



ALTERNATTIVA DEMOKRATIKA – THE GREEN PARTY

10, Triq Manwel Dimech, Sliema SLM02, MALTA.

Email info@alternattiva.org.mt

Malta in breach of Directive 2001/42/EC due to the extensions to the development zones.

This paper will show how the Maltese Government has breached Directive 2001/42/EC by extending the zones which may be developed without carrying out the required assessments according to law. It will be clearly demonstrated that the way in which the government conducted the process by which more land was made available for development, violates the provisions of the said directive.

According to the Maltese Government the extension to the development zone boundaries is part of the process which was initiated in 1992 with the approval of the structure plan by parliament. This paper shall present the legal arguments showing that the way in which this process was conducted violates provisions in Directive 2001/42/EC.

The applicable EU directives and guidance documents

Directive 2001/42/EC relates to the applicability of a strategic environmental assessment. Further clarifications to the applicability of this directive are to be found in the implementation guidance document issued by the Commission and available from http://ec.europa.eu/environment/eia/030923_sea_guidance.pdf. This has clearly identified three articles in Directive 2001/42/EC which determine the applicability of the Directive to an undertaking¹.

- Article 2 sets out the characteristics which plans and programmes (PPs) within the scope of the Directive, must have.
- Article 3 defines which of these plans and programmes are likely to have a significant impact on the environment and should consequently be subject to environmental assessment.
- Article 13 sets a temporal limit on the applicability of the Directive to PPs satisfying the criteria laid down by articles 2 and 3.

It is clear that the extensions to the development boundaries as approved by parliament on the 26 July satisfy all these three criteria and should thus have been subject to an environmental assessment. In fact the Maltese Government did not carry out such an assessment.

1. The Directive makes it clear that for an undertaking to fall within the scope of its provisions, it must either be a plan or a programme. It is essential to prove that the modifications of the development zones fall within the definition of the term plan or of the term program.

¹Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.1, page 5.

2. It is a widely accepted practice to separate the policy hierarchy into four phases: Policy, Plan, Programme and Project. Policy is usually taken to be a declaration of intentions, a plan usually outlines “how it is proposed to carry out or implement a scheme or a policy”². Most Member States consider a programme to be “a plan covering a set of projects in a given area”³. It is evident that as far as this Directive is concerned the term project has got the same meaning as in Article 1(2) of Directive 85/337/EC: “*project means: the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*”.
3. The undersigned have adopted the “exclusion” approach suggested by Gao Ming Zhi (2006)⁴ to classify the Structure Plan and its recent modifications. This approach entails the exclusion of the undertaking in question from classification as either one of the two extremes of the policy hierarchy (Policy and Project), which implies that the Structure Plan and its modifications should be classified as being either a Plan or a Programme. No further distinction between a Plan and a Programme is necessary since as far as the “Directive’s requirements are concerned they are treated in an identical way. It is therefore neither necessary nor possible to provide a rigorous distinction between the two”⁵
4. It is clear that the Structure Plan and the recent extension to the development boundaries can not be classified as a project, since a project must by definition⁶ involve construction work or any other physical intervention in the natural environment This is not the scope of the Structure Plan or its extensions.
5. The Structure Plan can not be classified as Policy since it goes beyond merely stating intentions, declaring principles and indicating targets (qualitatively and quantitatively) and in fact through the various policies within the Structure Plan and also through the development boundaries, it sets out how the land is to be developed. It also lays down guidance as to the kind of development which might be appropriate or permissible in particular areas and sets out the criteria which must be taken into account in designing new development, as suggested by the Commission’s Guidance Document⁷ this falls well within what is considered to be a Plan.
6. One must also note that in paragraph 39 of Case-72/95 *Kraaijeveld*, the European Court of Justice declared that “*the scope of the Directive (85/337/EEC) is wide and its purpose very broad*”, in view of the fact that the purposes of Directives 85/337/EEC and 2001/42/EC are related and since there are numerous conceptual similarities between the two Directives, the Commission is advising the Member States to “*adopt a similar approach in considering whether an act is to be considered a plan or a programme falling within the scope of Directive 2001/42/EC.*”⁸

² Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.5, page 6.

³ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.5, page 6.

⁴ Gao Ming-Zhi, A. (2006) *SEA Guidance: A Reinterpretation of the SEA Directive and its Application to the Energy Sector*. European Environmental Law Review, pp 129 – 148.

⁵ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.1, page 3.

⁶ Article 1 (2) of Directive 85/337/EEC.

⁷ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.5, page 6.

⁸ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.4, page 5.

7. The Commission explicitly includes modifications to PPs in the definition of PPs and uses land use plans as an example *“The definition of plans and programmes includes modifications to them. Many plans, especially land use plans, are modified, when they eventually become outdated, rather than being prepared afresh. Such modifications are treated in the same way as plans and programmes themselves and require environmental assessment provided the criteria laid down in the Directive are met”*⁹. This means that the extensions to the development zones (which are a modification of The Structure Plan) are to be treated as if they themselves were PPs. Therefore from this point onwards the extensions in question will be treated in the same way as PPs.
8. Further the Commission sees it as *“logical to consider that a modification of a plan or a programme ... must be subject to assessment under article 5 if the modification itself involves significant effects not yet assessed”*. According to Article 3(3) of Directive 2001/42/EC even minor changes are capable of significant environmental effects. In the case of the extension to the development zones more land is being placed within the development boundaries, when according to the Malta Environment and Planning Authority the supply of dwellings is such that it is capable of meeting twice the cumulative demand for housing till the 2020¹⁰. No studies assessing whether or not the extension to the development zones involved significant environmental effects, were carried out even though the area of land included within the new development boundaries is of $2 \times 10^6 \text{ m}^2$ ¹¹ i.e. 0.6% of Malta’s surface area (total area of the Maltese Islands is $3.16 \times 10^8 \text{ m}^2$). The government has refused to subject this modification of the Structure Plan to an environmental assessment under Article 5.
9. Article 2(a) sets two formal conditions which must be met by PPs in order to be covered by the Directive:

The PPs in question must be *“subject to preparation/or adoption by an authority at national ... level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government and they must be required by legislative, regulatory and administrative procedures”*¹².

10. The Structure Plan and its modification (the extensions to the development zones) satisfy both conditions. Section 18 of Chapter 356: Development Planning Act, 1992 obliges the Competent (Public) Authority to prepare a Structure Plan. The Structure Plan is described as a *“written statement illustrated by diagrams as necessary and accompanied by an explanatory memorandum giving a reasoned justification for each of the policies and proposals contained in the plan”*¹³. Section 18 (3B - 8) gives further insight as to how the structure plan is to be reviewed, therefore the PPs in question do arise from a specific obligation in Maltese Legislation.
11. The Structure Plan itself was compiled by the Competent (Public) Authority and approved by Parliament in July of 1992. The extensions to the development zones were compiled after Cabinet issued a memo which included the criteria, the Malta Environment

⁹ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.9, page 7.

¹⁰ Housing Topic Paper (Structure Plan for the Maltese Islands) – Final Draft, February 2002, page 120.

¹¹ Onor Stefan Buontempo’s speech in Parliament, 26 July 2006.

¹² Article 2(a) of 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.

¹³ Section 18 of Chapter 356: Development Planning Act, 1992.

Planning Authority (MEPA) had to use in defining the development boundaries. Subsequently MEPA drew up the maps indicating the “new” development boundaries. These were then subject to a public consultation exercise, rearranged and approved by Parliament on the 26 July 2006 (the motion for the approval of these development zones was tabled on the 7 July 2006). Hence both the Structure Plan and its Modification were prepared by a public authority and approved through a legislative procedure by parliament.

12. The scope of the application of the Directive is laid down by Article 3 of 2001/42/EC. All PPs likely to have significant environmental effects are to be subject to an environment assessment. This article then classifies the classes of PPs which require an assessment either automatically (paragraph 2) or on the basis of a determination by the Member State (paragraphs 3 and 4)¹⁴.
13. PPs defined in paragraph 2 of article 3 are deemed by the Directive to be likely to have significant environmental effects and must as a rule be subject to an environmental assessment. It is to be noted that in this case the Member State has got absolutely no discretion to determine whether the PPs are likely to have significant environmental effects.
14. It is being submitted that the PPs in question fall under points 10b of Annex II to Directive 85/337/EEC and must therefore be subject to an environmental assessment. One must also consider that in paragraph 31 of Case C-72/95, *Kraaijeveld*, The European Court of Justice ruled that the points in Annex II of Directive 85/337/EEC were to be interpreted in the widest sense possible, especially if the works in question were “liable permanently to affect the composition of the soil, flora and fauna or the landscape. Such works must therefore fall under the directive”¹⁵. Exemptions must likewise be interpreted as restrictively as possible¹⁶.
15. Without prejudice to the above mentioned argument, even if the PPs in question are regarded as plans and programmes which set the framework for future development consent of projects, but are not covered by Article 39(2), then the Member State has to determine whether a plan or programme is likely to have significant environmental effects. This is to be done in conformity with the criteria established by Annex II to Directive 2001/42/EC¹⁷. In this case this was not done and the Government simply stated that an environmental assessment was not required.
16. In order for Directive 2001/42/EC to be applicable to the said PPs they must meet one final condition, “*the first formal preparatory act is subsequent to (21 July 2004) and which are adopted or submitted to the legislative procedure more than 24 months thereafter*”¹⁸. Since the Commission is itself of the opinion that modifications are to be treated as plans and programmes, we are of the opinion that the first formal preparatory act of the modifications (i.e. the memo from cabinet to MEPA) must be subsequent to 21 July 2004. This memo was in fact issued in May 2006 and therefore subsequent to 21 July 2004.

¹⁴ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.17, page 9.

¹⁵ Paragraph 32 of Case C – 72/95, *Kraaijeveld*.

¹⁶ Paragraph 65 of Case C-435/97, *WWF and Others v Autonome Provinz Bozen and Others*.

¹⁷ Article 3(5) of 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

¹⁸ Article 13(3) of 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.

17. However without prejudice to the argument presented in 16, one is to note that if the first formal preparatory act is to be regarded as being July of 1992 (i.e. the date when the Structure Plan was approved by Parliament) then since the modifications were approved on the 26 July 2006, they are to be regarded as having been adopted after the 24 months “period of grace” envisioned by Article 13(3) of Directive 2001/42/EC, hence the obligation to submit these PPs to an environmental assessment holds in this case as well.

18. Dr Chris Ciantar Chairman to the Strategic Environment Assessment Audit Team and Director of Environment Policy and Initiatives within the Ministry of Rural Affairs and the Environment publicly justified the Government’s failure to subject the extensions to the development zones to an environmental assessment by saying that “in this particular case the (planning boundary extensions) process is at a stage when it is not feasible to carry out a strategic environmental assessment”¹⁹. It is evident that the Directive does not give the Member State any discretion to decide at which point it is feasible to subject a plan to an environmental assessment. The only part of the directive which mentions feasibility is the second sentence of article 13(3) of Directive 2001/42/EC however Dr Ciantar’s justification contrasts with the Commission’s interpretation of this clause “*the focus of this provision is not so much on how long before July 2004 was the starting date of the plan or programme, but on whether the planning process of relevant plans or programmes is at a stage at which a meaningful environmental assessment can be carried out.*”²⁰. Considering that the fact that cabinet proposed this extension in May 2006 then the process definitely is at a stage at which a meaningful environmental assessment can be made.

¹⁹ Letter sent to the Chairman MEPA by Chris Ciantar on behalf of the Strategic Environmental Audit Team, 20 July 2006 and available from http://www.doi.gov.mt/EN/press_releases/2006/07/ittra%20lill-MEPA.doc

²⁰ Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, paragraph 3.66 page 20.