STRATEGIC ENVIRONMENTAL ASSESSMENT[1]

David Elvin Q.C.
Landmark Chambers

Introduction

1. This paper outlines the regime for the environmental assessment of plans and programmes, otherwise known as strategic environmental assessment ("**SEA**"). The legislation is important – the SEA provisions fill the gap not covered by the environmental impact assessment Directive 85/337/EEC, by requiring transparent assessment of the likely environmental effects of the hierarchy of plans and programmes which have a strategic role in directing not only development but also other interventions in the environment. There is as yet no guidance from the courts on the provisions of either the EU or national legislation.

Overview of the legislation

2. The Environmental Assessment of Plans and Programmes Regulations 2004 S.I. 2004 No. 1633 ("**the SEA Regulations**") came into force on 20th July 2004 and they implemented Directive 2001/42/EC of the European Parliament and Council on the assessment of the effects of certain plans and programmes on the environment ("**the SEA Directive**").[2] The SEA Regulations reproduce the Directive and do not add any further requirements. However, they adapt the Directive to arrangements in the UK in certain respects, notably by defining the authorities responsible for SEA (the 'Responsible Authorities'), designating the organisations to be consulted (the 'Consultation Bodies', or in Scotland 'Consultation Authorities'), and setting out time limits and other arrangements for consulting and informing authorities and the public.

3. The UK national authorities[3] jointly published guidance on this legislation in September 2005: "*A Practical Guide to the Strategic Environmental Assessment Directive*" ("**the UK Guidance**"),[4] and the Commission also issued guidance on the SEA Directive in 2003:

---

[1] "Strategic environmental assessment" or "SEA" is commonly used to refer to the process in the SEA Directive and Regulations, but it does not appear in them.

[2] The Regulations which transpose the Directive in Northern Ireland, Scotland and Wales are: The Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004 (Statutory Rule 2004 No. 280); The Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004 (Scottish Statutory Instrument 2004 No. 258), and The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 (Welsh Statutory Instrument 2004 No. 1656 (W.170)).

[3] The former ODPM, the Scottish Executive, DOENI and the National Assembly for Wales.

[4] Specific guidance has been developed for certain types of plans and programmes, particularly land use and spatial planning and transport planning (see paragraphs 1.10 and 1.11 of the UK Guidance).

"*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*" ("**the Commission Guidance**")[5].

4. Regulation 8 of the SEA Regulations prohibits the adoption (or submission for adoption) of those plans and programmes, for which the "*first formal preparatory act*"[6] occurred after 21 July 2004 and -

   (1) which require SEA, until the requirements of the SEA Regulations relating to Environmental Reports and consultation procedures have been met and account has been taken of the Environmental Report and consultation responses;

   (2) which may not be likely to have significant environmental effects, until a determination to that effect has been made.

5. The SEA Directive applies to plans and programmes whose first formal preparatory act is on or after 21 July 2004, and also to those whose formal preparation began before 21 July 2004 but which have not been either adopted or submitted to a legislative procedure leading to adoption by 21 July 2006.

6. Paragraph 2.10 of the UK Guidance states that:

> "A first formal preparatory act is likely to be a definite and clearly ascertainable part of the process of preparation of the plan or programme. However, the European Commission guidance (paragraph 3.65) states that "the word 'formal' does not necessarily mean that the act should be required by national law, nor that it should produce legal effects in national law. A judgement should be made in each case, taking into account factors such as the nature of the act in question, the nature of the steps preceding it, and the apparent aim of the transitional provision, namely to pursue legal certainty and good administration."

Importance of SEA

7. The Director General of the Environmental Directorate of the Commission explained the importance of SEA as follows[7]:

> "The Strategic Environmental Assessment (SEA) Directive is an important step forward in European environmental law. At the moment, major projects likely to have an impact on the environment must be assessed under Directive 85/337/EEC. However, this assessment takes place at a stage when options for significant change are often limited. Decisions on the site of a project, or on the choice of alternatives, may already have been taken in the context of plans for a whole sector or geographical area. The SEA Directive … plugs this gap by requiring the environmental effects of a broad range of plans and programmes to be assessed, so that they can be taken into account while plans are actually being developed, and in due course adopted. The public must also be consulted on the draft plans and on the environmental assessment and their views must be taken into account.
>
> Whilst the concept of strategic environmental assessment is relatively straightforward, implementation of the Directive sets Member States a considerable challenge. It goes to the

---

[5] Copies can be downloaded from http://europa.eu.int/comm/environment/eia/sea-support.htm.

[6] Not defined and not considered in detail in the Draft Guidance. See para. 2.12.

[7] Foreword to the Commission's Guidance. For the application and scope of SEA prior to the coming into force of the SEA Directive, see the ICON Final Report "*SEA and Integration of the Environment into Strategic Decision-Making*" (May 2001) (European Commission Contract No. B4-3040/99/136634/MAR/B4).

> heart of much public-sector decision-making. In many cases it will require more structured planning and consultation procedures. Proposals will have to be more systematically assessed against environmental criteria to determine their likely effects, and those of viable alternatives. There will be difficult questions of interpretation, but when properly applied, these assessments will help produce decisions that are better informed. This in turn will result in a better quality of life and a more sustainable environment, now and for generations to come."

Objective of SEA

8. The objective of SEA is set out in Paragraph 5 to the preamble to the SEA Directive:

> "(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision-making. The inclusion of a wider set of factors in decision-making should contribute to more sustainable and effective solutions."

9. Article 1 of the SEA Directive states:

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

<u>What is environmental assessment?</u>

10. The Directive defines "environmental assessment" (Article 2(b)) as a procedure comprising:

    (1) preparing an Environmental Report on the likely significant effects of the draft plan or programme;

    (2) carrying out consultation on the draft plan or programme and the accompanying Environmental Report;

    (3) taking into account the Environmental Report and the results of consultation in decision making; and

    (4) providing information when the plan or programme is adopted and showing how the results of the environmental assessment have been taken into account.

11. In many respects, the content, procedure and form of the SEA environmental report will closely resemble an environmental statement under EIA[8].

Scope of the SEA Directive and Regulations

12. Unlike the various EIA Regulations, the SEA Regulations are general in form and closely follow the structure and terminology of the Directive. For example, since the Regulations simply follow the broad definition of "plans and programmes" given in article 2(a) of the SEA

---

[8] See the SEA Regulations, reg.s 12-15 and the UK Guidance, Chapter 5.

Directive, the same issues arise with respect to these key concepts under the Regulations as they do in respect of the Directive. Indeed, it should be noted that reg. 2(2), following the definitions in reg. 2(1), provides:

> "Other expressions used both in these Regulations and in the Environmental Assessment of Plans and Programmes Directive have the same meaning in these Regulations as they have in that Directive."

13. This ensures to a great degree the achievement of the full transposition of the SEA Directive, which has been the subject of litigation in the case of the EIA Directive[9]. It also ensures a wide application of the provisions of the SEA Directive.

The definition of 'plans and programmes'

14. The SEA Directive applies to "plans and programmes" and, significantly, not in terms to policies. Under Article 2(a), the plans and programmes subject to the Directive are those which are:

    (1) subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and

    (2) required by legislative, regulatory or administrative provisions.

15. This definition is applied almost exactly by reg. 2(1) of the SEA Regulations. The requirements of SEA apply to any plans, programmes and their modifications:

> "Which are required by legislative, regulatory or administrative provisions; and
>
> Which are -
>
> subject to preparation and/or adoption at national, regional or local level; or
>
> prepared by an authority for adoption through a legislative procedure."

16. The potential width and interpretation of the requirements of articles 2 is likely to give rise to the most significant difficulties in the application of the SEA Directive and SEA Regulations. Indeed, the UK Guidance goes so far as to produce an "*indicative list of plans and programmes subject to the SEA Directive*" though it is noted that[10]

> "It is not possible to give a definitive list because of the number of plans and programmes in existence and the varying extent to which the Directive's criteria apply, either to types of plan or programme or to individual plans or programmes within a type."

17. Apart from the plans which clearly require SEA, the open-ended definition of "plans and programmes" creates an area of wide and uncertain application which is underlined by the Commission's Guidance:

> "3.5 The kind of document which in some Member States is thought of as a plan is one which

---

[9] E.g. the recent judgment in ***Barker*** Case C-290/03, 4.5.06.
[10] UK Guidance, Appendix 1.

> sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development ….
>
> 3.6 In some Member States, programme is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete ... But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy' – the sense in which 'plan' was used in the previous paragraph ….”

18. As art. 3(2) and reg. 5(2) and (3) provide, SEA is required for all 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*” and which set the framework for development consent within the requirements for EIA. The effect of this is that the application of the SEA Regulations is not confined to specific areas of law, for example planning, as with the various EIA Regulations, but is of much more general effect. See below.

“Required” by legislative, regulatory or administrative provisions

19. The terms “legislative” and “regulatory” provisions cover a range of legal requirements, including both primary and delegated legislation. There can be no doubt that the SEA Regulations apply to the preparation of the elements of development plans since these are either prepared/adopted at local or regional level and are required by legislative provision. This includes not only LDFs but regional spatial strategies[11], and other spatial strategies, such as the London Plan, which now form part of the statutory development plan under s. 38 of the Planning and Compulsory Purchase Act 2004.

20. However, the “administrative provisions” category is far less clear and gives rise to the greatest area for debate – especially since it does not appear as a distinct category in some of the authentic language versions of the Directive[12].

21. The UK Guidance states at para. 2.6 that:

> “Characteristics of “administrative provisions” are likely to be that they are publicly available, prepared in a formal way, probably involving consultation with interested parties. The administrative provision must have sufficient formality such that it counts as a “provision” and it must also use language that plainly requires rather than just encourages a plan or programme to

---

[11] This is confirmed, in any event, by para. 1.2 of ODPM’s “The Strategic Environmental Assessment Directive: Guidance for Planning Authorities” (October 2003), which also considers existing RPG to fall within the scope of the SEA Directive. Interestingly, RPG (as opposed to RSS) does not appear in the “indicative list” of plans subject to the SEA regime at Appendix 1 of the later UK Guidance except by reference to its revision through RPG. This may simply be due to the fact that no new RPG is proposed to be issued except in the form of RSS.

[12] The ECJ generally has regard to other language versions in interpreting legislation. Here, the structure of the different versions varies significantly, the Dutch and German texts omitting entirely as a distinct third category what is rendered in the English version as “administrative provision” while the French and Italian versions correspond closely with the English.

be prepared."

22. The approach to "required" is also an important concept in approaching the width of the obligation under the SEA Directive. The term, applied directly by the SEA Regulations, doubtless has an autonomous EC law meaning having regard to the objectives of the Directive. Such an approach is likely to focus on the end product of a plan or programme which sets a framework for granting consents rather than on drawing fine distinctions between the various means by which they might be brought into existence.

23. "Required" could be approached as including, inter alia, only plans which arise from a legal requirement to produce them. However, "required" might be approached more broadly to include administrative or policy guidance which urges the production of a plan or programme[13], e.g. where a development plan policy requires the production of a development brief (which will be SPD) for a particular site. The development plan policy itself would be a "regulatory or administrative provision" and whether the brief itself was potentially subject to SEA would depend on whether the policy obligation meant it was "required" in terms of the Directive and Regulations.

24. The Commission's Guidance unsurprisingly adopts a broad approach at para. 3.16 which supports the view that a requirement may exist even if it is not legally binding:

> "3.16. Administrative provisions are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions."

25. Since the Commission clearly considers that "required" in this context should be read broadly and only imports some form of non-binding administrative "requirement", this leads to the conclusion that the following may well be sufficient "requirements" to bring those matters within the SEA regime:

    (1) A stipulation requiring SPD in the form of a development brief or masterplan in a development plan or other policy; and

    (2) The production of supplementary guidance anticipated or required by policy (whether as SPD or otherwise[14]).

---

[13] The broader interpretation is supported by at least the Italian version which uses "previsti" ("foreseen") in place of the English "required".

[14] Although a procedure is provided for the adoption of SPD, guidance and the regulations do not in terms rule out the ability of authorities to produce guidance which is not SPD. However, given the terms of draft PPS 12 section 2.4, it would be unlikely that future non-SPD guidance would be considered to possess significant weight.

26. Moreover, if “required” does not need the underpinning of a legal duty, then the question also arises whether planning policy adopted by the First Secretary of State constitutes an “administrative provision”. If national policy requires the adoption of a plan or programme, there will be an issue whether that plan or programme falls within article 2(a).

27. It might be argued that national policy itself falls within the requirements for SEA. Statute recognises that national policy has an important role to play:

    (1) in the formulation of the development plan[15]; and

    (2) in planning decision making[16].

    It might therefore be said that national policy is thus “required” by implication.

28. However, it seems unlikely that national policy could be regarded as “required” even with a broad approach to interpretation. The fact that modern government would find it hard to function without policy of some kind is a concept which seems too remote even for a broad interpretation. While statute requires national policy to be taken into account in formulating development plan policies there is no general requirement that there be national policy at all. There is therefore a valid distinction between RPG and RSS which might be considered to be “required” by, respectively, administrative and legal provisions and national policy generally which is not required at all but merely to be taken into account if it is produced.

29. In the light of the apparently clear government view that regional economic strategies are plans for the purposes of SEA, can it be said that national planning policy should be treated differently? It is difficult to regard RES as setting the framework for development consents as opposed to the framework for RSS whereas there can be no doubt that national policy does directly influence the determination of development consent applications. However strong that proximity argument, there is a clear distinction namely that RES is required by statute and national policy is not “required”.

Exemptions

30. Under Article 3(8), and reg. 5(5), the requirement for SEA does not apply to:

    (1) plans and programmes the sole purpose of which is to serve national defence or civil emergency

    (2) financial or budget plans and programmes

    (3) plans and programmes supported by the EU Structural Funds and the European Agricultural Guidance and Guarantee Fund for the programming periods from 2000 to

---

[15] See ss. 12(6), 31(6), 36(9) of the Town and Country Planning Act 1990, reg. 20 of The Town and Country Planning (Development Plan) (England) Regulations 1999 S.I. 1999 No. 3280. See section 5(3) of the 2004 Act with regard to RSS and section 19(2) with regard to local development documents.

[16] Through s. 70(2) of the 1990 Act.

2006 or 2007 (under Council Regulations (EC) Nos 1260/1999 and 1257/1999), on which programme spending continues until the end of 2008.

When is SEA required?

31. The SEA Directive does not require assessment of every plan or programme which falls within the definition in Art.2(a). Like the EIA Directive, it defines a category of plans and programmes for which assessment is compulsory, and a category in relation to which Member States enjoy a degree of discretion.

(a) Where SEA is mandatory

32. As art. 3(2) and reg. 5(2) and (3) provide, SEA is required for all plans and programmes to which the Directive and Regulations apply, namely those which

(1) are

(a) "prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use" and

(b) "which set the framework for future development consent of projects" listed in Annex I and II to Directive 85/337 EEC and Schedules 1 and 2 of the EIA Regulations 1999, or

(2) in view of the likely effects on site, have been determined to require an assessment pursuant to Articles 6 or 7 of the Habitats Directive (Directive 92/43/EEC)[17].

33. The breadth of the subject-matter of the plans and programmes is clear; they are not confined to land use planning issues.

"Development consent"

34. The concept of "*development consent*" may be interpreted broadly and is likely to be interpreted probably consistently with decisions under the EIA Directive. See ***R. v. North Yorkshire CC ex parte Brown*** [2000] A.C. 397, ***R (Wells) v Secretary of State*** [2004] Env. L.R. 528, ***Commission v. UK*** Case C-508/03 and ***R (Barker) v. Bromley LBC*** Case C-290/03, judgments both given by the ECJ on 4.5.06. As the ECJ, following ***Wells***, held in ***Barker*** –

> "39 Article 1(2) of Directive 85/337 defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.
>
> 40 Thus, while this term is modelled on certain elements of national law, it remains a Community concept which, contrary to the submissions of Bromley LBC and the United Kingdom

[17] See ***Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw*** Case C-127/02 [2005] Env. L.R. 14.

> Government, falls exclusively within Community law. According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (see, to this effect, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C 287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37)."

35. By reference to the multi-stage process involved in outline planning applications, the ECJ held in ***Commission v. UK*** -

> "101. In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.
>
> 102. Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended."

36. Similarly, the requirement for approvals under reviewed old mining permission conditions was held to be a "development consent" in ***Wells***.

"Set the framework" for EIA projects

37. Whether the plans or programmes "set the framework" for future EIA projects appears to be an issue which should be approached as a matter of fact and degree. The Commission's Guidance[18] explains it as follows -

> "The words would normally mean that the plan or programme contains criteria or conditions which guide the way the consenting authority decides an application for development consent. Such criteria could place limits on the type of activity or development which is to be permitted in a given area; or they could contain conditions which must be met by the applicant if permission is to be granted; or they could be designed to preserve certain characteristics of the area concerned (such as the mixture of land uses which promotes the economic vitality of the area)…
>
> … Whether particular criteria or conditions set the framework in individual cases will be a matter of fact and degree in each case: a single constraining factor may be so significant that it has a dominant influence on future consents. On the other hand, several rather trivial or imprecise factors may have no influence on the granting of consents."

38. A similar approach is adopted in the UK Guidance: see para. 2.8, p. 11.

39. The width of the concept of setting the framework can be seen from the list at Appendix 1 to the UK GUidance, and from the apparent acceptance that regional economic strategies which are only indirectly influential on the consent process should be subject to SEA (see below), that this requirement will be interpreted by the national authorities in a very broad manner.

---

[18] Para.s 3.23-3.28.

(b) Where SEA is discretionary

40. It does not appear under the SEA Directive that there is a general discretion to require SEA since art. 3(1) requires assessment only of plans and programmes "referred to in paragraphs 2 to 4 which are likely to have significant environmental effects". The correct approach (and that adopted in framing the SEA Regulations[19]) appears to be that art. 3(2) should be regarded as defining those projects where SEA is in any event considered to fall within art. 3(1).

41. Reg. 5[20] adopts the approach that there is no discretion in the cases described in reg. 5(2) and (3) which transpose the provisions of art. 3(2)(a) and (b).

42. For post-21.7.04 plans and programmes which do not fall within reg. 5(2) and (3) there is a requirement to carry out an SEA only if there has been a determination under reg. 9 or direction under reg. 10(3) that the plan or programme is "likely to have significant environmental effects" (Article 3(3) and 3(4))". Such plans and programmes comprise:

    (1) Plans and programmes of the types listed in reg. 5(6)(a) and (b)[21] which determine the use of small areas at local level, or which are minor modifications to plans and programmes; and

    (2) Plans and programmes of types which are not listed in reg. 5(2)(a), which set the framework for development consent of projects (not limited to projects listed in the Annexes/Schedules to the EIA Directive or Regulations) (reg. 5(4)).

43. The Commission Guidance (para.s 3.33–3.35) suggests that plans or programmes which determine the use of small areas at local level might include "a building plan which, for a particular, limited area, outlines details of how buildings must be constructed, determining, for example, their height, width or design…. The complete phrase… makes it clear that the whole of a local authority area could not be excluded (unless it were itself small). …The key criterion for the application of the Directive, however, is not the size of area covered but whether the plan or programme would be likely to have significant environmental effects".

44. The Commission Guidance states at para. 3.36:

> "Similarly, 'minor modifications' should be considered in the context of the plan or programme which is being modified and of the likelihood of their having significant environmental effects […] Article 3(3) clarifies the position by recognising that a modification may be of such small order that it is unlikely to have significant environmental effects, but requiring that where the modification … is likely to have significant environmental effects then an assessment should be carried out regardless of the scale of the modification"

---

[19] See para. 3.4 of the Explanatory Memorandum to the SEA Regulations dated 23.6.04.
[20] The temporal application of the SEA Regulations depends on the "first formal preparatory act" of a plan or programme falling after 21.7.04 with additional provision in the case of plans which are not adopted by 21.7.06 – reg. 5(6).
[21] See Article 3(2).

45. Where a plan or programme falls into one of these categories, the Responsible Authorities must carry out screening to determine whether the plan or programme is likely to have significant environmental effects. If it does have significant environmental effects, SEA will be required under the Directive.

46. The criteria for determining the likely significance of the environmental effects of plans or programmes are listed in Annex II of the Directive I. The Responsible Authority must make its conclusions on a determination available to the public, including reasons for not requiring SEA.

47. The SEA Regulations also detail publicity requirements for determinations, and make provision for a direction by the Secretary of State or devolved Ministers. When forming a view on whether SEA is needed in these cases, Responsible Authorities must consult the Consultation Bodies.

Specific issues concerning the applicability of SEA

National policy

48. One important question is the extent to which the making of national policy may be subject to SEA. The application of SEA to RPG or RSS shows that its application extends to more than purely local policy-making. Indeed, development plan policies frequently apply or adapt national and/or regional policies and the only distinction between them is that national policy as such does not have a specific statutory role except as a “material consideration” whereas development plan policy has a specific role under s. 70(2) of the Town and County Planning Act 1990 and s. 38(6) of the Planning and Compulsory Purchase Act 2004.

49. The 2004 Act removed at least one critical distinction between regional and local policy since, in England, RSS becomes one element of the development plan[22]. In connection with the width of application of these provisions, it is interesting to note that para. 1.2 of ODPM’s October 2003 SEA Guidance considered even old-style RPG to fall within the scope of the SEA Directive.

50. The distinction between regional and national policy is not particularly strong to the extent that the former carries into effect on a detailed regional basis the requirements of national policy. RSS is legally required to do so.

51. National policy as well as regional policy can be regarded as setting the framework for development control decisions since, even if there is no specific duty with regard to applying national policy, the duty to have regard to all material considerations in determining planning applications brings in such policy. Moreover, in practice, national policy is often a significant determining consideration particularly on appeal or call-in. National and regional policies also

---

[22] Section 38(3)(a). Existing RPG was made interim RSS as a transitional measure in the Town and Country Planning (Initial Regional Spatial Strategy) (England) Regulations 2004 (S.I. No. 2206), reg. 2 and Schedule.

provide the context for the formulation and adoption of development plan policies. In functional terms, it is therefore difficult to draw a clear distinction between national and regional policy.

52. The boundary between national/regional planning policy and development plan policy as plans or programmes which "set the framework for future development control decisions" of EIA development and which are "subject to preparation and/or adoption at national, regional or local level" is not therefore a clear one. There is scope for argument that some forms of regional or national policy ought to be considered "plans" within article 2(a), given a broad approach to interpretation. The point at which it may be possible to draw a line is in considering whether they are "required by legislative, regulatory or administrative provisions"[23], considered above. National policy does not appear in the "indicative list" in the UK Guidance at Appendix 1 but in Appendix 2 nonetheless requires the ER to consider the relationship of the subject plan or programme to other relevant plans and programmes which include–

> "• The UK Sustainable Development Strategy, and those of England, Wales, Scotland, and Northern Ireland
>
> • White Papers setting out policies (e.g. Urban, Rural, Aviation)
>
> • Planning Policy Statements and Minerals Planning Guidance …"

Regional economic strategies

53. Regional development agencies ("RDAs") are required to produce regional economic strategies ("RES") pursuant to s. 7(1) of the Regional Development Agencies Act 1998. Such strategies are relevant to the formulation of RSS and thus at least indirectly influence the terms of planning and other policy. RES provide an example of how wide the requirement for SEA has been interpreted nationally.

54. RES is included in the "*Indicative list of plans and programmes subject to the SEA Directive*" in Appendix 1 to the UK Guidance. Although there is scope for questioning whether RES falls within the obligation to carry out SEA, it appears to have been accepted that SEA should be carried out. Indeed, there is also an expectation by DTI that SEA should be carried out as set out at para.11 of its Guidance to RDAS on Regional Strategies:

> "11. Both the RES and the RSS are subject to European Directive 2001/42/EC on strategic environmental assessment (SEA) (transposed by the Environmental Assessment of Plans and Programmes Regulations 2004). For the RSS, the Directive's requirements are covered by mandatory Sustainability Appraisal under the Planning Act 2004. RDAs should refer to the ODPM consultation publications "A Draft Practical Guide to the SEA Directive" and "SA of RSSs and Local Development Frameworks: Consultation Paper" (www.odpm.gov.uk). The latter shows planning bodies how to assess the full range of social, environmental and economic effects of plans against criteria of sustainability."

---

[23] For example, there is a distinction between national and regional policy to the extent that national policy is not expressly required, even by an administrative provision whilst RPG might be regarded as "required" by PPG 11. See, further, below.

55. Nonetheless, it is a little difficult to understand how RES, which plainly influences the formulation of RSS, can be regarded as a plan which sets “the framework for future development consent of projects” except in an indirect fashion.

Supplementary guidance

56. A further category of policy, which is placed on a much more formal footing under the new regime, is that of what is now termed SPD. Although they will not form part of development plans, SPD will still form part of LDFs as PPS12 makes clear[24]:

> “The category of SPD is potentially very wide[25]:
>
> “Supplementary planning documents may cover a range of issues, both thematic and site specific which provide further detail of policies and proposals in a development plan document, but cannot be used to allocate land to meet the strategy of the plan. They may take the form of design guides, area development briefs, or issue-based documents which supplement policies in a development plan document…”

57. SPD is now subject to a detailed statutory adoption procedure under Part 5 of the Town and Country Planning (Local Development) (England) Regulations 2004[26]. The process is a simplified version of the development plan process, lacking consideration by an inspector.

58. In the context of SEA, although the SPD will not have the significance of development plan policy, it nonetheless appears to be plan or programme which is adopted at local level and which may set the framework for future development consent of EIA projects. If it is “required”, as considered in the following section, it will be subject to SEA where it may set the framework for future EIA development.

59. Despite the fact that development plans and planning guidance are principal targets of the SEA Directive, the SEA Regulations and the development plan provisions of the 2004 Act appear to have been drafted independently and without reference to each other. The most recent guidance in PPS11 and PPS12 do not take matters significantly further and appear uninformed as to the SEA Regulations and Guidance[27].

Transitional provisions

60. The SEA Directive & Regulations apply to plans and programmes whose first formal preparatory act was on or after 21 July 2004, and also to those whose formal preparation began before 21 July 2004 but which have not been either adopted or submitted to a legislative procedure leading to adoption by 21 July 2006.

---

[24] PPS 12, Appendix A, 1.1.8 – “Supplementary planning documents (SPD): will cover a wide range of issues on which the plan–making authority wishes to provide policy guidance to supplement the policies and proposals in development plan documents. They will not form part of the development plan or be subject to independent examination…”

[25] Para. 2.4.2.

[26] S.I.2004/2204.

[27] Note the absence of reference to either on p. 33 of PPS11.

61. Paragraph 2.10 of the UK Guidance states that:

> “A first formal preparatory act is likely to be a definite and clearly ascertainable part of the process of preparation of the plan or programme. However, the European Commission guidance (paragraph 3.65) states that “the word ‘formal’ does not necessarily mean that the act should be required by national law, nor that it should produce legal effects in national law. A judgement should be made in each case, taking into account factors such as the nature of the act in question, the nature of the steps preceding it, and the apparent aim of the transitional provision, namely to pursue legal certainty and good administration.”

62. "First formal preparatory" act is not defined, but

    (1) the UK Guidance at para. 2.10 suggests that it is "likely to be a definite and clearly ascertainable part of the process of preparation of the plan or programme"; and

    (2) the Commission Guidance (para.3.65) states that "formal" "does not necessarily mean that the act should be required by national law, nor whether it produces legal effects in national law" and that a judgment must be made in each case "taking into account factors such as the nature of the act in question, the nature of the steps preceding it, and the apparent aim of the transitional provision, namely to pursue legal certainty and good administration."

63. It may be difficult in practice to draw a line between an act which is the first formal preparatory act and something which falls short of it e.g. a number of planning authorities engage in informal, non-statutory consultation prior to issuing the first draft of a development plan. Although such a document may not strictly be "formal" it may nonetheless have been formally adopted or approved by the authority for consultation and be the result of the scoping of development plan issues which could properly be said to be preparatory to the plan.

64. Further, SEA is required even where the first formal preparatory act occurred before 21 July 2004 where a plan "has not been adopted or submitted to the legislative procedure for adoption before 22nd July 2006" (reg.6(1)(a)), provided that the plan or programme would have required an environmental assessment had the first act in its preparation occurred on 21st July 2004 (reg.6(1)(b)-(c)), except where the assessment of a particular plan is "not feasible" and the public is informed of the reasons for that decision (reg.6(2)).

65. As a derogation from the general obligation, this provision should be narrowly construed. The ECJ is likely to require a high threshold to be passed before a Member State can lawfully decide that assessment is not "feasible". The fact that national legislation prevents assessment in these circumstances would not in itself suffice: EU law requires national legislation to give way to the requirements of the SEA Directive. The feasibility of SEA must be determined on an objective basis, independent of the requirements of national law.

66. The issue may arise in the context of development plans which straddle the introduction of the Regulations and it may be inconvenient or expensive to interrupt the process to carry out SEA. However, the imminence of the introduction of SEA was known for some time not least

through the clear advice by ODPM in "The Strategic Environmental Assessment Directive: Guidance for Planning Authorities" (October 2003). Moreover, the Regulations allow two years to conclude procedures begun before 21 July 2004. If "feasibility" sets a high threshold, then delay or inconvenience may not be sufficiently compelling reasons in themselves to avoid the requirement to carry out SEA.

The Environmental report and consultation

67. The provisions in the SEA Directive and Regulations which require the supply of environmental information and consultation are also closely based on the EIA Directive. Where assessment is required, an "environmental report" ("**ER**") is to be prepared.[28] The definition of ER in Art.2(c) refers to "the part of the plan or programme documentation containing the information required in Art. 5 and Annex I." Article 5 and Annex I and reg. 12(2) requires that the ER must "identify, describe and evaluate" the likely significant effects on the environment of implementing the plan or programme. Significantly, the ER must deal with "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme"[29]. The report must include an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken[30].

68. Detailed guidance is given in the UK Guidance Appendix 6 as to the assessment of alternatives. The guiding principle is that alternatives should be approached proportionately-

> "Only reasonable, realistic and relevant alternatives need to be put forward. It is helpful if they are sufficiently distinct to enable meaningful comparisons to be made of the environmental implications of each."

69. The SEA Directive does not prescribe who is to prepare the report and leaves this to the national transposing legislation. The Regulations impose the duty on the "Responsible Authority" (reg. 12(1) and reg. 2(1)), namely the authority by which or on whose behalf the plan or programme is prepared.

70. Article 12(2) requires that environmental reports should be of a suitable standard:

> "Member States shall ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive and shall communicate to the Commission any measures they take concerning the quality of these reports."

71. The Commission Guidance suggests that the requirement as to reaching the standard under Art. 12(2) can be met by a proper transposition and application of the SEA Directive. On that

---

[28] See reg. 12 and the guidance as to the form and content of the report in section 5 of the Commission Guidance. See also UK Guidance Section 5 Stage C pp. 35-36.

[29] Article 5(1) and reg. 12(2)(b). Contrast the less stringent provisions of the EIA Directive which only requires that the environmental information provided under Annex IV 2 should include an "outline of the main alternatives studied by the developer". See Commission Guidance at paras 5.6, 5.11-5.14 and UK Guidance Section 5 Stage B and Appendix 6.

[30] Annex I(h).

basis, the Art. 12(2) obligation appears to add nothing of substance. The Regulations appear to proceed on that basis and do not contain any direct transposition of Art. 12(2).

72. As in the case of EIA, the quality of the information must be primarily a matter for the rational judgment of the decision maker[49] although, unlike EIA, in most cases the decision maker will also be the authority responsible for the SEA. This approach is supported by the Commission[50]:

> "In most cases, it will be the individual authority that has to decide before it adopts a plan or programme whether a specific environmental report is of sufficient quality or, if not, what action needs to be taken to rectify the deficiencies. This might include amending or augmenting the environmental report or even repeating part or all of the SEA procedure. In identifying what makes for satisfactory quality, the authorities responsible for the plan or programme will need to pay close attention to the requirements of the Directive as set out in Art. 5 and Annex I. They will also need to pay close attention to the results of consultation with the environmental authorities and the public under Art. 6. They will need to bear in mind that a defective report may call into question the validity of any acts or decisions taken in pursuance of it."

73. The ER is required by reg. 12(3) to include such of the information referred to in Schedule 2 as may reasonably be required, taking account of

> "(a) current knowledge and methods of assessment;
>
> (b) the contents and level of detail in the plan or programme;
>
> (c) the stage of the plan or programme in the decision-making process; and
>
> (d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment."

74. The SEA Directive does not expressly require the environmental report to be contained in one document[51]. As is noted above, it is defined as "the part of the plan or programme documentation containing the information required in Art. 5 and Annex I". Reg. 12 does not require a single document and the UK Guidance confirms this at para.s 5.C.2 and 5.C.3:

> "5.C.2 While the Environmental Report need not be issued as a separate document from the draft plan or programme, it must be clearly distinguishable.
>
> 5.C.3 An Environmental Report may be included within a document covering effects other than those on the environment, for example as part of a Sustainability Appraisal. Where this is done, the document must clearly show that the Directive's requirements in relation to the Environmental Report have been met. This could be achieved through signposting the place or places in the document where the information required by the Directive is provided."

75. The draft plan or programme and the environmental report are to be made available to the environmental authorities defined by the Member State, and the public. The Member State is required to "designate" the environmental authorities to be consulted, and "identify" the public to be consulted. The distinction between the words designate and identify may imply that the environmental authorities are to be identified in the transposing legislation, whereas the public can be identified administratively, on a case by case basis.

76. The detailed arrangements for consultation are to be determined by the Member State. The designated Consultation Bodies in the UK (reg.s 2(1) and 4) are currently:

(1) England: Countryside Agency, English Heritage, English Nature, and the Environment Agency

(2) Northern Ireland: The Department of the Environment's Environment and Heritage Service

(3) Scotland (Consultation Authorities): Historic Scotland, Scottish Natural Heritage, and the Scottish Environment Protection Agency

(4) Wales: Cadw (Welsh Historic Monuments), Countryside Council for Wales, and the Environment Agency Wales.

77. The UK Guidance summarises the consultation requirements at para 3.1:

> The Directive creates the following requirements for consultation (summarised in Figure 3):
>
> • Authorities which, because of their environmental responsibilities, are likely to be concerned by the effects of implementing the plan or programme, must be consulted on the scope and level of detail of the information to be included in the Environmental Report. These authorities are designated in the SEA Regulations as the Consultation Bodies (Consultation Authorities in Scotland).
>
> • The public and the Consultation Bodies must be consulted on the draft plan or programme and the Environmental Report, and must be given an early and effective opportunity within appropriate time frames to express their opinions.
>
> • Other EU Member States must be consulted if the plan or programme is likely to have significant effects on the environment in their territories.
>
> • The Consultation Bodies must also be consulted on screening determinations on whether SEA is needed for plans or programmes under Article 3(5), i.e. those which may be excluded if they are not likely to have significant environmental effects (see paragraph 2.12).

Consultation period for the scoping report

78. The consultation requirements in the SEA Regulations are set out in reg. 13. as in the case of EIA, the Directive does not prescribe specific forms of consultation and leaves the choice to the Member States.

79. Article 6 of the Directive ("Consultations") provides[31]:

> "1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.
>
> 2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 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.
>
> 3. Member States 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 and programmes.
>
> 4. Member States shall identify the public for the purposes of paragraph 2, including the public

[31] Directive 2003/35/EC on public participation applies the Åarhus Convention to certain plans and programmes not subject to the SEA Directive. See art. 2.

affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States."

80. There are 2 sets of provisions for consultation. Reg.s 12 and 13 of the SEA Regulations provide (where relevant):

"**Preparation of environmental report**

12. - (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

…

(5) When deciding on the scope and level of detail of the information that must be included in the report, the responsible authority shall consult the consultation bodies.

(6) Where a consultation body wishes to respond to a consultation under paragraph (5), it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation.

Consultation procedures

13. - (1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report ("the relevant documents") shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.

(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall –

(a) send a copy of those documents to each consultation body;

(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority's opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive ("the public consultees");

(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and

(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.

(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents.

(4) The responsible authority shall keep a copy of the relevant documents available at its principal office for inspection by the public at all reasonable times and free of charge.

(5) Nothing in paragraph (2)(c) shall require the responsible authority to provide copies free of charge; but where a charge is made, it shall be of a reasonable amount."

81. With regard to consultation on the Scoping Report, the applicable provision is reg. 12. The duty to consult on scoping is contained in reg. 12(5) and the time in which the Consultation Body must respond is reg. 12(6):

"it shall do so within the period of 5 weeks beginning with the date on which it receives the responsible authority's invitation to engage in the consultation…"

82. The provision does not refer to informal pre-consultation discussion or consultation but the formal decision to consult on scoping, i.e. "the responsible authority's invitation to engage in the consultation". Both the UK Guidance and Commission Guidance stress the integral role of consultation to the SEA process and the principle that early consultation is to be encouraged. Early informal consultation is unlikely to be objectionable.

83. Even if there were an issue over consultation, it is likely that any judicial review relating to that issue should have been brought promptly and within 3 months of the scoping consultation since it then set the structure of the subsequent SEA/SA consultation. In ***Malster v. Ipswich BC*** [2002] PLCR 14 Sullivan J. (whose decision was upheld by the Court of Appeal [2001] EWCA Civ 1715) held that a separate JR period ran from a screening decision to that for the challenge to a formal decision to grant planning permission since it was a separate decision and its resolution was critical to the subsequent decision. A similar approach is likely to be taken to scoping consultation for SEA.

Consultation for the ER and the draft plan/programme

(1) Together or separately?

84. It is likely that there is an obligation to consult on both the draft plan and ER at the same time, although the legislation is not wholly clear. Indeed, both the Commission Guidance and UK Guidance, which adopts it, proceeds on that basis.

85. Art. 6(2) refers to the obligation to give -

> "an early and effective opportunity within appropriate time frames to express their opinion <u>on the draft plan or programme **and** the **accompanying** environmental report</u> before the adoption of the plan or programme or its submission to the legislative procedure" (emphasis added)

86. This appears to indicate that the opportunity to give an opinion is to be -

   (1) given on both the draft plan and ER; and

   (2) the ER "accompanies" the draft plan.

87. While it is possible to argue that "and" and "accompanying" do not necessarily mean "at the same time" or "together" such a line is unattractive. The point of the consultation is to allow the consultees to consider the ER and its implications for the draft plan. Plainly the most effective means of achieving that objective is to have both documents available at the same time.

88. The principal applicable guidance is sufficiently clear in its view that the two documents should be consulted upon together and at the same time:

   (3) The Commission Guidance at para. 5.7 states that "the process of preparing the report should start as early as possible and, ideally, at the same time as the preparation of the plan or programme" although this is strictly dealing with the preparation of the plan

and ER;

(4) Para.s 5.4 and 5.5 contemplate that the ER could be part of the plan documentation;

(5) Para. 7.1 states (in terms which accord with the need to have both documents)

> "The consultation provisions of the Directive oblige Member States to grant an opportunity to certain authorities and members of the public to express their opinion on the environmental report and the draft plan or programme. One of the reasons for consultation is to contribute to the quality of the information available to those responsible for the decisions that are made concerning the plan or programme."

(6) Para. 7.2 and Box 1 at p. 34 sets out an overview of the stages in the SEA process in terms which makes it clear that the draft plan and the ER should be consulted on together. See the third stage below:

Box 1: Stage of SEA	**Consultation requirements in Domestic situations**	**Additional requirements in Transboundary situations**
Determination if a plan or programme requires an SEA	Consultation of authorities (Art. 3(6)) Information made available to the public (Art. 3(7))	
Decision on scope and level of detail of the assessment	Consultation of authorities (Art. 5(4))	
Environmental report and draft plan or programme	Information made available to the public (Art. 6(1)) Consultation of authorities (Art. 6(2)) Consultation of the public concerned (Art. 6(2))	Consultation of authorities in the Member State likely to be affected (Art. 7(2)) Consultation of the public concerned in the Member State likely to be affected (Art. 7(2))
During preparation of plan or programme	Take account of environmental Report and opinions expressed under Art. 6 (Art. 8)	Take account of results of transboundary consultation (Art. 8)
Adopted plan or programme; statement according to Art. 9(1)(b), measures concerning monitoring	Information made available to authorities (Art. 9(1)) Information made available to the public (Art. 9(1))	Information made available to the consulted Member State (Art. 9(1))

(7) Box 1, above, is substantially reproduced as Fig. 3, para. 7.2 p. 17 of the UK Guidance;

(8) In Section 5 of the UK Guidance, Stage D deals with the consultation on the draft plan and ER and is unequivocal in its requirements at para. 5.D.1 p. 37 -

> "The Environmental Report must be made available at the same time as the draft plan or programme, as an integral part of the consultation process, and the relationship between the two documents clearly indicated."

(2) Consultation period for the ER and draft plan

89. Neither the Directive nor the SEA Regulations prescribe a consultation period. They require

that the consultation is (to use the phrase in reg. 13(3)) of "such length as will ensure that the consultation bodies and the public consultees are given **an effective opportunity** to express their opinion on the relevant document."

90. Indeed, neither the Commission nor UK Guidance advises in clear terms that any specific period, or minimum period, should be allowed. The Commission Guidance states:

> "**7.9.** The time frame needs to be laid down in legislation. Member States are free to determine its duration so long as it meets the requirement to give an 'early and effective' opportunity for responses. Experiences with the EIA Directive and other consultation procedures will give Member States information about the time frames needed.
>
> **7.10.** Different time frames may be appropriate for different types of plan or programme but care should be taken to allow sufficient time for opinions to be properly developed and formulated on lengthy, complex, contentious or farreaching plans or programmes. Adequate time will also be needed for the planning authority to take these views into account before deciding on the plan or programme. Sometimes requests for additional information may be made and the time frame for consultation may also need to take into account the time for the responsible authority to respond."

91. The UK Guidance is not as clear as it might be. At pp. 18 and 37 it states:

> "**3.12** When carrying out consultation, Responsible Authorities **must have regard as appropriate** to:
> …
> • The Cabinet Office *Code of Practice on Consultation*, which sets out criteria for conducting effective consultation. UK non-departmental public bodies and local authorities are encouraged to follow this code."

> "**5.D.2** Publication of proposals and consultation on them are already established practice for many plans and programmes, and are in many cases legal requirements. The timing of consultation is however also important. Responsible Authorities must ensure that the public and the Consultation Bodies are given "an early and effective opportunity within appropriate time frames to express their opinion". Chapter 3 above provides more detailed guidance on consulting the Consultation Bodies and the public as part of SEA."

92. Accordingly, although it could easily have done so, the UK Guidance does not give indicative consultation periods and, at most, advises that "regard as appropriate" should have had to e.g. the Cabinet Office Code.

93. The Cabinet Office **Code of Practice on Consultation** ("CO Code") advises a 12 week consultation period as consultation Criterion 1:

> "**1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**
>
> 1.1 Consultation is a continuous process that needs to be started early in the policy development process.
>
> 1.2 It is important to identify proactively relevant interested parties and those whom the policy will be likely to affect. These groups should be contacted and engaged in discussion as early as possible in the policy development process.
>
> 1.3 Informal consultation with these stakeholders should be conducted prior to the written consultation period. Not only does this lead to a more informed consultation exercise but it also ensures that stakeholders are engaged early and have a better understanding of the policy.
>
> 1.4 The formal consultation period should always include a written consultation exercise. This

written consultation period should be a minimum of 12 weeks. Departments should consider the specific circumstances of their stakeholders and consider longer consultation periods at certain times, for example during the summer holiday period.

1.5 Although there will sometimes be circumstances that require a consultation period of less than 12 weeks, this should be the exception and should be avoided wherever possible. Such circumstances may be timetables set out in statute; those unavoidably dictated by EU or other international processes; those tied to the Budget or other annual financial cycles; measures where there is a health and safety or security dimension; or some other urgent requirement for the introduction of new measures. Where re-consultation takes place on the basis of amendments made in the light of earlier consultation, a shorter period may also be appropriate."

94. The CO Code is mandatory for central Government departments and bodies and is only advised for non-governmental bodies[32]. As can be seen from the UK Guidance it states that regard must be had to (amongst other things) the CO Code "as appropriate".

95. To take the specific example of RES, considered above, the DTI Guidance advises reference to the CO Code:

"15. In formulating the RES, the agency should consult widely within the region, with RDAs in neighbouring regions and with Government and other interests nationally, ensuring that they meet the SEA Directive's requirements on consulting the public**. In developing their approach to consultation** the RDAs **should refer to** the Government's Code of Practice on Consultation, and to "Working Together: Co-operation between Government and Faith Communities", published by the Home Office. These documents are available on the Cabinet Office and Home Office websites (www.cabinetoffice.gov.uk and www.homeoffice.gov.uk). For the voluntary and community sector, the process of developing a regional Compact should inform consultation. The RES should include a statement on the arrangements made for consultation, including a list of those consulted and, where appropriate, of those who have agreed to be associated with its proposals."

96. The CO Code is unlikely to be applicable without some adaptation and this is supported by the fact that the UK Guidance simply requires it be had regard to "as appropriate". For example, at least some aspects of Criterion 6 are already covered by the SA/SEA process.

97. Unless further guidance and clearer guidance is issued, however, it would plainly be prudent to utilize the 12 week CO Code period as a minimum consultation period or, at least, to ensure that any decisions as to consultation properly consider the CO Code and if a decision is made to reduce the period below 12 weeks, that proper reasons are given for doing so.

Decision-making

98. Reg. 8 prohibits the adoption (or submission for adoption) of those plans and programmes, for which the "first formal preparatory act" occurred after 21 July 2004 and which:

---

[32] Introduction p. 5: "The code and the criteria within it apply to all UK public consultations by government departments and agencies, including consultations on EU directives. UK non-departmental public bodies and local authorities <u>are encouraged to follow</u> this code. Devolved Administrations are free to adopt this code, but it does not apply to consultation documents issued by them unless they do so."

(1) require SEA, until the requirements of the SEA Regulations relating to Environmental Reports and consultation procedures have been met and account has been taken of the Environmental Report and consultation responses[33]; and

(2) in cases where reg. s 9 and 10 apply, may not be likely to have significant environmental effects, until a determination to that effect has been made.

99. Any plan or programme which is adopted or submitted for adoption and which has failed to carry out SEA where required is unlawful and the decision to adopt or submit liable to be quashed. Compare the position under EIA: ***Berkeley v. Secretary of State*** [2000] 3 W.L.R. 420. However, note Carnwath L.J.'s comment in ***R (Jones) v Mansfield*** [2004] Env. L.R. 21, at para. 58 that

> "the EIA process is intended to be an aid to efficient and inclusive decision-making in special cases, not an obstacle-race."

100. Like the EIA Directive and regulations, neither the SEA Directive nor SEA Regulations constrains the discretion of the authority in adopting a plan or programme which it considered appropriate. The SEA process informs the decisions made as to the form and contents of the plan or programme adopted but does not dictate any particular outcome.

101. Finally, the plan or programme which is ultimately adopted is to be made public. The authority must also publish a "statement summarising how environmental considerations have been integrated into the plan or programme"[34]. The statement must also summarise how the results of consultation have been taken into account, and the reasons for choosing the plan or programme in the light of the reasonable alternatives dealt with[35].

Monitoring

102. Article 10 and reg. 17 require the responsible authority[36] to "monitor the significant environmental effects of the implementation of plans and programmes". The purpose of this is "inter alia, to identify at an early stage unforeseen adverse effects, and <u>to be able to undertake</u> appropriate remedial action"[37]. This is likely to be a powerful provision, when combined with administrative law requirements as to rationality and the Art. 12(2) requirement as to quality. They are express requirements not included in the EIA Directive.

103. Section 5 Stage E and Appendix 10 of the UK Guidance deals with monitoring and proposes a 'monitoring framework'. The Guidance states that:

> "Responsible Authorities may already monitor implementation of plans or programmes against their objectives or targets. Some of these may be environmental, but this will not necessarily be

---

33 Reg. 8(3).
34 Article 9(1)(B).
35 See Article 9 and reg. 16.
36 The Member States under the Directive.
37 See Commission Guidance, section 7 and UK Guidance Appendix 10.

enough to satisfy the Directive. Responsible Authorities must ensure when designing their monitoring arrangements that they comply with this provision…SEA monitoring can be used to answer questions such as:

> • Were the assessment's predictions of environmental effects accurate?
>
> • Is the plan or programme contributing to the achievement of desired environmental objectives and targets?
>
> • Are mitigation measures performing as well as expected?
>
> • Are there any adverse environmental effects? Are these within acceptable limits, or is remedial action desirable?"

104. Although the provisions do not impose any requirement specifically to undertake remedial action, as opposed to being able to do so, it appears to be reasonably arguable that an authority would be acting irrationally if, faced with adverse effects not foreseen in the original environmental report, it did not at least give reasoned consideration to taking remedial action. Its decision as to whether to take action could well itself then be reviewable. The UK Guidance is general in its terms. Section 5 stage E states:

> "5.E.6 Responsible Authorities are encouraged to consider how to react if monitoring reveals adverse effects. While the Directive itself does not create new obligations on environmental protection, other legislation or policies may require action on the part of either the Responsible Authority or another body. Details of any contingency arrangements could be included in the mitigation measures set out in the Environmental Report. This may include giving feedback to those responsible for plans and programmes higher up in the hierarchy on the effects of these plans and programmes."

105. Step 5 of Appendix 10 suggests that

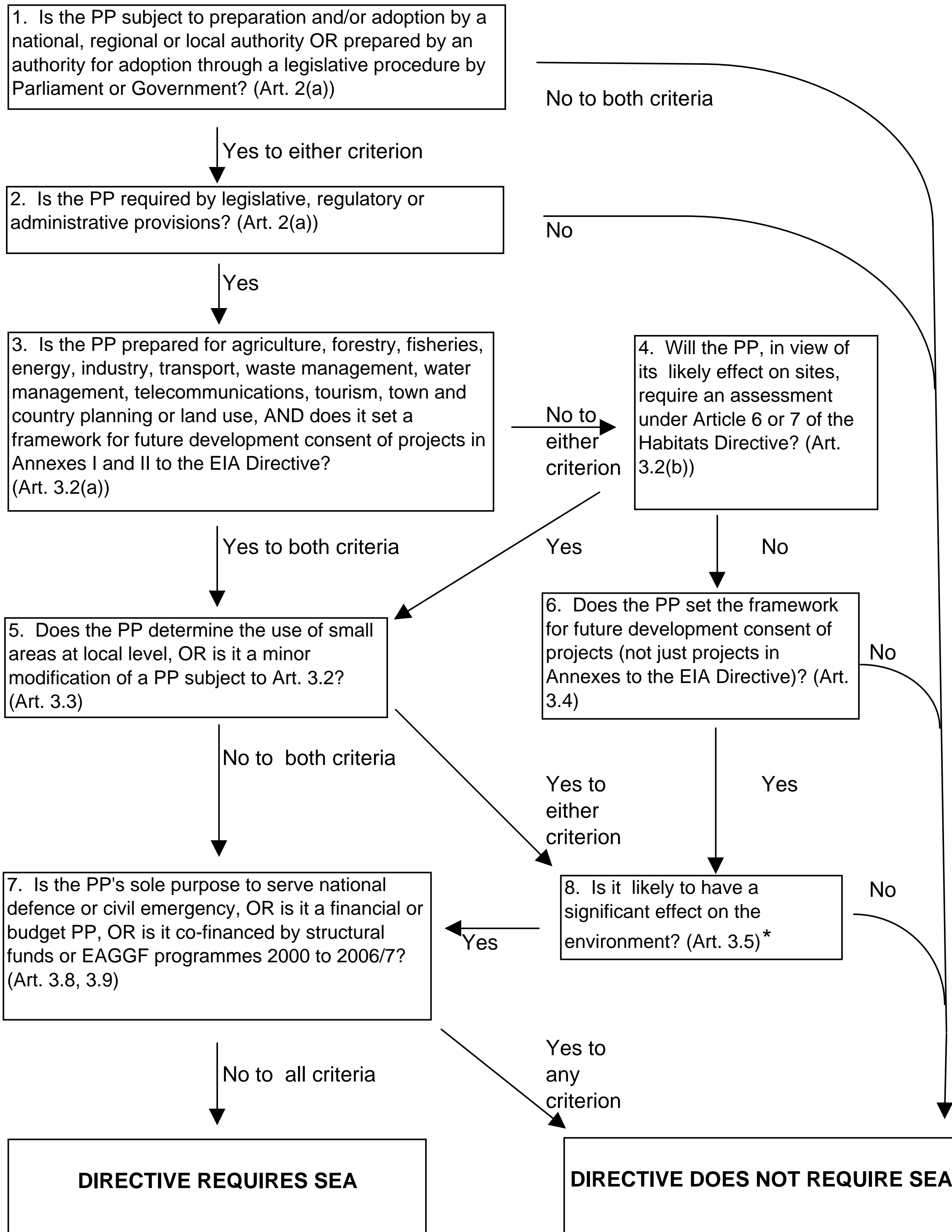
> "It may be useful to establish a mechanism or framework to identify if and when remedial action is needed in response to adverse effects, including:
>
> • Criteria or thresholds for remedial action (e.g. what are the conditions that would be regarded as environmentally undesirable or unacceptable).
>
> • Potential remedial actions that could be taken if a significant environmental effect was identified (e.g. review aspects of the plan or programme that are causing the effects and make amendments, develop mitigation measures).
>
> • Those responsible for taking the remedial action (e.g. another authority or agency may be responsible for taking the remedial action and may need to be consulted)."

Annex: DCLG's "SEA - Criteria for Application to Plans and Programmes"

The Strategic Environmental Assessment Directive

Criteria for Application to Plans and Programmes

This diagram is intended as a guide to the criteria for application of the Directive to plans and programmes (PPs). It has no legal status.



*The Directive requires Member States to determine whether plans or programmes in this category are likely to have significant environmental effects. These determinations may be made on a case by case basis and/or by specifying types of plan or programme.