, therefore, not be regarded as pure ‘financial plans’. CAP SPs are intended to steer the development of agriculture in a certain direction, in line with the general and specific objectives of the CAP. This is made apparent from Article 95, Paragraph 1, CAP SP Proposal, describing the content of the plans:

*Each CAP Strategic Plan shall contain the following sections:*

- (a) an assessment of needs;*
- (b) an intervention strategy;*
- (c) a description of elements common to several interventions;*
- (d) a description of the direct payments, sectoral and rural development interventions specified in the strategy;*
- (e) target and financial plans;*
- (f) a description of the governance and coordination system;*
- (g) a description of the elements that ensure modernisation of the CAP; and*
- (h) a description of the elements related to simplification and reduced administrative burden for final beneficiaries.*

“Financial plans” under letter (e) are only one section of a much more complex content, while it appears that, e.g. under letters (b) and (d), Strategic Plans will be key to delineate a national strategy for agriculture.

**Therefore, considering that the CAP SPs satisfy the four mentioned conditions and do not qualify as exceptions, it can be argued that CAP SPs fall under the scope of the SEA Directive.**

The confirmation that strategic environmental assessments should be conducted prior to adopting CAP SPs is further supported by Article 95(2)(a), as well as by Article 125, CAP SP Proposal: not only should Annex I of the SPs contain a description of the ex-ante evaluation and of the strategic environmental

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<sup>40</sup> Projects listed in Annex I, Point 17, EIA Directive, namely *Installations for the intensive rearing of poultry or pigs with more than: (a) 85 000 places for broilers, 60 000 places for hens; (b) 3 000 places for production pigs (over 30 kg); or (c) 900 places for sows*, might be considered as agricultural projects as well.

<sup>41</sup> Those not included in Annex I, point 17, EIA Directive.

<sup>42</sup> The exact definition of each of the categories listed in Annex II, EIA Directive, differs from one Member State to the other. However, it might be helpful to refer to the EU Commission’s document “Interpretation of definitions of project categories of annex I and II of the EIA Directive”, providing a first guidance on this matter. Available at: [https://ec.europa.eu/environment/eia/pdf/cover\\_2015\\_en.pdf](https://ec.europa.eu/environment/eia/pdf/cover_2015_en.pdf) (last access 26th May 2020).

<sup>43</sup> Article 1(1)(c) and Article 91, CAP SP Regulation Proposal.

assessment<sup>44</sup>; but the CAP SP Proposal also prescribes that the ex-ante evaluation has to *incorporate the requirements for strategic environmental assessment set out in Directive 2001/42/EC (i.e., the SEA Directive)*.

The recent Commission Staff Working Document “Analysis of links between CAP Reform and Green Deal”<sup>45</sup> confirms that *Member States have to draw up their CAP Strategic Plans on the basis of a thorough Strategic Environmental Assessment in line with the provisions of the SEA Directive*.

**In conclusion, arguing that CAP SPs fall under the scope of the SEA Directive is key to ensure that public participation takes place in Member States where, pending the adoption of the CAP SP Regulation by the co-legislators, the authorities have already started drafting the national plans.**

**Applying the SEA Directive<sup>46</sup> to the preparation of CAP SPs implies that Member States must organise public consultations with relevant authorities and the concerned public – among which the directive identifies ENGOs – during the preparation of the draft CAP SP and the environmental report. It also ensures, pursuant to Article 7, SEA Directive, that the outcomes of the public consultations are taken into consideration when drafting the SPs. Finally, applying Article 9, SEA Directive, imposes on Member States a duty of information following the adoption of their CAP SPs.**

If you are aware of gaps in the public participation process or in the absence of it, this Legal Analysis should provide you with strong legal arguments to support your claim.

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<sup>44</sup> Article 95(2), CAP SP Regulation Proposal.

<sup>45</sup> Commission Staff Working Document, Analysis of links between CAP Reform and Green Deal, Brussels, 20.5.2020 SWD(2020) 93 final, p. 9. Available at: [https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/sustainability\\_and\\_natural\\_resources/documents/analysis-of-links-between-cap-and-green-deal\\_en.pdf](https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/sustainability_and_natural_resources/documents/analysis-of-links-between-cap-and-green-deal_en.pdf) (last access 26th May 2020).

<sup>46</sup> Article 6, SEA Directive.

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